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In re LOS ANGELES COUNTY PIONEER SOC.

LOS ANGELES COUNTY PIONEER SOC. et al. v. HISTORICAL SOC. OF SOUTHERN CALIFORNIA et al.

L. A. 22217.

Supreme Court of California, In Bank.

May 5, 1953.

Rehearing Denied May 28, 1953.

Proceeding for voluntary dissolution of society organized to collect and preserve data bearing upon history of Los Angeles County and California and for distribution of society's assets to active members wherein Attorney General intervened claiming that society was a charitable corporation and had abandoned its trust. The Superior Court, Los Angeles County, James H. Pope, J. pro tem., entered judgment declaring the society to be a charitable corporation and appointing a successor trustee, and the society and one member thereof appealed. The Supreme Court, Traynor, J., held, inter alia, that the society was a charitable corporation and the appointment of the successor trustee was proper.

Affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion 246 P.2d 1029.

1. Judgment ⇐678(1)

A judgment is res judicata only against persons who were parties or in privity with parties thereto.

2. Judgment ⇐707

Judgment in declaratory action by incorporated society against one of its members that assets of society were not impressed with trust was not binding on Attorney General who intervened in subsequent voluntary dissolution proceeding and sought judgment impressing assets with trust, in view of fact that Attorney General was not party to declaratory action and was not in privity with parties thereto. Corporations Code, § 4607.

3. Judgment ⇐217

The substance and effect, not the label, of judgment determines its finality.

4. Appeal and Error ⇐66

An appeal lies only from a final judgment, except in certain cases. Code Civ. Proc. § 963.

5. Appeal and Error ⇐80(3)

Where no issue is left for future consideration except fact of compliance or noncompliance with terms of decree, decree is final, but where anything further in nature of judicial action on part of court is essential to final determination of rights of parties, decree is interlocutory. Code Civ.Proc. § 963.

6. Appeal and Error ⇐80(3)

Where court entered judgment impressing assets of society with trust and expressly reserved for future decision questions regarding rights, duties, and liabilities of society, judgment was not final as to society and was not an "appealable judgment."

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Judgment".

7. Charities ⇐10, 12

The commemoration of historical events and collection and preservation of data of historical interest are for educational and recreational benefit of community as a whole and are charitable purposes.

8. Charities ⇐39

Where express aims of corporation were to collect and preserve data bearing upon early history of Los Angeles County and of California and customs of people in

California, and to perpetuate memory of those who contributed to making of such history, it was a "charitable corporation", and incidental social activities of corporation did not deprive it of its charitable character.

See publication Words and Phrases, for other judicial constructions and definitions of "Charitable Corporation".

9. Charities ⇐36

Gifts to society organized for charitable purpose without declaration of use to which gifts were to be put were given in trust to carry out objects for which society was created.

10. Charities ⇐49

The Attorney General is a necessary party to proceedings affecting disposition of assets of charitable trust, and, therefore, it was not error to allow Attorney General to intervene in proceedings for voluntary dissolution of charitable corporation and to challenge claim of corporation that assets could be distributed for personal benefit of its members. Corporations Code, §§ 9505, 10207.

11. Charities ⇐42

Under Corporations Code, a charitable corporation is subject to same supervision by Attorney General as is a nonprofit corporation holding its assets subject to charitable trust, and deviations from purposes stated in charitable corporation's articles are thus subject to same corrective measures that would be taken against trustee of charitable trust that similarly refused to carry out its duties. Corporations Code, §§ 9505, 10207.

12. Charities ⇐47

In proceeding for voluntary dissolution of corporation wherein Attorney General intervened claiming that corporation was charitable, evidence established that corporation was charitable and had abused and abandoned its trust, and supported determination of trial court that new trustee should be appointed. Corporations Code, § 10207.

13. Trusts ⇐165

Where trustees abandon or in any way abuse their trust, equity will correct abuses and remove offenders.

14. Charities ⇐45(1)

Charitable corporation by amending its by-laws to provide that active members should have exclusive proprietary rights in property and assets of corporation could not appropriate to members the assets previously acquired through gifts made to further purposes of corporation as expressed in its articles.

15. Constitutional Law ⇐278(1)

Members of charitable society did not at any time have right to receive assets of the society, and, therefore, judgment requiring assets of society to be transferred to another charitable corporation which was to act as trustee was not a confiscation of members' property in contravention of Fourteenth Amendment to federal Constitution. U.S.C.A.Const. Amend. 14.

16. Charities ⇐45(1)

A charitable corporation cannot dissolve and distribute its assets among its members.

17. Appeal and Error ⇐170(1)

Corporation, which stipulated that Attorney General's petition in intervention alleging that assets of corporation were held for charitable purposes could be filed, and which filed answer denying such allegation, alleging that it had complied with its articles and praying that its assets be distributed among its members, failed to put in issue question whether Attorney General was obliged to give it opportunity prior to petition in intervention to comply with its articles, and could not raise such question on appeal. Corporations Code, §§ 4691, 10207.

18. Charities ⇐49

The Attorney General has statutory power to obtain appointment of successor trustee for charitable corporation which has abandoned or abused its trust. Corporations Code, § 10207.

19. Charities ⇐45(1)

Although charitable corporation's abandonment of its trust was brought to light in voluntary dissolution proceeding, termination of dissolution proceeding by corporation did not require that trust assets be returned to corporation. Corporations Code, §§ 4606, 10207.

20. Charities ⇐47

In cases where property is conveyed to trustee with express declaration of charitable purpose by donor, court of equity will appoint successor trustee to carry out charitable purpose expressed by donor upon failure of original trustee.

21. Constitutional Law ⇐116, 253

Judicial decisions may be overruled and dicta may be disapproved without violating either due process clause or contract clause of United States Constitution. U.S.C.A.Const. art. I, § 10, par. 1; amends. 5, 14.

22. Charities ⇐47

A court of equity should appoint successor trustee to carry out charitable intent of donor whether charitable purpose is found in terms of conveyance to charitable corporation or in corporation articles, or whether failure of corporation is through dissolution or other disqualification.

23. Charities ⇐31

The policy of the law in favor of charitable gifts requires court to carry out dominant purpose of donor who makes charitable gift for purposes expressed in articles of corporate donee.

24. Charities ⇐47

Where property was given without restriction to charitable corporation and charitable intent of donor was ascertained by reference to charitable purposes of corporation as expressed in its articles, a successor trustee would be appointed upon abandonment of trust by corporation, rather than distributing assets to heirs of donor.

25. Charities ⇐47

Evidence established that successor trustee appointed to administer assets of charitable corporation which had abandoned its trust was qualified to do so.

26. Charities ⇐47

Order appointing successor trustee for charitable trust and providing that successor trustee should hold transferred assets as trustee for same purposes as those expressed in original trustee's articles sufficiently defined successor trustee's duties.

Morris Lavine, Los Angeles, for appellant Los Angeles County Pioneer Soc.

Ray Howard, Los Angeles, for appellant Lelande.

Lawler, Felix & Hall and Oscar Lawler, Los Angeles, for respondents.

Edmund G. Brown, Atty. Gen., and Edward Sumner, Deputy Atty. Gen., for intervener and respondent.

TRAYNOR, Justice.

Los Angeles County Pioneer Society and Harry Lelande, a member thereof, appeal separately from an order appointing the Historical Society of Southern California trustee of all property in the possession of Pioneer. The order was entered after the trial court determined that Pioneer held its property for charitable purposes, that Pioneer had repudiated its trust, and that appointment of Historical as trustee was necessary to carry out the purposes of the trust. We have concluded that the order is amply supported by the evidence and must be affirmed.

Pioneer was founded in 1897 as an unincorporated association of pioneers living in Los Angeles County, with about 600 members. In 1910 the members incorporated as a non-profit corporation. Over the years membership decreased until in 1941 there were less than 100 members. In that year and later years Mrs. Emma Stoltenberg, a member of Pioneer, made substantial gifts to Pioneer and on her death in 1946 left additional sums to Pioneer by will. Her gifts amounted to about $53,000. The money was used to purchase a building that was used for meetings of Pioneer and rented for commercial purposes. The membership continued to decrease and in 1948 the members decided to dissolve the corporation, distribute the assets among themselves, and continue the organization as an unincorporated association to carry out the purposes of the articles of incorporation.

To determine whether its assets were impressed with a trust, Pioneer filed an action for declaratory relief against a member of the society. On June 1, 1949, judgment was entered declaring that no trust of any kind was impressed upon the assets.

Thereafter the membership, by a petition signed by 53 of the 58 members, agreed to dissolve the corporation. The assets were converted to cash and, since the property owned by the corporation had greatly appreciated in value, $95,243.54 was realized. Pioneer then petitioned the superior court for judicial supervision of the dissolution. Corp.Code § 4607. Several members of Pioneer objected to the dissolution. Pursuant to stipulation of the parties, the Attorney General filed a petition in intervention, alleging that Pioneer held its assets in trust and praying that a new trustee be appointed on the ground that Pioneer had abandoned its trust. The court ordered that the assets be impounded. On May 19, 1950, the court entered judgment that Pioneer was a charitable corporation, that its assets were dedicated to charitable purposes, that it had abandoned its trust and was threatening to divert the assets to the private benefit of its members, and that appointment of a new trustee was necessary. The judgment was entitled "interlocutory judgment" and the court retained jurisdiction to make such further orders as were necessary to a complete determination of the action. Pioneer did not appeal. On October 18, 1950, after a further hearing, the court appointed Historical trustee and ordered the impounded assets turned over to it. The present appeals are from this order.

The first question presented is whether the trial court correctly determined that all of the assets of Pioneer were given and received for charitable purposes and held by Pioneer for those purposes.

[1, 2] Pioneer contends that the declaratory relief judgment is res judicata as to the question whether Pioneer holds its assets for charitable purposes, and characterizes the opposition to the dissolution proceedings as a collateral attack on the former adjudication, relying upon City of San Diego v. Superior Court, 36 Cal.2d 483, 224 P.2d 685. Historical, on the other hand, contends that the declaratory relief action was collusive and a fraud on the court, pointing out that all evidence therein was presented by stipulation, that Pioneer paid the attorneys' fees for both plaintiff and defendant in that action, and that the two opposing attorneys subsequently joined forces and together represented Pioneer at the trial of the dissolution proceedings. See Guardianship of Jacobson, 30 Cal.2d 326, 333, 182 P.2d 545. It is unnecessary to pass upon Historical's contention, since the declaratory relief judgment is res judicata only against persons who were parties or in privity with parties thereto. Restatement, Judgments, § 77; Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; City and County of Denver v. Denver Land Co., 85 Colo. 198, 201, 274 P. 743. The Attorney General was not a party to the declaratory relief action and was not in privity with parties thereto and, accordingly, he was not bound by that adjudication and was free to contend in the dissolution proceedings that Pioneer held its assets for charitable purposes.

[3–6] The Attorney General and Historical contend that the "interlocutory judgment" entered on May 19th was an appealable judgment that became final through the failure of Pioneer to appeal therefrom, and that it is now res judicata that Pioneer holds its assets for charitable purposes. The label of the judgment as "interlocutory" is not determinative upon this question, since it is the substance and effect of a judgment that determines its finality. Lyon v. Goss, 19 Cal.2d 659, 669–670, 123 P.2d 11; Peninsula Properties Co. v. County of Santa Cruz, 106 Cal.App.2d 669, 678, 235 P.2d 635. An appeal lies only from a final judgment, except in certain cases not applicable here. Code Civ.Proc. § 963. "As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." Lyon v. Goss, supra, 19 Cal.2d 659, 670, 123 P.2d 11, 17. In the present case the May 19th judgment provided that Pioneer should account to the court for the performance of its duties

as trustee, that a new trustee should be appointed to replace Pioneer, and that the court would from time to time "make such other and further orders as are competent, lawful and proper for a complete determination of this action." The assets of Pioneer were impounded by the court on February 15, 1950, but it was not ordered that they be turned over to Historical until the order of October 18th. Since the court expressly reserved for future decision questions regarding the rights, duties, and liabilities of Pioneer, the May 19th judgment was not final as to Pioneer and was not appealable. Erickson v. Boothe, 35 Cal.2d 108, 109, 216 P.2d 454; Lacey v. Bertone, 33 Cal.2d 649, 653, 203 P.2d 755; Lyon v. Goss, supra, 19 Cal.2d 659, 671, 123 P.2d 11; see cases collected in 4 C.J.S., Appeal and Error, §§ 93–96, pp. 184–193. The conclusion that Pioneer could not appeal from the judgment of May 19th disposes of the contention of appellant Lelande that the appeal by Pioneer must be dismissed because it was taken too late.

Since neither the declaratory relief judgment nor the May 19th judgment settled the issue whether Pioneer held its assets for charitable purposes, the determinative question is whether substantial evidence supports the order of October 18th. The articles of incorporation of Pioneer provide: "That the purpose for which this corporation is formed is to cultivate social intercourse and friendship among its members, to collect and preserve data touching the early history of Los Angeles County and the State of California, to collect and preserve articles, specimens and material things illustrative or demonstrative of the customs, modes and habits of the aforesaid times in said State; to perpetuate the memory of those who, by their labors and heroism, contributed to make the history of said County and State; and in furtherance of said purpose [to do all acts] necessary and convenient for the promotion of the aforesaid purpose; and to exist as a social corporation under the provisions of the laws of the State of California, covering such corporations, and not for pecuniary profit." In Pioneer's answer to the petition in intervention it is alleged that between 1945 and 1950 Pioneer engaged in acquiring material concerning the pioneers and founders of Los Angeles County and the State of California; that Pioneer perpetuated the memory of those who by their labors and heroism contributed to make the history of the County and the State; that the members attended a meeting at the Biltmore Hotel in 1948 to honor the memory of the dead pioneers during the discovery of gold in California; that Pioneer participated in the erection of a plaque at Inglewood, California, to mark the site of the first school building in Inglewood; that Pioneer held four picnics at which time the memory of the former pioneers and founders of Los Angeles County were commemorated; that in 1947 Pioneer celebrated the 166th anniversary of the founding of the City of Los Angeles and the members dressed in costumes of the Spanish period; that at the monthly meetings talks and discussions were held recollecting the activities and labors of the pioneers and their memories were perpetuated and honored; and that many further and additional activities were engaged in pursuant to the purposes set forth in the articles of incorporation.

[7, 8] The commemoration of historical events and the collection and preservation of data of historical interest are for the educational and recreational benefit of the community as a whole and are recognized charitable purposes. Restatement, Trusts, § 374; Estate of Butin, 81 Cal.App.2d 76, 81, 183 P.2d 304; Centennial & Memorial Association of Valley Forge, 235 Pa. 206, 211, 83 A. 683; Steenis v. Appleton, 230 Wis. 530, 533, 284 N.W. 492; Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 8 S.W. 346, 12 A.L.R.2d 888–896. By the allegations in its answer, Pioneer conceded that it was actively engaged in carrying out such objectives. Even if the concessions in the answer are disregarded, the articles of incorporation supply sufficient evidence to sustain the action of the trial court. It may be assumed that if the only purpose of Pioneer were "to cultivate social intercourse and friendship among its members" it would not be a charitable corporation, see 2 Bogert, Trusts

and Trustees, § 380, and cases cited therein, but it is clear from a reading of the articles as a whole that the social purposes of Pioneer are incidental to its public and charitable purposes. Since members of a charitable organization often participate in its activities with the object of making new friends and participating in pleasurable group activities in the course of carrying out the charitable purposes of the organization, the incidental social activities of Pioneer do not deprive it of its charitable character. See Young v. Boy Scouts of America, 9 Cal.App.2d 760, 764, 51 P.2d 191; Estate of Wirt, 124 Cal.App. 7, 11, 12 P.2d 95. The same conclusion was reached in Estate of Dol, 186 Cal. 64, 65, 198 P. 1039, where this court held that a gift to Pioneer was invalid under the mortmain statute, Civil Code § 1313, now Probate Code § 41, on the ground that Pioneer was a charitable corporation. It is not necessary to determine here whether the Dol decision is res judicata as to the issue whether Pioneer is a charitable corporation, as urged by the Attorney General, since the action of the trial court in the present case may be sustained by giving the Dol decision the effect of stare decisis only.

[9] Pioneer contends that the gifts of Mrs. Stoltenberg were for the benefit of the members of Pioneer personally and were not received for charitable purposes. Her will provided: "the Balance of my estate to be given to the Pioneer Society Meeting at the Biltmore Hotel." The gifts during her lifetime were subject to an oral understanding that the money would be used to purchase a permanent home for the society. Pioneer erroneously assumes that the gift could not be for charitable purposes unless the instrument of gift expressly so provided. "[A] devise to a society organized for a charitable purpose without a declaration of the use to which the gift is to be put is given in trust to carry out the objects for which the organization was created." Estate of Clippinger, 75 Cal.App.2d 426, 433, 171 P.2d 567, 572; Estate of McDole, 215 Cal. 328, 332, 10 P.2d 75. Similarly, in the present case the gift of Mrs. Stoltenberg in her will was for the purposes expressed in Pioneer's articles, and the gifts during her lifetime were for a building to be used to carry out those purposes.

[10] The conclusion that Pioneer held its assets for charitable purposes disposes of Pioneer's contention that the trial court should not have allowed the Attorney General to become a party to the dissolution proceedings. The Attorney General is a necessary party to proceedings affecting the disposition of assets of a charitable trust, People ex rel. Ellert v. Cogswell, 113 Cal. 129, 136, 45 P. 270, 35 L.R.A. 269; Society of Cal. Pioneers v. McElroy, 63 Cal.App.2d 332, 342, 146 P.2d 962; Restatement, Trusts, § 391; cases collected in 14 C.J.S., Charities, § 62b, and when assets are held by a charitable corporation, as here, the duty to protect such assets is expressly placed upon the Attorney General by the Corporations Code. Section 10207. Accordingly, it was not error to allow the Attorney General to intervene in the dissolution proceedings and challenge the claim of Pioneer that the assets could be distributed for the personal benefit of its members.

[11] The next question to be determined is whether the trial court was justified in appointing a successor trustee. Pioneer contends that the only remedy available to the Attorney General was an order of the trial court directing Pioneer to comply with its articles. As previously pointed out, substantial evidence supports the finding of the trial court that Pioneer held its assets for charitable purposes. Under the Corporations Code a charitable corporation is subject to the same supervision by the Attorney General as is a nonprofit corporation holding its assets subject to a charitable trust, sections 9505, 10207; see, 26 So.Cal.L.Rev. 80, and deviations from the purposes stated in Pioneer's articles are thus subject to the same corrective measures that would be taken against a trustee of a charitable trust that similarly refused to carry out its duties.

[12, 13] Pioneer amended its by-laws to close its membership and provide that existing members had a proprietary interest in

its assets;[1] it brought a declaratory relief action to obtain a ruling that the assets were not held in trust, paying the attorney fees for both parties thereto; it sold its assets and reduced its property to cash; it commenced dissolution proceedings; and it maintained in the trial court, in a petition for writs of prohibition and mandate,[2] and on this appeal that its assets are not held for charitable purposes. Pioneer's course of conduct throughout these proceedings thus demonstrates that it has abused and abandoned its trust and amply supports the determination of the trial court that a new trustee should be appointed. Corp.Code § 10207; Estate of Grblny, 147 Neb. 117, 131, 22 N.W.2d 488; Attorney General v. Armstrong, 231 Mass. 196, 214, 120 N.E. 678; Restatement, Trusts, §§ 387, 399. "If the trustees abandon, or in any way abuse, their trust, equity will correct the abuses, and remove the offenders." People ex rel. Ellert v. Cogswell, supra, 113 Cal. 129, 141, 45 P. 270, 273, see Scott on Trusts, § 387.

Pioneer invokes cases where the evidence showed that the corporation involved was a nonprofit corporation that existed for the private benefit of the members thereof and that the assets were not held for charitable purposes. In such cases it is properly held that the assets are distributed among the members upon dissolution Corp.Code § 9801; see Brown v. La Societe Francaise, 138 Cal. 475, 477, 71 P. 516; Abalian v. Townsend Social Center, 112 Cal.App.2d 441, 449, 246 P.2d 965; 168 A.L.R. 956, but those decisions are not controlling here, since substantial evidence supports the determination of the trial court that Pioneer holds its assets for the charitable purposes expressed in its articles of incorporation.

[14] Pioneer points out that in 1948 its by-laws were amended to provide that active members "shall have exclusive proprietary rights in the property and assets of the corporation." Whatever may have been the prospective effect of this amendment, it does not appear from the record that any donations were received by Pioneer after the amendment and, of course, the members of Pioneer could not appropriate to themselves the assets previously acquired by the device of renouncing the purposes expressed in its articles.

[15, 16] Pioneer contends that upon dissolution the assets must be distributed among its members and any holding allowing the assets to be transferred to another charitable corporation would be a confiscation of the members' property in contravention of the Fourteenth Amendment. The contention is without merit, since the members of Pioneer have not at any time had any right to receive the property. A charitable corporation cannot dissolve and distribute its assets among its members. See Ashton v. Dashaway Association, 84 Cal. 61, 69, 22 P. 660, 23 P. 1091, 7 L.R.A. 809; Zollmann, American Law of Charities, § 476. Thus in a case apposite to the present case, the Centennial and Memorial Association of Valley Forge, a charitable corporation, received contributions to perpetuate and preserve the site upon which George Washington had encamped in winter quarters. Upon dissolution, a member contended that the funds should be distributed

1. By-laws adopted May 4, 1948, provided: "The class of active memberships shall have exclusive proprietary rights to the property and assets of the corporation and the voting power of the corporation shall be vested exclusively in the holders of active memberships. Each active member shall be entitled to one vote.

"The social memberships shall have no proprietary rights whatsoever in the property or assets of the corporation and shall not have any voting rights. * * *

"The present paid up memberships of this corporation shall constitute the active memberships of the corporation and those who hereafter become members shall be social members only."

2. The petition, 2 Civil 18,328, was denied by the District Court of Appeal without opinion on January 11, 1951, and a hearing was denied by this court on March 8, 1951. Pioneer contended that it "was organized for the private interest and advantage of its members," that "the fair and proper thing to do was to dissolve the corporation and distribute the assets," and that "neither the public at large, nor the community of Los Angeles" had "any interest in the affairs of petitioner."

among the members of the corporation, but the court held that no individual right to the funds existed and that the property should go to another charitable corporation with purposes akin to those of the dissolved corporation. Centennial & Memorial Association of Valley Forge, supra, 235 Pa. 206, 213, 83 A. 683; see In re Mt. Sinai Hospital, 250 N.Y. 103, 113, 164 N.E. 871, 62 A.L.R. 564.

[17] Pioneer contends that in proceedings under section 10207 a charitable corporation must be given an opportunity to correct its deviation from its articles, as it would if the proceeding were in quo warranto. Section 4691. Pioneer's contention comes too late. The Attorney General's petition in intervention alleged that Pioneer had failed to comply with its articles and prayed that the court distribute Pioneer's assets to a trustee willing to comply with the charitable purposes expressed in Pioneer's articles. Pioneer stipulated that the petition of the Attorney General could be filed and filed an answer denying that its assets were held for charitable purposes, alleging that it had at all times complied with its articles, and praying that its assets "be distributed pro rata among the members of the Los Angeles County Pioneer Society." By the stipulation and the answer Pioneer failed to put in issue in the trial court the question whether the Attorney General was obliged to give Pioneer an opportunity prior to the petition in intervention to comply with its articles.

[18, 19] On January 26, 1953, at the oral argument of this case, Pioneer filed a motion to remand the case to the trial court "for the purpose of making a further order in the above entitled case to permit the society to continue to operate as a society and to revoke its former petition to dissolve the corporation and further to restore to the society the funds of which the society was divested." Pioneer alleged in its motion that on January 19, 1953, the members of Pioneer voted to revoke their petition to dissolve and decided that they would comply with the provisions of the articles.[3] Pioneer's position is that under section 4606 of the Corporations Code it could terminate dissolution proceedings at any time before distribution of the assets, that the assets of Pioneer have not been distributed,[4] and that the trial court does not have power to transfer the assets of Pioneer to Historical if dissolution proceedings are terminated. The Attorney General, however, has power to obtain appointment of a successor trustee under section 10207 of the Corporations Code, see People ex rel. Ellert v. Cogswell, supra, 113 Cal. 129, 141–142, 45 P. 270, and there is nothing therein limiting the power of the Attorney General to cases where the assets of the charitable corporation have been distributed. It is true that in the present case Pioneer's abandonment of its trust was brought to light in the dissolution proceeding, but it does not follow that termination of the dissolution proceeding by Pioneer would establish that the trust assets should be returned to Pioneer.

[20, 21] Pioneer contends that even if it is held that neither Pioneer nor its members may receive the assets, the trial court should have distributed the assets to the heirs of Mrs. Stoltenberg and not to Historical. We will assume that Pioneer is entitled to raise this point. In cases where property is conveyed to a trustee with an express declaration of a charitable purpose by the donor, a court of equity will appoint a successor trustee to carry out the charitable purpose expressed by the donor upon

3. The motion was not made until about 32 months after the interlocutory judgment, 27 months after the order appealed from, and 6 months after the District Court of Appeal affirmed the order. During this period Pioneer's attention was repeatedly called to its status as a charitable corporation.

4. The order of October 18, 1950, provided that Historical "is hereby appointed trustee of all property * * * for which the Los Angeles County Pioneer Society is accountable as Trustee" and orders all persons having assets or records of Pioneer to forthwith turn such assets over to Historical. Execution of the order has been stayed pending outcome of this appeal. The assets have been impounded and are in the custody of the Farmers and Merchants National Bank of Los Angeles.

failure of the original trustee, Fay v. Howe, 136 Cal. 599, 603, 69 P. 423; Estate of Upham, 127 Cal. 90, 94, 59 P. 315; 14 C.J.S., Charities, § 27, and Historical contends that these cases govern here. But in cases where, as here, property is conveyed without restriction to a charitable corporation and the charitable intent of the donor is ascertained by reference to the charitable purposes of the donee, the courts have had more difficulty. Some decisions state that upon dissolution of the corporation the property reverts to the donor or his heirs, see Mormon Church v. United States, 136 U.S. 1, 47, 10 S.Ct. 792, 34 L.Ed. 481; Mott v. Danville Seminary, 129 Ill. 403, 416, 21 N.E. 927, and a dictum in an early case indicates that that rule would be followed in this jurisdiction, at least as to real property. People v. President & Trustees of College of California, 1869, 38 Cal. 166, 174; cf. Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 464, 147 P. 124. Pioneer contends that the Constitution of the United States compels us to follow here the dictum in the College of California case; it is settled, however, that judicial decisions may be overruled and dicta disapproved without violating either the due process clause or the contract clause of the United States Constitution. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450–451, 44 S.Ct. 197, 68 L. Ed. 382; Alferitz v. Borgwardt, 126 Cal. 201, 208–209, 58 P. 460. Accordingly, we are free to re-examine the dictum in the College of California case.

[22–24] Decisions holding that gifts to charities revert to the donors upon dissolution have been subjected to severe criticism (See Simes, The Law of Future Interests, § 185; Gray, The Rule Against Perpetuities [4th ed.] § 51.1; Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal.L.Rev. 1, 14), and other states reach a contrary result. In re Centennial & Memorial Association of Valley Forge, supra, 235 Pa. 206, 213, 83 A. 683; McAlhany v. Murray, 89 S.C. 440, 446, 71 S.E. 1025, 35 L.R.A.,N.S., 895; see also Wilson v. Leary, 120 N.C. 90, 94, 26 S.E. 630, 38 L.R.A. 240; Hopkins v. Crossley, 138 Mich. 561, 566, 101 N.W. 822. We have concluded that the latter rule should be followed and that a court of equity should appoint a successor trustee to carry out the charitable intent of the donor whether the charitable purpose is found in the terms of the conveyance to the corporation or in the articles thereof, or whether the failure of the corporation is through dissolution or other disqualification. The policy of the law in favor of charitable gifts requires a court to carry out the dominant purpose of the donor to make a charitable gift for the purposes expressed in the articles of the original corporate donee. See Estate of Tarrant, 38 Cal.2d 42, 49, 237 P.2d 505, 28 A. L.R.2d 419; Estate of Loring, 29 Cal.2d 423, 436, 175 P.2d 524; Estate of Scrimger, 188 Cal. 158, 166, 206 P. 65. If the donors of property to a charitable corporation wish the property to revert upon dissolution, they may insert clauses to that effect in their gifts. See Estate of Randall, 341 Pa. 501, 19 A.2d 272; Bogert, Trusts and Trustees, § 419. If the right of reverter is not expressly reserved, recognition of a right of reverter by the courts would amount to a mere windfall since by the original gift the donors indicated that they preferred the property to be used to carry out the charitable purposes of the donee rather than go to themselves or to their heirs. A transfer of the assets to the donors or their heirs would thus conflict with the policy that the expressed purpose of the honors should be carried out so far as possible. See Estate of Lefranc, 38 Cal.2d 289, 296, 239 P.2d 617. Finally, recognition of the right of reverter presents grave practical difficulties, since in many cases dissolution of the charitable corporation will occur many years after the death of the donors of its assets and it will be extremely difficult or impossible to determine the heirs entitled to the property. For the foregoing reasons, the dictum in People v. President & Trustees of College of California, supra, is disapproved. The trial court therefore properly appointed a trustee in the present case.

[25] Pioneer contends that Historical is not qualified to act as trustee of the assets. Even if it is assumed that this question can be raised by Pioneer, see Society of Cal. Pioneers v. McElroy, supra, 63 Cal.

App.2d 332, 342, 146 P.2d 962, the selection of Historical as trustee is supported by the record. Historical is a charitable corporation first organized in 1883 and incorporated in 1891. It has 492 members and is actively engaged in collecting and preserving material of historic interest in Southern California. The order appointing Historical trustee provides that it shall hold the transferred assets as trustee for the same purposes as those expressed in Pioneer's articles. If Historical does not faithfully perform its duty as trustee, the Attorney General will institute appropriate proceedings to correct the noncompliance.

[26] Appellant Lelande, although not questioning Historical's fitness to act as trustee, contends that the order appointing Historical trustee should have defined Historical's duties in more detail. The order of the court followed the provisions of Pioneer's articles.[5] Lelande points out that before it was appointed trustee, Historical adopted a resolution providing that the assets acquired from Pioneer would be used to erect a building to be occupied by Historical and other societies,[6] and contends that the court should have ordered Historical to comply with that resolution. In our opinion, the trial court did not err in limiting its decree to provisions similar to those in Pioneer's articles. This limitation conforms to the wishes of the donors of the assets. In view of our conclusion that Lelande's contentions cannot be sustained, it is unnecessary to discuss the motion of Pioneer to dismiss Lelande's appeal.

The order is affirmed. The motion by appellant Los Angeles Pioneer Society to remand the case to the trial court, the motion by appellant Lelande to dismiss the appeal of appellant Los Angeles Pioneer Society, and the motion of appellant Los Angeles Pioneer Society to dismiss the appeal of appellant Lelande, are, and each is, denied.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I cannot agree that Pioneer was a charitable organization. The Los Angeles County Pioneer Society was organized in 1897 as an unincorporated association. In 1910, it was incorporated as a non-profit corporation under the existing laws of this state. At the time of incorporation, section 593 of the Civil Code provided that "A nonprofit corporation may be formed by any number of persons, not less than three, for any lawful purposes such as religious, charitable, *social, educational, recreational,* cemetery or for rendering services, which do not contemplate the distribution of

5. "1. To cultivate social intercourse and friendship among its members;

"2. To collect and preserve data touching the history of Los Angeles County and the State of California;

"3. To collect and preserve articles, specimens and material things illustrative or demonstrative of the customs, modes, and habits of the aforesaid times in said State;

"4. To perpetuate the memory of those who by their labors and heroism contributed to make the history of said County and State;

"5. And in furtherance of the aforesaid purposes, to receive, purchase, sell, hold, convey, encumber, lease, rent and maintain all kinds of property, both real and personal;

"6. To build clubhouses and do any and all acts, including but not limited to the borrowing of money, as may be necessary and convenient for the promotion of the aforesaid purposes,

"And it is further ordered [that the appointment is ineffective until Historical files an acceptance of the trusteeship providing that Historical] accepts the trusteeship for the specific purposes set forth above and not for any purpose which will result in any benefit to any private shareholder, member or individual, and that said assets shall in no way be devoted to the carrying on of propaganda or otherwise attempting to influence legislation."

6. The resolution provided that the funds would be used to erect a building, known as the Emma Stoltenberg Building, that it would be a home for the Historical Society, would have offices for Native Sons of the Golden West and the Native Daughters of the Golden West, and would have a meeting hall to be used jointly by the three foregoing organizations.

gains, profits or dividends to the members thereof, and for which individuals lawfully may associate themselves, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. *The carrying on of business at a profit incidental to the main purposes of the corporation and the distribution of assets to members on dissolution shall not be deemed forbidden to nonprofit corporations.*" (Emphasis added.) Its Articles of Incorporation provided "*That the purpose for which this corporation is formed is to cultivate social intercourse and friendship among its members,* to collect and preserve data touching the early history of Los Angeles County and the State of California, to collect and preserve articles, specimens and material things illustrative or demonstrative of the customs, modes and habits of the aforesaid times in said State; to perpetuate the memory of those who, by their labors and heroism, contributed to make the history of said County and State; and in furtherance of said purpose, to receive, purchase, sell, hold, convey, lease, rent and maintain all kinds of property, both real and personal; to build club houses, and to do any and all other acts necessary and convenient for the promotion of the aforesaid purpose; *and to exist as a social corporation under the provisions of the laws of the State of California,* covering such corporations, and not for pecuniary profit." (Emphasis added.) It was also provided that the corporation should exist for a period of fifty years.

Over the years, membership in the organization decreased until in 1941 there were less than 100 members; at the time of this action there were approximately 58 members still living. It would appear to be clear that the Pioneer Society was organized by a group of people who were brought together by their common interest in the history and historical relics of Los Angeles County and the State and that their purpose in so organizing was to enjoy each other's companionship, to exchange reminiscences and information. In Bogert, Trusts and Trustees (Vol. IIA, Sec. 380, pp. 182, et seq.) it is pointed out that "Gifts to provide social enjoyment for the members of a private club or other limited group have been held not to be charitable. Probably this is on account of the narrowness of their effect, rather than on account of the nature of the benefits to be derived. Good conversation, eating and drinking together, the playing of games, music, and other entertainment no doubt add to the pleasure of life and to some extent maintain health. A gift for a clubhouse where *all* citizens of the community might have such social intercourse has been held charitable. But donations for the support of private or limited organizations of a similar type are lacking in the breadth of influence necessary to give them a public or charitable character." (Emphasis added.) In 1947, it was held in England that a trust to pay income to maintain an institute in London for people of Welsh descent where lectures, study, entertainment, recreation and refreshment could be obtained, for the purpose of promoting the moral, social, spiritual and educational welfare of the Welsh people, is not devoted solely to charitable purposes (Trustees of Sir Howell Jones Williams' Trusts v. Inland Revenue Commissioners, 1 All Eng.R. 513).

The members of the Pioneer Society held meetings, gave picnics for themselves, held a meeting honoring the memory of the pioneers who discovered gold in California, erected a plaque to commemorate the site of the first school building at Inglewood, California, discussed the pioneers of California and (according to the majority opinion) "recollected" the activities of those pioneers. According to Webster (Int.Dict.2d ed.) the word recollect means "to recover or recall the knowledge of; to call to mind; to remember." Taking into consideration the average age of 75 years of the members of Pioneer, it seems logical to assume that they were the children of these pioneers to whom they paid tribute and that their purpose in honoring them was not for the benefit of society at large, but to honor their own ancestors as well as to consolidate their fast dwindling ranks for their own social benefit. An organization of canary fanciers, rose horticulturists, or of those interested

in purebred cattle, or purebred Irish Setters, or an association of breeders of Palomino horses could hardly be called charitable organizations even though an incidental benefit might be said to result to society at large, or that portion of society also interested in the particular subject. Groups of people vitally interested in the same subject matter enjoy each other's company because of that interest and often form organizations to discuss, socially, their common interests. Any educational features of any of these organizations is primarily intended for their own benefit, not for the benefit of the general public although non members may improve their knowledge through the efforts of the organization. Such general benefit is purely incidental, however, to the primary purpose of the organization. I am convinced that this is the situation we have here. Mrs. Stoltenberg's first gifts to Pioneer, of which she was a member, were to enable the organization to purchase a building in which to hold its meetings which she attended; her last gift, by will, was to enable her fellow-members and friends to continue their meetings and social events. It is interesting to note that Historical, the organization appointed to act as trustee, was an organization existing at the same time as Pioneer during Mrs. Stoltenberg's lifetime. Had she desired Historical to have the benefit of her gifts, undoubtedly she knew of its existence and could have interested herself therein; had she desired only to benefit the people of this State through the collection of historical data and relics, undoubtedly she would have made gifts to both organizations. To my mind, her membership in Pioneer and her gifts to that organization, clearly support the social character of Pioneer. Another point clearly supporting the social character of the organization is that neither outsiders nor members of the general public were admitted to the meetings of the society. If an organization is intended to benefit the general public, surely the general public should be admitted to meetings for its benefit.

In Abalian v. Townsend Social Center, 112 Cal.App.2d 441, 246 P.2d 965, it was held that a social center whose articles of incorporation disclose that its purpose was to acquire a club building for the convenience of its members and other persons interested in the old age pension movement was a nonprofit corporation for the benefit of its members, and not a charitable corporation holding assets charged with a public trust. In Estate of Dol, 186 Cal. 64, 198 P. 1039, (a case holding Pioneer a charitable organization) it was pointed out that if the "only" object of an organization were to cultivate social intercourse and friendship among its members, it would be for the benefit of the members alone and would not be a charitable organization. I can not agree that an organization may not be organized for social purposes with a common interest in an educational program without being classified as a charitable organization. In Estate of Dol, 182 Cal. 159, 163, 187 P. 428, 430 (involving the French Hospital in Los Angeles), it was held that "One of the essential features of a charitable use is that it shall be for the public benefit, either for the entire public or for some particular class of persons, indefinite in number, who constitute a part of the public. The persons to be benefited must consist of 'the general public or some class of the general public indefinite as to names and numbers.' Estate of Coleman, 167 Cal. [212] 214, 138 P. [992] 993, Ann.Cas. 1915C, 682; Estate of Lennon, 152 Cal. 327, 92 P. 870, 125 Am.St.Rep. 58, 14 Ann. Cas. 1024." Here, the members of Pioneer were definite and known. Here, as in Estate of Dol, supra, 182 Cal. 159, 187 P. 428, no one was entitled to the benefits of the society except those who became admitted as members and paid their dues. It was there held, in line with Stewart v. California Medical etc. Ass'n, 178 Cal. 418, 419, 176 P. 46, 47, that "the declaration in the articles alone are insufficient to establish the character of the St. Helena Hospital as a public charity, and the evidence of the manner it was conducted shows that it was not" and "The character of the institution is to be determined, not alone by the powers of the corporation as defined in its charter, but also by the manner of conducting the hospital." That statement is pertinent here. I have heretofore shown

that this organization was conducted for the benefit of the members alone; that its meetings were not open to the public; that its primary purpose was the social benefit to be derived by the members from their association with each other. In Estate of Henderson, 17 Cal.2d 853, 857, 112 P.2d 605, 607, this Court said "A bequest is charitable if: (1) It is made for a charitable purpose; its aims and accomplishments are of religious, educational, political or general social interest to mankind. People [ex rel. Ellert] v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; Estate of Merchant, 143 Cal. 537, 77 P. 475. (2) The ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion thereof. People [ex rel. Ellert] v. Cogswell, supra; Estate of Hinckley, 58 Cal. 457; Fay v. Howe, 136 Cal. 599, 69 P. 423. The charitable nature of an institution is determined on the same basis." See In re La Societe Francaise etc. Mutuelle, 75 Cal. App.2d 770, 171 P.2d 544.

In summary, and in applying the tests laid down in Estate of Henderson, supra, 17 Cal.2d 853, 112 P.2d 605, (1) Pioneer's aims were to promote the social life of its members through their common interest in California history; (2) The ultimate recipients of any benefits to be derived from the organization were the members in good standing of the organization, not the community as a whole or an unascertainable and indefinite portion thereof.

In a nonprofit corporation existing for the private benefit of its members, upon dissolution assets are distributed among the members Corp.Code, § 9801; Brown v. La Societe Francaise, 138 Cal. 475, 477, 71 P. 516; Abalian v. Townsend Social Center, 112 Cal.App.2d 441, 449, 246 P.2d 965, 168 A.L.R. 956. This, I believe, is the result which should be reached here. It seems quite apparent that Pioneer was a nonprofit organization existing for the private benefit of its members who should, upon dissolution, receive a distributive share of the assets held by Pioneer.

Assuming, however, only for the purposes of the following argument that Pioneer is a charitable organization, I see no valid reason why it should not be able to correct its deviation from its articles of incorporation. In other words, why should not Pioneer be permitted to continue to operate as a society and to revoke its former petition to dissolve the corporation? It is admitted in the majority opinion, that Pioneer's "abandonment of its trust was brought to light in the dissolution proceeding". Section 4691 of the Corporations Code provides that "if the cause of action is a matter or act which the corporation has done or omitted to do that can be corrected by amendment of its articles or by other corporate action, such suit *shall not be maintained unless* (a) the Attorney General, at least 30 days prior to the institution of suit, has given the corporation *written notice* of the matter or act done or omitted to be done, and (b) *the corporation has failed, neglected, or refused to institute proceedings to correct it within the 30-day period* or thereafter fails to prosecute such proceedings." (Emphasis added.) The majority calls attention to the fact that during the time intervening after the interlocutory judgment, the order appealed from and the affirmance by the District Court of Appeal, Pioneer's attention was repeatedly called to its status as a charitable organization. No mention is made of the fact that there was still to be made a determination by this Court. In the event that this Court had not decided that Pioneer was a charitable organization, it would have had the right to dissolve and distribute its assets among its members. Why then, should it not be given notice after the final determination has been made, that it must conform to its articles or that a successor trustee will be appointed? It is interesting to note that the title of section 4691 is "Conditions precedent: Notice affording opportunity for corrective action." The majority states that under section 10207 of the Corporations Code, the Attorney General has power to obtain the appointment of a successor trustee and that "there is nothing therein limiting the power of the Attorney General to cases where the assets of the charitable corporation have been distributed." The assets involved here have not been distributed but have been impounded pend-

ing the final determination of the issues involved. Section 10207 provides that "Each such [charitable] corporation shall be subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purpose for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to *correct* the noncompliance or departure. Except as specially approved by the Attorney General such a corporation shall not accumulate income for a period longer than five years." (Emphasis added.) The section provides for "correction" of a noncompliance or departure; it does not prohibit a self-correction by the erring corporation. If Pioneer terminates its dissolution proceedings, and continues as it has done in the past, then, under the view taken by the majority of this Court, it will be carrying on its charitable purposes and there is no reason why a successor trustee should be appointed to administer Pioneer's funds. No authority is cited for the proposition that Pioneer may not be permitted to correct its deviation from its articles by withdrawing or revoking its dissolution proceedings nor have I found any such authority. The Restatement of Trusts (§ 392) provides that (comment a) "A suit in equity can be maintained by the Attorney General to compel the trustees of a charitable trust to perform their duties as trustees, or to enjoin them from committing a breach of trust, or to compel them to redress a breach of trust, or to appoint a receiver to take possession of the trust property; or to remove the trustees and appoint other trustees." There are, thus, several remedies other than the appointment of a successor trustee.

There was no bad faith on the part of Pioneer in voting to dissolve the corporation. It filed an action in declaratory relief and obtained a judgment to the effect that no trust of any kind was impressed upon its assets; it voted to dissolve and then petitioned the superior court for judicial supervision of the dissolution; it agreed that the Attorney General might file a petition in intervention. Under the circumstances presented and in view of the fact that the applicable statutes do not prevent it, there appears to be no sound reason why Pioneer should not be permitted to revoke its dissolution proceedings and carry out the trust imposed by its articles since it is finally adjudged to be a charitable organization.

I would, therefore, reverse the judgment.

SCHAUER, J., concurs.

On Petition for Rehearing

Rehearing denied.

CARTER and SCHAUER, JJ., dissent.

CARTER, Justice (dissenting).

I dissent from the order denying appellant's petition for rehearing and in view of the contention of appellant in said petition that the effect of the decision of this Court is to deprive it of its property without due process of law, I am constrained to comment on this contention.

The record in this case presents one of the most outrageous examples of legalized larceny which has come under my observation.

The Pioneer Society was organized as an unincorporated association; the evidence shows clearly, and without contradiction, that it was intended to be, and was, a purely social organization. As such an unincorporated association and social organization, it had the right, upon dissolution, to distribute its assets among its members.

The record discloses that Pioneer has acted with the utmost good faith throughout. In the first instance, Pioneer sought a judicial determination of its charitable, or social, status. The first judicial determination was that it was a non-profit, noncharitable organization. A later judicial determination by the same court held it to be a charitable organization. Pioneer then sought to abandon its dissolution proceedings and, in accordance with the last judicial determination, carry on as a chari-

table organization. This it has not been permitted to do. A majority of this Court has declared that Pioneer is a charitable organization and that it may not be permitted to correct its so-called deviation from its articles of incorporation; that its assets must be turned over to a successor trustee—the Historical Society. As I pointed out in my dissenting opinion, this is a clear violation of the statutory provisions involved, which permit *corrective* action by a charitable organization which has deviated from its articles. Even if Pioneer is a charitable organization (which I am firmly convinced it is not) it has the right to abandon its dissolution proceedings and correct any deviation from its articles of incorporation. To refuse to permit such corrective action is, in my opinion, to deprive Pioneer of its property without due process of law under both the federal and state constitutions.

With respect to corporations, this Court is empowered only to apply the statutory law of the state as it was written by the Legislature; it is not empowered to ignore the statutory provisions relating to corporations and effect a distribution of corporate assets as its collective whim may dictate.

For the reasons stated herein, and in my dissenting opinion, I would grant a rehearing and reverse the judgment.

SCHAUER, Justice (dissenting).

I concur generally in the reasoning and conclusion of Justice CARTER. Particularly do I find no justification whatsoever for refusing to permit Pioneer to take the corrective action which it could not know it should take until this court had ruled that it could not rely on the prior final judgment or its charter from the state.

Pioneer, by its articles of incorporation and the laws of California was not a charitable corporation; it never intended or pretended to be a charitable corporation; it paid taxes as a non-charitable corporation; it was adjudicated not to be a charitable corporation. With that background it instituted a proceeding for dissolution as it had a right to do. Its every act shows the good faith of the fine citizens composing it. Now this court rules that it is a charitable corporation and in the same judgment punishes Pioneer for instituting the lawful dissolution proceeding by stripping it of its assets and giving them to another; it refuses even to permit Pioneer, despite the authorization of the statute, to discontinue the dissolution proceeding and to carry out the trust which the court adjudges to exist.

Such action in my view is contrary to fact, to law, to justice, to reason and to constitutional guarantees.



41 Cal.2d 45

TURNER v. MELLON et al.

S. F. 18755.

Supreme Court of California, In Bank.

May 15, 1953.

Rehearing Denied June 11, 1953.

Action against employer and employee for false arrest and false imprisonment. The Superior Court of the State of California in and for the City and County of San Francisco, Robert L. McWilliams, J., rendered judgment for the defendant-employer notwithstanding the jury verdict in favor of plaintiff as against both defendants, and plaintiff appealed. The Supreme Court, Schauer, J., held that the trial court should also have granted the defendant-employee's motion for judgment notwithstanding the verdict.

Affirmed.

Carter, J., dissented.

Prior opinion 249 P.2d 41.

1. False Imprisonment ⇐15(3)

Liability of employer, for acts of its employee in causing false arrest and false imprisonment, would depend upon whether employee committed tort in and as part of transactions of business of employer.

2. Appeal and Error ⇐877(3)

Even though employee failed to appeal from judgment against him in action against employer and employee for false arrest and false imprisonment, appellate court would not be precluded from examining, on plaintiff's appeal from judgment entered for employer notwithstanding ver-

dict for plaintiff, correctness of finding that employee was liable.

3. False Imprisonment ⇐15(2)

Participant must have taken active part in bringing about arrest or he will not be liable for false imprisonment, and merely giving information to police authorities in good faith will not be grounds for imposing liability.

4. False Imprisonment ⇐15(2)

Party will not be held responsible in damages for false imprisonment merely because he made an honest mistake as to identity of party.

5. Judgment ⇐199(3.15)

In action against employer and employee for false arrest and false imprisonment, evidence required that both defendants' motions for judgment notwithstanding verdict for plaintiff be granted.

6. False Imprisonment ⇐15(2)

Victims of crime should not be held to responsibility of guarantors of accuracy of their identifications, and citizens who have been criminally wronged may, without fear of civil reprisal for honest mistake, report to police or public prosecutor facts of crime, and in good faith, without malice, identify as to best of their ability to such public officers the perpetrator of the crime.

William J. Connolly, San Francisco, for appellant.

Pillsbury, Madison & Sutro, John A. Sutro, Francis N. Marshall and Harry C. Scott, Jr., San Francisco, for respondent.

SCHAUER, Justice.

Plaintiff sued Tevis Mellon and Western Union Telegraph Company, Mellon's employer, for false arrest and false imprisonment. A jury returned its verdict in favor of plaintiff as against both defendants. The motion of defendant Mellon for judgment notwithstanding the verdict was denied and that of defendant Western Union was granted. Plaintiff appeals from the ensuing judgment in favor of Western Union; Mellon has not appealed from the judgment against him. We have concluded that the judgment appealed from should be affirmed.

[1, 2] Although, as will hereinafter appear, the trial court should have granted Mellon's motion for judgment notwithstanding the verdict, Mellon's failure to appeal does not prevent our examining the correctness of the finding that he was liable, for any liability of Western Union would necessarily depend upon whether its agent Mellon committed a tort "in and as a part of the transactions of the business of the agency" (Deevy v. Tassi (1942), 21 Cal.2d 109, 125, 130 P.2d 389), and Western Union, defending on appeal the judgment in its favor in the action in which the liability of Mellon was first placed in issue, is not precluded from disputing every element of that liability.

Mellon was branch manager of a Western Union office on the street floor of the Sheldon Building in San Francisco. His hours of employment were from 2 p. m. to 10:30 p. m. After 6 p. m. he was the only employe on duty in the office. During the three months prior to April 8, 1949, the date of plaintiff's arrest, Mellon had been robbed of company funds on four occasions, by the same person, at hours varying from 5:20 to 10:15 p. m. Mellon had been expressly and repeatedly instructed that his duties included the safeguarding of company funds; a company bulletin stated that upon discovery of a theft of such funds a manager should "Notify the local police authorities and secure their co-operation in finding the thief." Mellon or his superintendent reported each of the four robberies to the police. After the fourth robbery the superintendent arranged for installation of an alarm system to summon the police, and plain clothes men were stationed in the building each night after 6 p. m.

On April 8 at about 2:30 p. m. Mellon observed plaintiff walk past the Western Union office, then retrace his steps and, according to Mellon's answer, "evince an unusual interest in the premises." The jury impliedly found, on sufficient evidence, that plaintiff, on legitimate business, was looking for the office of a firm which was in the Sheldon Building. Plaintiff, according to Mellon, "looked very much like the man that

had been holding me up." Mellon telephoned the police and reported, "I saw the robber pass the office, or a man that looked like him." Mellon got into the police car with the officer who first arrived, rode along Market Street for about half a block, saw plaintiff, and said, "There is the man I was speaking of." A number of other officers arrived. According to Mellon, "never at any time did I positively identify him [plaintiff]. I told them he resembled the man very much." But according to plaintiff, Mellon in responding to an officer's statement, "If he is who you think he is, we will take him," said, "Yes, that is the man."

Plaintiff was arrested, taken to jail, and held until the next day. Mellon then talked with and carefully observed plaintiff and described the ensuing events as follows: "They [the police] told me to sign the complaint, if I was positive of the identification. * * *

"Q. But you got a good close look at him this time? A. Yes.

"Q. And you were convinced it wasn't the man? A. I wasn't one hundred per cent convinced, because there was such a striking resemblance.

"Q. Did you ask him to say anything? A. Yes.

"Q. To identify his voice? A. That's right.

"Q. Did you ask him to turn in different positions? A. That is right.

"Q. And after that was done, you weren't sure, is that right? A. That is right.

"Q. And you didn't sign a complaint? A. No, sir. * * * I decided that, as long as there was some doubt in my mind about him being the man, I would rather not make a mistake."

Plaintiff was then released. Two nights later Mellon was again robbed by the same person who had committed the four previous crimes. Shortly thereafter Mellon resigned his position with Western Union because he "couldn't stand the suspense."

[3–5] It is settled law "that the defendant must have taken some active part in bringing about the unlawful arrest and that he is not liable if, acting in good faith, he merely gives information to the authorities. [Citations.] * * * [I]t would be unjust to impose liability for an honest mistake in identification even where the identification may have been the principal cause of the wrongful arrest." (Hughes v. Oreb (1951), 36 Cal.2d 854, 859, 228 P.2d 550.) As is pointed out in Miller v. Fano (1901), 134 Cal. 103, 107, 66 P. 183 (and also in the Hughes case, supra), "it would be a hard and unjust law that would hold a party responsible in damages for false imprisonment for an honest mistake as to the identity of a party." All that Mellon did here was to report the commission of the crimes and state to the police officers his honest but mistaken opinion that plaintiff was the robber. This conduct did not in law amount to taking "some active part in bringing about the unlawful arrest," and since Mellon did not participate in the false imprisonment neither he nor his employer, whose only liability would necessarily rest on the doctrine of *respondeat superior*, is liable therefor.

[6] Plaintiff relies upon Turner v. Elliott (1949), 91 Cal.App.2d 901, 904, 206 P.2d 48, wherein understandable and commendable concern is shown for the victims of mistaken identification and ensuing false arrest. We share this concern but we think that proper concern for the victim in such a case must stop at some point along the line where to support his claims further would contravene the public interest. We think it serves the public interest—and, hence, the line should be drawn here—that citizens who have been criminally wronged may, without fear of civil reprisal for an honest mistake, report to the police or public prosecutor the facts of the crime and in good faith, without malice, identify to the best of their ability to such public officers the perpetrator of the crime. Investigation and action from then on are the responsibility of the public employes who are skilled in that work and who are paid to perform it. The victims of crimes should not be held to the responsibility of guarantors of the accuracy of their identifications.

The Turner case, as indicated above, was a false arrest action and in it judgments

for plaintiffs were affirmed upon the stated ground that the defendant actively participated in the arrests because the evidence showed that he "was a victim of the robbery, caused the police to be summoned, pointed out [plaintiffs] Butcher and Moore, stated that they were the men who had robbed him, and when [plaintiff] Turner interceded he directed the officers to arrest Turner also. Without his activities there would have been no identification of the plaintiffs and no arrests." The Turner case purports to distinguish the Miller case (1901), supra, 134 Cal. 103, 66 P. 183, upon the ground that the facts in Miller "bear no resemblance to the circumstances of the arrests of plaintiffs herein." While there are differences between the facts of the two cases, at least in respect to Turner, there are also implications in the above quoted language of the Turner case which are contrary to the Miller case and also to the Hughes case. Such contrary implications of the Turner case are disapproved. A view contrary to that of the Miller and Hughes cases would, we think, inevitably tend to discourage a private citizen from imparting information of a tentative, honest belief to the police and, hence, would contravene the public interest which must control.

Plaintiff also relies upon Nelson v. Kellogg (1912), 162 Cal. 621, 624, 123 P. 1115, where it is said that "the defense of probable cause is not applicable in actions for false imprisonment." In view of our conclusion that Mellon's conduct, as a matter of law, did not amount to participation in the arrest, we do not reach the question of probable cause. Our conclusion also obviates the need for discussion of the question whether Mellon was acting in the scope and course of his employment so as to render Western Union liable for his acts.

For the reasons above stated the judgment appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

CARTER Justice (dissenting).

I dissent.

On the theory that bad Court decisions like bad kings are good for us if they are bad enough, the majority decision in this case casts ominous shadows of such dire consequences in the realm of human rights and the dignity of man that those who believe in the American concept of liberty and justice may rise in defense of that concept and become so articulate that decisions such as this cannot stand as the law of this state.

There can be no doubt that under the rule here announced, the right of the individual to the enjoyment of life, liberty and the pursuit of happiness is not only abridged, it is destroyed. The right of a person who has done no wrong—violated no law—injured no one—to walk along a public street in a dignified, respectable manner without fear of arrest and imprisonment no longer exists in this state. The dignity and security of the individual citizen is subordinated to the whim and caprice of any fanatical, overzealous person who chooses to point a finger of suspicion at him and thereby cause his arrest and imprisonment without written charge, complaint or warrant of arrest.

The concept of the majority appears to be that the detection of crime and apprehension of criminals is of greater importance to society than the right of innocent, law-abiding persons to live in peace and security and be free from arrest and imprisonment unless there is reasonable and probable cause for the belief that such person has committed a crime. This concept is diametrically opposed to that on which this government was founded and is akin to the totalitarian concept that the citizen is a mere pawn of the state and all his rights must yield to what may be considered in the interest of the state—hence, he may be arrested and imprisoned without probable cause and is entitled to no redress for the injury suffered as the result of the ignominious indignity inflicted upon him.

The majority opinion is not supportable on any theory therein advanced or otherwise. It fails to give sensible meaning to what constitutes actively participating in the arrest, confuses that question with

good or bad faith and probable cause, omits facts in the record and those found by the jury, and is based upon a philosophy and policy wholly foreign to the fundamental principles of our government.

Looking at the facts, we find defendant Mellon, employee of defendant corporation, was acting in the course of his employment when he actively procured plaintiff's arrest. That he acted in the course of his employment is clear from the able and learned opinion of Mr. Justice Fred Wood, speaking for the district court of appeal when the case was there decided. See Turner v. Mellon, Cal.App., 249 P.2d 41. Plaintiff on entirely legitimate business walked by Western Union's premises and then returned and passed there again. Mellon, the employee, saw him and notified the police. The police responded to his call and he joined them in their patrol car and directed them down the street where plaintiff was walking. Mellon pointed out plaintiff as the person who had robbed him before. As the result of Mellon's assurances the police arrested plaintiff and took him to the police station. There again Mellon positively identified plaintiff as the robber of the Western Union office on four previous occasions. Mellon had described the person who had previously robbed him as being "5 feet 11 inches" tall, weighing 150 pounds, and age 28. Plaintiff, on the other hand, was 6 feet and ¼ inches tall and weighed 130 pounds, and was 39 years of age. Moreover, the jury had the opportunity of observing plaintiff on the stand and thus comparing the appearance he made with that given by Mellon of the robber. The four previous robberies had all occurred between 8 and 9 p. m., while Mellon's observation of plaintiff just before the arrest was at 2:30 p. m. There was nothing unusual or suspicious about the actions of plaintiff at the time Mellon observed and identified him. I mention these factors because they supply an adequate basis upon which the jury could decide, as it did, that Mellon was acting either in bad faith or without probable cause.

There can be no doubt that Mellon procured, actively participated in and brought about plaintiff's arrest. On observing plaintiff walking along the street, he called the police. He directed them to the point where he had last seen plaintiff. He pointed plaintiff out as the person who had perpetrated the robberies. When the officers were reluctant to make the arrest, he assured them that plaintiff was the robber and on that basis *alone* the arrest was made. If that does not constitute a participation in the arrest—the procuring cause of it—then it is difficult to imagine a case that would. In Hughes v. Oreb, the defendant did nothing more than, in good faith, give information to the arresting officers. Here the evidence shows that Mellon was the *sole* procuring cause of plaintiff's arrest. The officers would not have arrested plaintiff except for Mellon's false but positive identification.

The majority opinion, however, *concludes as a matter of law*, repudiating the jury's contrary finding, that Mellon did not participate in the arrest. It makes that determination by giving to the participation element a meaning that ordinarily would be ascribed to probable cause. The latter factor, by that name, is said to be not involved because there was *no* participation in the arrest by Mellon. It first states the rule iterated in Hughes v. Oreb, supra, 36 Cal.2d 854, 859, 228 P.2d 550, 553, that: "the defendant must have taken some active part in bringing about the unlawful arrest and that he is not liable if, acting in good faith, he merely gives information to the authorities. * * * every person is entitled to give information to the proper officers and that it would be unjust to impose liability for an honest mistake in identification even where the identification may have been the principal cause of the wrongful arrest." Then, it concludes that Mellon's actions were in good faith, an honest but mistaken opinion as to identity and therefore he did not take an "active part in bringing about the unlawful arrest". If the last quoted words are to be given a meaning that has any resemblance to their real sense, it is a non sequitur to state that a person did not take an active part in procuring the arrest of a person because he acted in good faith. His activity could

be with good or bad faith but nevertheless be activity. Manifestly the majority is, by giving a completely foreign meaning to those words, using them to declare a public policy against holding a person liable for actively participating in an unlawful arrest where he acts honestly (later I will discuss the policy question) or, although it says probable cause is not involved, it is speaking of the same principle but calling it no participating because of good faith. In any event, as I have above pointed out, there was adequate evidence to show active procurement of the arrest and also bad faith, even accepting the terminology of the majority opinion. On the evidence the jury found the facts on those issues and this Court cannot disturb that finding without thereby denying plaintiff's right to a jury trial, which it had done here.

For cogent reasons the majority has excluded the issue of probable cause from its consideration. It is a vital issue in this case as it is in every case of false arrest. It must be conceded that any person who has probable cause to believe that a crime has been committed and that he knows the person guilty thereof, should report such facts to peace officers to the end that persons who violate the law should be apprehended and punished. Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the person accused is guilty of the offense with which he is charged. The determination of what constitutes probable cause is and should be a question of fact. Therefore, the issue in this case was whether or not defendant Mellon had probable cause to believe that plaintiff had committed the four robberies of which defendant Mellon was aware. In determining whether or not defendant Mellon had probable cause to believe that plaintiff had committed said robberies, the trier of fact was required to consider all the facts in order to determine whether or not defendant Mellon acted as a reasonable and prudent person in identifying plaintiff as the robber and directing the police to arrest him. It must be assumed that the jury, as the trier of fact in this case, gave consideration to this issue and determined it adversely to defendant Mellon. Certainly every citizen who walks upon the street should not be subjected to the whim and caprice of the fanatical, irrational person who might identify him as the perpetrator of a crime and subject such a person to arrest and imprisonment. Some standard should be adopted to protect innocent, law-abiding people from arrests of this character, and the only standard known to the law is that of probable cause. By refusing to consider this issue as an essential element in determining the reasonableness of the conduct of defendant Mellon in this case, the majority of this Court has disregarded the only standard known to the law for the protection of innocent persons from unjustified arrests in cases such as this.

Turner v. Elliott, 91 Cal.App.2d 901, 206 P.2d 48, overruled by the majority opinion is precisely in point and sound law. The facts there are practically identical with the facts in the instant case and the Court upheld the jury's verdict for plaintiff. See cases to the same effect, 21 A.L.R.2d 643, 710.

As heretofore mentioned, the basic premise of the majority opinion is that to hold a person liable who by false identification procures the arrest and imprisonment of another would "contravene public interest." The nature of the public interest or policy is not elucidated but it is not hard to discern. It is the policy of making it easier for the police to catch alleged criminals even at the expense of the innocent by false imprisonment. That policy is and should be subordinate to the fundamental rights of individual freedom—principles which are imbedded in our constitutions, state and federal. The policy declared by the majority makes the rights of individuals expendable on the chance that more criminals may be apprehended. The framers of the Constitution of the United States weighed that policy against those rights and took the calculated risk in favor of the latter. These principles have been enunciated repeatedly. In considering coerced confessions, it has been said, "The rule [that confessions obtained for one crime while de-

fendant was held in custody for another could validly be used at the trial of the first crime] I propose would, of course, reduce the 'efficiency' of the police. But so do the requirements for arraignment, the prohibition against coerced confessions, the right to bail, the jury trial, and most of our other procedural safeguards. We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police." United States v. Carignan, 342 U.S. 36, 46, 72 S.Ct. 97, 102, 96 L.Ed. 48, Douglas, J. dissenting, Black, J. and Frankfurter, J. joining. It is forcefully put by Mr. Justice Black in Chambers v. Florida, 309 U.S. 227, 240, 60 S.Ct. 472, 479, 84 L.Ed. 716, also dealing with coerced confessions: "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." The same thoughts have been expressed in cases dealing with arrests and searches and seizures. In United States v. Di Re, 332 U.S. 581, at page 595, 68 S.Ct. 222 at page 229, 92 L.Ed. 210, Mr. Justice Jackson said: "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveilance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand." To the same effect is the declaration of Mr. Justice Douglas in McDonald v. United States, 335 U.S. 451, at page 455, 69 S.Ct. 191 at page 193, 93 L.Ed. 153: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed to precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." The principles thus declared are not new. In 1920, the late Mr. Justice Clarke, speaking for a unanimous Court in Gouled v. United States, 255 U.S. 298, at page 303, 41 S.Ct. 261, at page 263, 65 L.Ed. 647, said: "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and in Silverthorne Lumber Co. v.

United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments [Fourth and Fifth]. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of *habeas corpus*, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." While those cases were dealing with unlawful acts of public peace officers, the fundamental principles are nevertheless relevant to the question of when civil liability should be imposed on an individual who unlawfully procures the arrest and imprisonment of another and thus causes those rights to be violated. In both cases, the person is unlawfully deprived of his liberty and for that he should be compensated. Indeed, the argument has been made many times by the proponents of the view that illegally obtained evidence cannot be excluded at the trial in the state courts, that the offended person has his civil remedy for damages, the clear implication being that that remedy is adequate. The majority opinion in this case demonstrates not only the inadequacy of such a remedy but concludes there is no remedy at all.

Finally, I wish to state without qualification or reservation that in my opinion the inalienable rights to the enjoyment of life, liberty and the pursuit of happiness guaranteed to all persons by our fundamental law are so precious that they constitute the sine qua non of the American way of life, and that any intrusion on or abridgement of those rights should not be tolerated by judges who have taken a solemn oath to support the Constitution of the United States and the Constitution of the State of California; that a heavy burden should be cast upon the person who sets in motion any action or proceeding which results in a violation of such rights to justify his action; that the only justification of such an action or proceeding is that the person instigating the same has reasonable and probable cause to believe that the person whose rights are being invaded is guilty of a public offense; and that in the absence of a showing of the existence of reasonable and probable cause for the instigation of such action or proceeding, the person instigating the same should be liable in civil damages to the person injured regardless of the honesty or good faith of the instigator. If such a rule were announced by this Court in this case, the judgment notwithstanding the verdict rendered by the trial court would be reversed. In my opinion that should be the decision of this Court.

Rehearing denied; CARTER, J., dissenting.



41 Cal.2d 33

TALLEY et al. v. NORTHERN SAN DIEGO COUNTY HOSPITAL DIST.

L. A. 22537.

Supreme Court of California, in Bank.

May 15, 1953.

Action against hospital district for injuries to plaintiff as result of employees of district. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment from which plaintiffs appealed. The Supreme Court, Shenk, J., held that hospital district was performing a governmental function, and the doctrine of sovereign immunity was applicable.

Judgment affirmed.

Carter, J., dissented.

Prior opinion 246 P.2d 970.

1. Pleading ⇐6, 214(2)

For the purpose of testing a question of law, all facts well pleaded are deemed

to be admitted on demurrer and additional facts of which judicial notice may be taken will also be considered, even though not pleaded.

2. States ⇐191(1.13)

When acting in its governmental capacity, a sovereign may not be sued except where doctrine of sovereign immunity has been specifically departed from by constitutional or statutory law.

3. Counties ⇐142, 208

Generally, the doctrine of sovereign nonliability for tort applies to state subdivisions, if they were at the time in question acting in governmental capacity in discharge of official duties, but tort liability will attach and may be adjudicated pursuant to consent statute, when state or its subdivision were engaged at time of the wrong in industrial or business enterprises.

4. Counties ⇐146

County hospitals exercise governmental functions and the counties are consequently not liable for negligence of employees towards patients therein. Health and Safety Code, § 32201 et seq.; Welfare and Institutions Code, §§ 200 et seq., 203, 203.5.

5. Counties ⇐142
States ⇐112

The imposition of a charge for services is not inconsistent with the exercise of a governmental function by the state or its subdivision, nor is the profit or nonprofit element determinative, but test is whether particular activity in which agency is engaged at time of injury is of a public or private nature.

6. Hospitals ⇐7

Statute authorizing creation of hospital districts does not authorize hospital district to engage in private business, but has primary purpose of protecting public health and welfare by furnishing hospital services in areas where facilities are for some reason inadequate, and the district is performing a governmental function when rendering its services, with result that it is not liable for the negligence of its employees. Health and Safety Code, §§ 32001, 32003, 32125, 32128, 32129, 32200.

7. Constitutional Law ⇐81

A state may, in the exercise of its police power, act to provide for public health and welfare.

8. Hospitals ⇐8

Section of statute relating to hospital districts, and providing that each hospital district shall have the power to sue and be sued, is not an authorization for a suit against district for damages because of the negligence of its employees, but district is merely authorized to appear as a party to an action where it otherwise would be entitled to prosecute such action or liable to answer in damages. Health and Safety Code, § 32121.

9. Constitutional Law ⇐70(1)

It is not the function of the courts, but of the Legislature, to modify the doctrine of sovereign immunity, if deemed necessary.

David S. Casey, San Diego, for appellants.

Belli, Ashe & Pinney, San Francisco, and Renetzky & Davis, San Luis Obispo, amici curiae on behalf of appellants.

Gray, Cary, Ames & Frye and Ward W. Waddell, Jr., San Diego, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the defendant in an action to recover damages for personal injuries alleged to have resulted from the negligence of the defendant's agents in caring for the plaintiff while she was a patient at the defendant's hospital. Judgment was entered upon the sustaining of a demurrer on the ground that the amended complaint failed to state a cause of action. The court took judicial notice of the fact that the defendant is a local hospital district, organized under Section 32000 et seq. of the Health and Safety Code, and applied the rule that a hospital performing a governmental function is not liable for personal injuries suffered by patients as a result of the negligence of its employees.

The amended complaint alleges that the plaintiff was admitted to the defendant's hospital for the purpose of delivering her

of a child; that while she was in a state of unconsciousness brought about by the use of an anaesthetic the defendant and its agents allowed her body and legs to become burned by the negligent use of hot water bottles; that as a result she suffered serious and permanent injuries; that the defendant's hospital was "open to the public as a hospital where a person, for a money consideration, could obtain hospital and medical services"; that the plaintiff was accepted as a patient "for a money consideration * * * and became indebted and was given a bill for services rendered" by the defendant.

[1] For the purpose of testing a question of law all facts well pleaded are of course admitted. Additional facts of which judicial notice may be taken will also be considered by the court although not pleaded. French v. Senate, 146 Cal. 604, 608, 80 P. 1031, 69 L.R.A. 556; Mullan v. State, 114 Cal. 578, 46 P. 670, 34 L.R.A. 262. The defendant hospital district was organized under the provisions of The Local Hospital District Law, Stats. 1945, ch. 932, p. 1738, § 32000 et seq., Health and Safety Code. The question presented is whether that statute has created an agency immune from liability in tort for the negligence of its agents.

[2] It is generally recognized that when acting in its governmental capacity a sovereign may not be sued except where the doctrine has been specifically departed from by constitutional or statutory law. People v. Superior Court, 29 Cal.2d 754, 756, 178 P.2d 1. The plaintiffs contend that a statutory departure from the doctrine has been brought about in this state.

In 1893, Stats.1893, p. 57, the legislature enacted its first general statute providing for suits against the state. The rule is expressed today by Section 16041 of the Government Code, Stats.1945, p. 511, as follows: "Any person who has a claim against the State (1) on express contract, (2) for negligence, or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution, shall present the claim to the board in accordance with Section 16021. If the claim is rejected or disallowed by the board, the claimant may bring an action against the State on the claim and prosecute it to a final judgment, subject to the conditions prescribed by this chapter."

In Chapman v. State, 1894, 104 Cal. 690, 38 P. 457; recovery was sought for a loss alleged to have been due to the negligence of the Harbor Commissioners in maintaining a wharf. The facts involved occurred prior to the enactment of 1893. The court refused to apply the act retroactively to create any liability against the state for past negligence, leaving open the question of the prospective effect of tortious acts of officers of the state. The court concluded, however, that a contractual liability existed prior to the act of 1893 and allowed the plaintiff to recover his loss in the action as an additional remedy given by the statute. The rule of the Chapman case with regard to tortious actions was followed in Melvin v. State, 1898, 121 Cal. 16, 53 P. 416, again involving facts prior to the enactment of 1893. Denning v. State, 1899, 123 Cal. 316, 55 P. 1000, 1001, directly presented the question of the state's prospective tortious liability under the act. Without noting the problem left open in prior cases, the court applied the language of the Chapman and Melvin cases as holding that the act of 1893 "did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted."

In reviewing the foregoing line of decisions, this court in People v. Superior Court, supra, 29 Cal.2d 754, 178 P.2d 1, 4, stated: "Thus there was adopted in this state the doctrine that state consent to be sued for negligence did not waive sovereign immunity from liability for tort."

Prior to the enactment of 1893 the court was confronted with a statute authorizing the commencement of actions against the state for damages resulting from the construction of a channel in the American River by a levee commission. The court held, Green v. State, 1887, 73 Cal. 29, 11 P. 602, 14 P. 610, that the statute did not waive any legal defense except that of immunity from

suit. Thus, where the state was engaged in a public work for the common good, that is, in a governmental activity as distinguished from a commercial enterprise, the former constituted a defense to the action authorized by the statute.

[3] In Melvin v. State, supra, 121 Cal. 16, 53 P. 416, in denying the retroactive application of the act of 1893, the court pointed out that the state was engaged in a governmental activity. In Denning v. State, supra, 123 Cal. 316, 55 P. 1000, in denying the prospective application of the act the court noted that the plaintiff was employed by the state in a governmental activity at the time of his injury. Following these decisions it was generally held that the doctrine of sovereign nonliability for tort applied to state subdivisions but only where they were acting in a governmental capacity in the discharge of official duties. People v. Superior Court, supra. 29 Cal.2d 754, 760, 178 P.2d 1; Nissen v. Cordua Irr. Dist., 204 Cal. 542, 269 P. 171; Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; Davoust v. City of Alameda, 149 Cal. 69, 70, 84 P. 760, 5 L.R.A.,N.S., 536; Madison v. City and County of San Francisco, 106 Cal.App.2d 232, 234 P.2d 995, 236 P.2d 141. On the other hand, "where the state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to the consent statute." People v. Superior Court, supra, 29 Cal.2d 754, 178 P.2d 1; see also Yolo v. Modesto Irr. Dist., 216 Cal. 274, 13 P.2d 908.

The defendant hospital district is a public corporation, § 32001, Health and Safety Code, duly formed as the result of the favorable vote of a majority of the voters in the district, § 32003, Health and Safety Code. Although no section of the statute specifically declares the purpose for which the district is created that purpose is made apparent from the statute as a whole. Thus, in Section 32125 (powers of a local hospital district) it is declared that: "The board of directors shall be responsible for the operation of all hospitals owned or leased by the district, according to the best interests of the public health * * *." In Section 32128 (minimum standards of a local hospital district) it is stated that "The rules of the hospital, established by the board of directors pursuant to this article, shall include * * * 5. Such limitations with respect to the practice of medicine and surgery in the hospital as the board of directors may find to be in the best interests of the public health and welfare * * *."

Section 32129 prohibits the district from rendering any professional services, either directly or through persons employed by the hospital. Professional services may be rendered by physicians and surgeons who contract to do so with the district, but only on a basis which does not result in any profit or gain to the district. Section 32125 provides that "In fixing the rates the board shall, insofar as possible establish such rates as will permit the hospital to be operated upon a self-supporting basis." Section 32200 gives the district the right to finance itself by taxation of "real and personal property within the district," and Section 32201 et seq. provide means by which an annual tax may be levied and collected to support the operations of the district during the next ensuing fiscal year.

[4] It is the contention of the defendant district that it is exercising a governmental function under the laws of the state; that it is not acting in a proprietary capacity, and that as a result it is immune from a suit for personal injuries. It is insisted that the same rule should apply to hospitals organized under the provisions of The Local Hospital District Law as apply to county hospitals organized and operated under Section 200 et seq. of the Welfare and Institutions Code. The principal difference between the two appears to be that county hospitals are administered by county boards of supervisors while hospitals operated by local hospital districts are administered by a board of directors. But both are governmental agencies. County hospitals may charge patients for hospitalization and medical care, § 203.5, Welfare and Institutions Code; are supported by taxation, § 200, Welfare and Institutions Code; and tend to promote the public health and welfare, § 203, Welfare and Institu-

tions Code. The cases have uniformly held that county hospitals are exercising governmental functions and that the counties are not liable for the negligence of employees towards patients therein. Sherbourne v. Yuba County, 21 Cal. 113; Madison v. City and County of S. F., supra, 106 Cal.App.2d 232, 234 P.2d 995, 236 P.2d 141; Latham v. Santa Clara County Hospital, 104 Cal. App.2d 336, 231 P.2d 513; Griffin v. County of Colusa, 44 Cal.App.2d 915, 113 P.2d 270; Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523.

[5] The plaintiff seeks to distinguish the present case from those dealing with county hospitals on the ground that the authority of county hospitals to charge fees is limited to those patients otherwise eligible for admission because of financial circumstances or the unavailability of other hospital facilities, Latham v. Santa Clara County Hospital, supra, 104 Cal.App.2d 336, 231 P.2d 513; whereas there is no limitation on the admission of paying patients to hospitals operated by local hospital districts, § 32125, Health and Safety Code. However, any distinction based upon the right to charge for hospitalization or medical care is not apparent. The imposition of a charge for service is not inconsistent with the exercise of a governmental function. Kellar v. City of Los Angeles, supra, 179 Cal. 605, 178 P. 505; Latham v. Santa Clara County Hospital, supra, 104 Cal.App.2d 336, 231 P.2d 513; Calkins v. Newton, supra, 36 Cal.App.2d 262, 267, 97 P.2d 523. Neither is the profit or nonprofit phase of the activity engaged in determinative of either a proprietary or a governmental function. People v. Superior Court, supra, 29 Cal.2d 754, 178 P.2d 1; cf. Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A. 1917E, 685. The test is whether the particular activity in which the governmental agency is engaged at the time of the injury is of a public or a private nature. The agency may be authorized to act in both capacities. For example, it has been held that an irrigation district, so long as it operates only as an irrigation district, is acting in a governmental capacity within the meaning of the rule that such agencies are not liable for tort. Nissen v. Cordua Irrigation District, supra, 204 Cal. 542, 269 P. 171; Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal.App. 234, 212 P. 706. But when it steps aside and engages in the business of selling power in a proprietary capacity it is liable in tort. Yolo v. Modesto Irr. Dist., supra, 216 Cal. 274, 13 P.2d 908; see also Davoust v. City of Alameda, supra, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536.

[6, 7] In the present case the statute does not authorize the hospital district to engage in private business. The primary purpose of the statute is to fulfill the function of protecting the public health and welfare by furnishing hospital services in areas where hospital facilities are for some reason inadequate, especially in those rural districts where hospitals cannot be maintained without extraordinary governmental support. While the health and general welfare of the citizens of a county may be promoted by the availability of a county hospital regardless of the ability to pay, Calkins v. Newton, supra, 36 Cal.App.2d 262, 266, 97 P.2d 523, it is equally true that the health and general welfare of the citizens of a district are promoted by the availability of such a hospital within the district. In the exercise of its police power the state may act to provide for the public health and welfare and this in essence is what the Local Hospital District Law was designed to accomplish.

The plaintiff relies upon Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 97 P.2d 798. The court held that the private charitable hospital there involved was not immune from liability in tort for negligent acts of its agents. That case has no application where as here the immunity arises out of the governmental nature of the activity engaged in by a public agency.

[8] It is contended that the present action is specifically authorized by Section 32121 of the Health and Safety Code, which provides that "Each hospital district shall have and exercise the following powers * * * (b) To sue and be sued in all courts and places and in all actions and proceedings whatever * * *." This provision of the statute means no more than that the district is authorized to appear as a party to an action where it otherwise would be

entitled to prosecute such an action or otherwise be liable to answer in damages. In Nissen v. Cordua Irr. Dist., supra, 204 Cal. 542, 269 P. 171, 172, it was held that a provision in the California Irrigation District Act authorizing the board of an irrigation district "to sue, appear and defend" in all courts, actions, suits, or proceedings did not enlarge the liability of the district and applied only to actions such as a public corporation might otherwise be subjected to.

[9] Whether the doctrine of sovereign immunity should be modified in this state is a legislative question. New York's consent statute prior to 1939 was construed by its courts not to create a cause of action in favor of a claimant which did not theretofore exist, although the state's immunity to suit was waived. Smith v. State of New York, 227 N.Y. 405, 125 N.E. 841, 13 A.L.R. 1264. The rule applied in New York was similar to that announced by this court in its early beginnings and since consistently adhered to. To impose a liability upon the state for the tortious acts of its agents committed in the performance of a governmental function, the New York Legislature adopted its Court of Claims Act in 1939 by which the state waived both its immunity from suit and its defense of performing a governmental function. The act expressly provides that the state's liability be determined in accordance with the same rules of law as are applied in actions against individuals or private corporations. No such legislative change in the law of this state has been made.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Again it is necessary for me to protest the continuance of the archaic, outmoded, unfair and discriminatory doctrine of governmental immunity blindly followed by the majority in this case. As I have heretofore pointed out, and as I will continue to point out, the reason which ever existed for the rule has long since ceased to exist, and when the reason ceases, so should the rule. Civ.Code, § 3510.

Section 32121 of the Health and Safety Code specifically provides that "Each local hospital district shall have and exercise the following powers: * * *; (b) To sue and be sued in all courts and places and in *all* actions and proceedings *whatever* * *." (Emphasis added.) A majority of this Court holds that "This provision of the statute means no more than that the district is authorized to appear as a party to an action where it otherwise would be entitled to prosecute such an action or otherwise be liable to answer in damages." This statement *may* have a meaning known only to the majority, but it is held to have *no* meaning *here* where the facts show that plaintiff, a paying patient, in a hospital run by a local hospital district, was badly burned while unconscious, as the result of the gross negligence of the employees of the hospital. Such a holding is a travesty on justice and should lead every ill person to travel as many miles as his, or her, condition permits to find haven in a hospital which will be liable for its tortious conduct. To say that the state was engaged in a public work for the common good—that is, in a governmental activity as distinguished from a commercial enterprise—is begging the question. Under that definition, a minister would not be liable for tortious conduct; a doctor could never be sued for malpractice; a private hospital located conveniently near any ill patient would never be liable for injury flowing from its negligence; a dentist would not be liable for tortious conduct toward his patients. All of these tend to promote the public welfare and the public health. The fact that all of them engaged in their various professions for personal monetary gain, no matter how slight, is not of the least importance under the rule stated in the majority opinion where we are told that "Neither is the profit or nonprofit phase of the activity engaged in determinative of either a proprietary or a governmental function" and that "The imposition of a charge for service is not inconsistent with the exercise of a governmental function." We are told that the test "is whether the particular activity in which the governmental agency is engaged

at the time of the injury is of a public or a private nature."

Such a hospital as the one here concerned is in direct competition with private enterprises of the same character. No thinking person could seriously contend, as I have just done, that a private hospital, a doctor, a dentist, or even a minister, should not be liable for its, or his, or her, torts, and yet the majority is so anxious to absolve any governmental agency from liability for its torts, that that is the logical outcome of this perpetuation of an outmoded and archaic theory. This is obvious because the only peg on which the entire opinion rests is that in organizing such a hospital the state has promoted the health and general welfare of citizens in the particular community. When a patient enters such a hospital as a private patient, under the care of his, or her, own doctor, he or she should not be classified with an indigent person receiving care and aid from the welfare fund of the state if this absurd rule of governmental immunity is to go on ad nauseum.

The government obviously cannot insure the citizen against all defects and errors in administration, but there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of governmental officers and employees, should be allowed to rest at the door of the unfortunate citizen alone. The entire doctrine of governmental immunity rests upon a rotten foundation, and professors, writers and liberal minded judges are of the view that it should be placed in the judicial garbage can where it belongs. See Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480; 75 A.L.R. 1196; Brooklyn Law Review, April, 1932, "Should the Liability of Municipalities in Tort be Extended to Include Injury and Damage Caused in the Negligent Performance of a Governmental Function?"; 120 A.L.R. 1376; 54 Harvard Law Review, pp. 437–462, "Municipal Tort Liability in Operation".

The majority opinion, in order to achieve its unjust result, finds it necessary to go back to 1893, and to cite cases decided in that era. For example, Chapman v. State, 104 Cal. 690, 38 P. 457, was decided in 1894; Melvin v. State, 121 Cal. 16, 53 P. 416, was decided in 1898; Denning v. State, 123 Cal. 316, 55 P. 1000, was decided in 1899; Green v. State, 73 Cal. 29, 11 P. 602, 14 P. 610, was decided in 1887; Sherbourne v. Yuba County, 21 Cal. 113, was decided in 1862. Apparently it is easier and more convenient to adhere to the views held by our early predecessors on this Court than it is to discard them, old, outmoded and outworn as they are, for a doctrine or theory in keeping with modern times. So far as a majority of this Court is concerned, we are living even farther back than the horse and buggy days.

I had thought when People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1, 6, was decided in 1947, that we had begun to revamp our ideas. It was said there that "The considerations of an asserted subversion of public interests by embarrassments, difficulties and losses, which developed the doctrine of nonliability of the soverign in former times, are no longer persuasive in relation to an industrial or business enterprise which by itself may be looked to for the discharge of all appropriate demands and expenses growing out of operation." I find, however, that this Court has again reverted to the old, archaic theory of sovereign immunity and will continue to hold that a governmental agency, no matter how it conducts its business, is engaged in its governmental capacity and is, therefore, immune from tort liability. I dissented from the denial of a hearing in Madison v. City & County of S. F., 106 Cal.App.2d 232, 234 P.2d 995, 236 P.2d 141, a case involving governmental immunity, and I will do so every time a majority of this Court votes to perpetuate that archaic and outmoded doctrine.

We are told in the majority opinion, that whether the doctrine should be modified in this state is a legislative question. Under the section of the Health and Safety Code heretofore quoted, it is no longer a legislative question. The Legislature has already spoken. It has provided that such a district may *"sue and be sued in all courts and places and in all actions and proceedings whatever"*. It is difficult to imagine language which could set forth with more clarity the position already taken by the

Legislature, and if the majority of this Court was not so fettered and weighted down by the outmoded traditional concept of sovereign immunity it would so hold in this case.

I would reverse the judgment with direction to the trial court to overrule the demurrer and permit the defendant to answer if it be so advised.



41 Cal.2d 57

PEOPLE v. GALLARDO et al.

Cr. 5338.

Supreme Court of California, in Bank.

May 15, 1953.

Two defendants were convicted of abortion, of conspiracy, and of attempted abortion. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., rendered a judgment and defendants appealed from the judgments and sentences, and from an order denying their motions for a new trial. The Supreme Court, Gibson, C. J., held that evidence sustained judgments on counts charging abortion and on count charging defendants with conspiracy to commit abortion.

Order in accordance with opinion.

Schauer, J., dissented in part.

Prior opinion 243 P.2d 532.

1. Criminal Law ⇐1023(10)

No appeal lay from sentences imposed upon defendants who were convicted of abortion, of conspiracy to commit abortion, and of attempted abortion, and attempted appeals therefrom would be dismissed. Pen.Code, § 1237.

2. Abortion ⇐8

In prosecution for performing abortions, brought under statute prohibiting such act unless necessary to preserve life of woman upon whom abortion was performed, prosecution was required to establish as part of its case that operations were not necessary to preserve life. Pen. Code, § 274.

3. Abortion ⇐11

In prosecution for performing abortion, fact that operation was not necessary to preserve life may be shown by evidence that woman operated on was in good health before operation, and her testimony as to her physical condition is sufficient on such issue. Pen.Code, § 274.

4. Abortion ⇐11

In prosecution for performing abortion, evidence justified finding that abortion was performed and that it was not necessary to preserve life of woman upon whom abortion was performed. Pen.Code, § 274.

5. Abortion ⇐11

A defendant charged with abortion cannot be convicted upon testimony of woman upon or with whom offense was committed unless she is corroborated by other evidence. Pen.Code, §§ 274, 1108.

6. Abortion ⇐11

Corroboration, within rule that defendant charged with abortion cannot be convicted upon uncorroborated testimony of woman upon or with whom offense was committed, is sufficient if it tends to connect defendant with commission of abortion in such a way as may reasonably satisfy jury that woman is telling truth, and corroborative evidence need not by itself establish that abortion was committed or show all elements thereof, but it must relate to some act or fact which is an element of offense and must create more than a suspicion, but it may be sufficient even though slight and entitled to but little consideration when standing by itself. Pen. Code, § 274.

7. Abortion ⇐11

In prosecution for performing abortions, any one of several women upon whom abortions were allegedly performed could act as corroborative witness with respect to matters which she observed that were relevant to another count charging performance of abortion upon a different woman. Pen.Code, §§ 274, 1108.

8. Criminal Law ⇐507(6)

A woman who has submitted to an abortion is not an "accomplice" of person

charged with procuring or conspiring to procure miscarriage. Pen.Code, § 274.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

9. Abortion ⇐11

In prosecution for commission of abortions, testimony of any of the several women upon whom abortions were allegedly committed could be corroborated by testimony of an accomplice, and testimony of accomplices could be corroborated by testimony of any one of such women. Pen. Code, §§ 274, 1108.

10. Abortion ⇐11

In prosecution for commission of abortions, testimony of one of several women upon whom abortions were allegedly performed, that a person performed an abortion upon her, would not of itself be sufficient to corroborate testimony of another woman that same person performed abortion upon her, but there was sufficient corroboration where independent testimony of women upon whom abortions were allegedly performed showed that such abortions were performed in similar manner. Pen. Code, §§ 274, 1108.

11. Abortion ⇐11

Conspiracy ⇐47

Evidence justified convictions of two defendants for performing abortions, and for conspiring to commit abortions. Pen. Code, §§ 274, 1108.

12. Criminal Law ⇐44

In order to establish "attempt" by a defendant to commit a crime it must appear that defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end, and some appreciable fragment of crime must have been accomplished, and preparation alone is not enough.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempt".

13. Abortion ⇐11

Evidence that policewoman met a defendant at hospital and arranged for abortion, that such defendant was paid money by policeman who accompanied policewoman, that at such defendant's request policeman left building and policewoman remained in waiting room and that two other women met such defendant near hospital and accompanied such defendant inside hospital through rear door and paid money to such defendant while in a back room and then went into waiting room, and that hospital cards and records were prepared for all three women by such defendant, did not establish "attempt" of such defendant to commit abortions. Pen.Code, § 274.

14. Witnesses ⇐256

Statute authorizing witness to refresh memory by use of writing made under prescribed conditions, and requiring writing to be produced, and authorizing adverse party to inspect such writing, does not require production of writing which witness consulted prior to time witness testifies. Code Civ.Proc. § 2047.

15. Witnesses ⇐256

In prosecution for performing abortions, statute authorizing witness to refresh memory by use of writing made under prescribed conditions, and requiring writing to be produced, and authorizing adverse party to inspect such writing, did not entitle defendant to inspect notes used by a witness for prosecution to refresh her memory where such notes were used before witness took witness stand. Pen.Code, § 274; Code Civ.Proc. § 2047.

16. Criminal Law ⇐1186(4)

Convictions for performing abortions and for conspiracy to commit abortions would not be reversed on appeal because of improper admission of evidence where no miscarriage of justice resulted therefrom. Pen.Code, § 274; Const. art. 6, § 4½.

17. Abortion ⇐8

In prosecution for performing abortions, prosecution was not required to establish that women upon whom abortions were performed were actually pregnant. Pen.Code, § 274.

18. Abortion ⇐1

A defendant charged with performing unlawful abortion may have necessary in-

tent to procure miscarriage where defendant merely believes that woman upon whom defendant performs abortion is pregnant. Pen.Code, § 274.

19. Abortion ⇐13

Instruction reciting that person who uses or employs instrument or other means upon a woman with intent to procure miscarriage, unless necessary to preserve her life, is guilty of a criminal offense, and that to constitute crime of abortion it is immaterial whether woman is pregnant, was not misleading, as against contention that sentence of instruction stating pregnancy to be immaterial was too broad and might have led jury to believe that prosecution was not required to show intent to procure miscarriage. Pen.Code, § 274.

Fred N. Howser, Arcadia, Leonard Wilson, Glenn A. Lane, Ralph R. Sleeper, Los Angeles, and Robert P. Dockeray, Burbank, for appellants.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Albert K. Lucas, Deputy Dist. Attys., Los Angeles, for respondent.

GIBSON, Chief Justice.

[1] Defendants Gallardo and Glynn were charged in four separate indictments, embracing a total of twenty-two counts, with performing abortions in violation of section 274 of the Penal Code,[1] conspiracy to induce abortions and attempts to perform abortions. The cases were consolidated for trial. Six counts were dismissed, and Gallardo and Glynn were convicted on the remaining counts, namely, twelve counts of abortion, one of conspiracy and three of attempted abortion.[2] They have appealed from the judgments and sentences, and from an order denying their motions for a new trial. No appeal lies from the sentences, and the appeals therefrom must be dismissed. Pen.Code, § 1237; People v. Tallman, 27 Cal.2d 209, 215, 163 P.2d 857; People v. Clark, 106 Cal.App.2d 271, 273, 235 P.2d 56.

As grounds for reversal defendants contend that the judgments are not supported by substantial evidence and that errors were committed in admitting evidence and instructing the jury.

Sufficiency of the Evidence.

Glynn, who is not a doctor, owned and operated an establishment, consisting of a hospital and medical offices, which was under surveillance by the police during the month of March, 1950. On the last day of the month the police entered the premises while Gallardo, a licensed osteopathic physician and surgeon, was attending a woman patient in an operating room. Upon hearing the noise made by the officers, Gallardo removed an instrument from the woman's body, threw the instrument into a washroom, and ran out into the back yard where he was arrested. Glynn was arrested shortly thereafter in an alley at the rear of the property. He then had in his possession over $2,000 in cash and a piece of paper which contained the names of three of the twelve women upon whom abortions were assertedly performed. The police also obtained from the hospital and from Glynn records containing the names of all but two of the twelve women.

When Gallardo was arrested he told one of the officers "I never should have come here today * * *. I have tried many times to withdraw from this association * * *. At one time I tried to get money for a health plan for my people * * *. I talked to Henry Glynn about it, and we got together and this is a re-

1. Section 274 of the Penal Code provides: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

2. Of the other defendants named in the indictments, one was convicted but did not appeal; one was acquitted in another trial; the cases were dismissed as to one; and two pleaded guilty.

sult of that * * *. I had to go ahead with it because of my financial commitments * * *. I was hooked * * *."

The twelve women named in the abortion counts testified, and it can be inferred from their testimony that each of them was pregnant and desired to terminate her pregnancy, that she went to Glynn's establishment for the purpose of obtaining an abortion and that some one there used instruments on her in order to accomplish that purpose. The women, with one exception, made some or all of the arrangements for their operations with Glynn. The one who made no direct contact with him dealt with Mrs. Chelini, a defendant who pleaded guilty. Eight of the women paid Glynn in advance sums ranging from $200 to $600. Two women paid Mrs. Chelini, who testified that she gave part of the money to Glynn. The remaining two paid $450 each to Mrs. Schroeder, who accompanied them to Los Angeles and who was also a defendant pleading guilty. Eleven of the women who visited the hospital were relieved of their pregnancies, and Gallardo was using an instrument on the twelfth one when the police entered.

Gallardo, testifying in his own behalf, admitted that he made a physical examination of the reproductive organs of eleven of the women and that in some instances he performed operations which required incisions in the lower portion of the abdomen. He denied, however, that anything he did was for the purpose of procuring a miscarriage. Gallardo testified that he did not examine or treat the other woman, but she identified him as the person who performed an abortion upon her.

[2–4] Defendants contend that the evidence is insufficient to support convictions on the counts charging abortions in that the prosecution failed to establish that the operations were not necessary to preserve life within the meaning of the exception contained in section 274. We have found no case directly in point in California, and we adopt the rule followed by the weight of authority which requires the prosecution to establish as a part of its case that the operations were not necessary to preserve life. See Fitch v. Commonwealth, 291 Ky. 748, 165 S.W.2d 558; State v. De Groat, 259 Mo. 364, 168 S.W. 702, 706–707; State v. Montifoire, 95 Vt. 508, 116 A. 77, 79; 153 A.L.R. 1218, 1266–1277. The fact that an operation was not necessary to preserve life may be shown by evidence that the woman was in good health before the operation, and her testimony as to her physical condition is sufficient on this issue. People v. Emery, 79 Cal.App.2d 226, 231–232, 179 P.2d 843; Murphy v. Board of Medical Examiners, 75 Cal.App.2d 161, 166, 170 P.2d 510; People v. Card, 40 Cal.App. 22, 24, 180 P. 53; see People v. Balkwell, 143 Cal. 259, 262, 76 P. 1017; People v. Malone, 82 Cal.App.2d 54, 59, 61, 185 P.2d 870; 153 A.L.R. 1218, 1270. All of the women except one testified that they were in good health, thus meeting the burden of the prosecution with regard to the statutory exception. Gallardo admitted that he performed an operation on the twelfth woman but testified that the purpose of the surgery was to remove her appendix and that it was not a "therapeutic abortion." The jurors obviously disbelieved Gallardo's statement that the operation was not intended to induce a miscarriage, and the evidence justifies a finding that an abortion was performed and that it was not necessary to preserve life.

[5–7] A defendant charged with abortion "cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence." Pen. Code, § 1108. Corroboration is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the woman is telling the truth.[3] See People v. Miner, 96 Cal.App.2d 43, 49–50, 214

3. Some of the cases state that the evidence must be "inculpatory," but this is used merely as another way of stating that it must tend to connect the defendant with the crime. See People v. Shaw, 17 Cal.2d 778, 803–804, 112 P.2d 241; People v. Morton, 139 Cal. 719, 724, 73 P. 609; People v. Reingold, 87 Cal. App.2d 382, 392–393, 197 P.2d 175.

P.2d 557; People v. Malone, 82 Cal.App. 2d 54, 61, 185 P.2d 870; People v. Lorraine, 28 Cal.App.2d 50, 53, 81 P.2d 1004; People v. Lee, 81 Cal.App. 49, 53, 252 P. 763; cf. People v. Wilson, 25 Cal.2d 341, 346–347, 153 P.2d 720; People v. Barclay, 40 Cal.2d 146, 252 P.2d 321; People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681. It has been held that the corroborative evidence need not by itself establish that the crime was committed or show all the elements thereof, but it must relate to some act or fact which is an element of the offense. See People v. Barclay, 40 Cal.2d 146, 252 P.2d 321; People v. Yeager, 194 Cal. 452, 473, 229 P. 40; People v. Robbins, 171 Cal. 466, 469–471, 154 P. 317; People v. Josselyn, 39 Cal. 393, 400–401; People v. Lee, 81 Cal.App. 49, 53, 252 P. 763. It must create more than a suspicion, but it may be sufficient even though slight and entitled to but little consideration when standing by itself.[4] See People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Kempley, 205 Cal. 441, 455–456, 271 P. 478.

[8, 9] A woman who has submitted to an abortion is not an accomplice of the persons charged with procuring or conspiring to procure the miscarriage. People v. Buffum, 40 Cal.2d 709, 256 P.2d 317; People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Clapp, 24 Cal.2d 835 et seq., 151 P.2d 237. The testimony of any one of the twelve women can be corroborated by that of a witness who was an accomplice, for example Gallardo or Chelini, and the testimony of the accomplices can be corroborated by that of any one of the women. People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Clapp, 24 Cal.2d 835, 837 et seq., 151 P.2d 237. Moreover, any one of the women upon whom an abortion was performed can act as a corroborating witness with respect to matters which she may have observed that are relevant to another count charging the performance of an abortion upon a different woman. Cf. People v. Jones, 36 Cal.2d 373, 378, 224 P.2d 353 [victims of separate thefts by false pretenses]; People v. Owens, 28 Cal.2d 191, 193, 168 P.2d 945 [different accomplices of defendant in separate illegal wagers].

[10] As to three of the charges, there is sufficient corroborative evidence without resort to the testimony of the women named in other counts, but as to each of the remaining charges there is not sufficient corroboration unless it can be found in the testimony of the women involved in the other eleven counts. It is not necessary to recite the testimony referred to with respect to the three counts first mentioned because we have concluded that the independent testimony of the twelve women, fortified in some instances by the testimony of Gallardo and Chelini, is mutually corroborative in that it shows that each abortion was committed in a similar manner following the same procedure. Although the testimony of one woman that a person performed an abortion upon her is not of itself sufficient to corroborate the testimony of a second woman that the same person committed an abortion upon her, cf. People v. Darby, 64 Cal.App.2d 25, 30–32, 148 P.2d 28; People v. Thompson, 69 Cal.App.2d 80, 90–91, 158 P.2d 213, it has been held that there is sufficient corroboration if the independent testimony of the women shows that each abortion was committed in a similar manner. See People v. Reimringer, 116 Cal.App.2d 332, 253 P.2d 756; People v. Kendall, 111 Cal. App.2d 204, 210–211, 244 P.2d 418; People v. Allen, 104 Cal.App.2d 402, 411, 231 P.2d 896; People v. Collins, 80 Cal.App.2d 526, 534–535, 182 P.2d 585; cf. People v. Coltrin, 5 Cal.2d 649, 656, 662, 55 P.2d 1161; People v. Smitherman, 58 Cal.App.2d 121, 123, 135 P.2d 674. In People v. Kendall,

4. Although it has been said that corroboration is not sufficient where the circumstances are consistent with the innocence of the accused, see e.g., People v. Davis, 210 Cal. 540, 555, 293 P. 32; People v. Kempley, 205 Cal. 441, 461, 271 P. 478; People v. Robbins, 171 Cal. 466, 470, 154 P. 317, the more recent decisions have held that whether the corroborating evidence is as compatible with innocence as it is with guilt is a question of weight for the trier of fact, see People v. Henderson, 34 Cal.2d 340, 347, 209 P.2d 785; People v. Estes, 99 Cal.App.2d 745, 747, 222 P.2d 454; cf. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

supra, the women described the same premises, the same instruments and the same abortifacient, and the court pointed out that one of the reasons for accepting the evidence as corroboration is that the testimony of two people who independently went through the same procedure tends to establish the credence of both. 111 Cal. App.2d at page 211, 244 P.2d at page 423. In the Allen case, among other similarities, each of the women stated that she had been blindfolded. Under statutes similar to section 1108 of the Penal Code it has likewise been held that there is sufficient corroboration where each witness independently reveals the commission of a crime which is uniform in plan and pattern with the crimes described by the other witnesses. People v. Chait, 69 Cal.App.2d 503, 516, 159 P.2d 445, Pen.Code, § 1110; People v. Solano, 48 Cal.App.2d 126, 130, 119 P.2d 381, Pen.Code, § 1111; cf. People v. Thorne, 10 Cal.2d 705, 708, 76 P.2d 491; People v. Peete, 28 Cal.2d 306, 317, 169 P.2d 924.

As we have indicated, the independent testimony of each of the twelve women upon whom defendants are charged with having performed abortions, considered together with the testimony of Gallardo and, as to two counts, with the testimony of the accomplice Chelini, shows that defendants followed a similar plan or procedure as to each of the abortions. Under all of the counts the testimony shows that Glynn did not perform any of the operations himself but arranged for Gallardo to do the work and that Gallardo, who admitted examining or operating on eleven of the women, performed or participated in each operation but did not make any of the initial contacts or arrangements and left such matters to Glynn. In each instance it appears that an abortion was performed in Glynn's establishment. Each woman was placed upon an operating table, and instruments were used on her. Eleven of the women testified that they met Glynn prior to their operations and made some of the arrangements with him, and the accomplice Chelini testified that she made arrangements with Glynn for an abortion upon the twelfth woman, who did not see Glynn. It thus appears that there is independent testimony as to each count that Glynn acted as an intermediary.

Further similarities appear in connection with some but not all of the counts. For example, as to ten of the women there is testimony that payments for the operations were made to Glynn, either directly or through some third person, and Gallardo testified that he received a check from Glynn for the services rendered to the eleventh woman, from which it could be inferred that payment had previously been made to Glynn. As to eight or more of the women full payment was made to Glynn in advance, and as to two others he received substantial sums in advance. Although there are some differences in the evidence on the separate offenses, this does not alter the fact that there is independent testimony with respect to each count indicating that essentially the same procedure was followed in each instance, and, accordingly, the testimony of the witnesses is mutually corroborative within the principles discussed above. The corroborative evidence as to each count is complete in itself and did not require resort to the testimony of the witness who had to be corroborated for interpretation and direction. Cf. People v. Shaw, 17 Cal.2d 778, 805, 112 P.2d 241.

[11] The evidence is sufficient to support the judgments on the twelve counts charging abortion and on the count charging defendants with conspiracy to commit abortion.

In support of the judgments convicting defendants of attempts to commit abortion, the People rely upon three transactions which occurred a few minutes before the police officers entered the hospital. The first of these involved a policewoman who, endeavoring to obtain evidence, met Glynn at the hospital and arranged with him for an abortion. She was accompanied by a policeman who paid Glynn $250. The policeman, at Glynn's request, left the building, and the policewoman remained in the waiting room. The other transactions involved two women who met Glynn near the hospital and accompanied him inside. They entered through a rear door,

and while in a back room each of the women paid Glynn $250. They then went to the waiting room where the policewoman was sitting. Hospital cards and records were prepared for the three women by Glynn.

[12, 13] In our opinion this evidence does not support the convictions for attempts to commit abortions. In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished. People v. Buffum, 40 Cal.2d 709, 256 P.2d 317; People v. Werner, 16 Cal.2d 216, 221–222, 105 P.2d 927; People v. Miller, 2 Cal.2d 527, 530–532, 42 P.2d 308, 98 A.L.R. 913. The record shows merely preparation and does not disclose any direct, unequivocal act toward the commission of an abortion upon any of the three women. There is no evidence that Glynn or Gallardo started to provide, supply or administer any medicine or to use or employ any instrument or other means to procure the miscarriage of any of the three women. Pen.Code § 274. The conduct of Glynn in arranging for operations, filling out hospital cards, and accepting money did not amount to an attempt. Cf. State v. Davis, 319 Mo. 1222, 6 S.W.2d 609, 612; State v. Lowrie, Minn., 54 N.W.2d 265, 266–267; State v. Lampe, 131 Minn. 65, 154 N.W. 737, 739.

Other Claims of Error.

Numerous claims of error are made by defendants in connection with the admission of evidence and the instruction of the jury. Some of these claims are entirely without merit, and a discussion of them would unnecessarily lengthen this opinion.

[14, 15] One question raised by defendants has not been previously decided in this state. A witness for the People testified on cross-examination that before she took the stand she had refreshed her memory by examining notes which she had made earlier. Defendants claim that it was prejudicial error for the court to refuse their request that she be ordered to produce the notes for inspection. Section 2047 of the Code of Civil Procedure [5] provides that a witness may refresh his memory by use of a writing made under certain prescribed conditions and that "in such case the writing must be produced, and may be seen by the adverse party". It has been held that a similar statute applies only to the conduct of the witness while on the stand and that it does not require him to produce a writing which he consulted prior to the time he testifies. State v. Magers, 36 Or. 38, 58 P. 892, 893–896. We agree with this interpretation. Section 2047 is a codification of the common law rule, and a majority of the jurisdictions applying that rule have held that production of notes for inspection may be compelled only where the witness uses them while on the stand and not where he refreshes his memory with them before being examined. See Goldman v. United States, 316 U.S. 129, 132, 62 S.Ct. 993, 86 L.Ed. 1322; Lennon v. United States, 8 Cir., 20 F.2d 490, 493–494; State v. Magers, 36 Or. 38, 58 P. 892, 893–896; 3 Wharton's Criminal Evidence [11th ed., 1935], § 1279, p. 2147; 58 Am.Jur. 335–336; 14 Am.Jur. 893; cf. Leonard v. Taylor, 315 Mass. 580, 53 N.E.2d 705, 707, 151 A.L.R. 1002; but cf. 3 Wigmore on Evidence [3rd ed., 1940], § 762, p. 111; State v. Deslovers, 40 R.I. 89, 100 A. 64, 69–70; The Alpha, D.C., 44 F.Supp. 809, 815. An exception has been made in cases where a government witness refers to documents before taking the stand and the party demanding the right of inspection lays a foundation by showing that the documents are in possession of the government, were made by the government's witness and are contradictory of his present testimony as

5. Section 2047 of the Code of Civil Procedure provides: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. * * *"

to relevant and important matters. Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 372–373. No such showing has been made in the present case. Since the witness involved here did not look at her notes while she was on the stand, the trial court properly denied defendants' request that they be produced for inspection.

[16] Defendants also complain of the admission in evidence of a number of conversations which, they assert, were inadmissible hearsay. We have examined the record with regard to this evidence, and, although some of the conversations may have been improperly admitted, we are of the opinion no miscarriage of justice resulted therefrom. Const., art. VI, § 4½.

[17–19] It is contended that the court misdirected the jury by giving the following instruction: "You are instructed that every person who uses or employs any instrument or other means whatever upon a woman with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is guilty of a criminal offense. In that connection, I instruct you further that to constitute the crime of abortion it is immaterial whether the woman is pregnant or not." It is settled that the prosecution need not establish that the woman was actually pregnant, and a defendant may have the necessary intent to procure a miscarriage where he merely believes that the woman upon whom he performs an abortion is pregnant. People v. Crain, 102 Cal.App.2d 566, 568, 228 P.2d 307; People v. Raffington, 98 Cal.App.2d 455, 460, 220 P.2d 967; People v. Pollum, 97 Cal.App. 2d 173, 177, 217 P.2d 463; People v. Ramsey, 83 Cal.App.2d 707, 717, 723, 189 P.2d 802. The defendants argue, however, that the last sentence of the instruction is too broad and may have led the jury to believe that the prosecution was not required to show an intent to procure a miscarriage. Although belief that the woman was pregnant has some bearing on intent and therefore is not wholly immaterial, when the two sentences of the instruction are read together it does not appear how the jury could have been misled.

The appeals from the sentences are dismissed. The judgments and the order denying a new trial on the twelve counts charging abortion and the count charging conspiracy to commit abortion are affirmed. The judgments and the order denying a new trial on the counts charging attempt to commit abortion are reversed.

SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice (concurring in part and dissenting in part).

I concur in the judgment of this court insofar as it (1) dismisses the appeals from the sentences and (2) reverses the judgments and the order denying a new trial on the counts charging attempt to commit abortion.

I dissent from that portion of the judgment which affirms the judgments and the order denying a new trial on the twelve counts charging abortion and the count charging conspiracy to commit abortion.

I disagree with all those portions of the discussion in the majority opinion relative to the definition of accomplices and the competency of the testimony of persons who in fact, and under general provisions of law, appear to be, but are held not to be, accomplices. See People v. Clapp (1944), 24 Cal.2d 835, 840–847, 151 P.2d 237; People v. Wilson (1944), 25 Cal.2d 341, 351–352, 153 P.2d 720; People v. Lima (1944), 25 Cal.2d 573, 579, 154 P.2d 698; People v. Harper (1945), 25 Cal.2d 862, 877, 156 P.2d 249; People v. Wallin (1948), 32 Cal.2d 803, 808, 197 P.2d 734; People v. Buffum (1953), 40 Cal.2d 709, 256 P.2d 317.

I furthermore do not agree with the discussion or the conclusion of the majority relative to the sufficiency of the evidence to support the judgments of conviction on any of the several counts on which the judgments of conviction are affirmed.

CARTER, J., concurs.

118 Cal.App.2d 94

PEOPLE v. MARTINELLI.

Cr. 2833.

District Court of Appeal, First District, Division 1, California.

May 25, 1953.

Defendant was convicted of robbery, with one prior conviction of robbery. Thereafter defendant filed a petition for writ of error coram nobis. The Superior Court, City and County of San Francisco, Twain Michelsen, J., entered order denying the writ, and defendant appealed. The District Court of Appeal, Peters, P. J., held that alleged insufficiency of evidence could not be passed on in proceeding for writ of error coram nobis.

Order affirmed.

1. Criminal Law ⇐997

On writ of error coram nobis, contention that evidence was insufficient to sustain conviction could not be passed on.

2. Criminal Law ⇐997

Judicial error that could have been corrected on motion for new trial or on appeal from the judgment is not subject to review on writ of error coram nobis.

3. Criminal Law ⇐997

Writ of error coram nobis is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions ad infinitum.

4. Criminal Law ⇐997

Where record showed that continuances, with consent of counsel for defendant and without objection from defendant, were granted until certain date, and that cause was brought to trial within 35 days thereafter, conviction was not subject to attack on writ of error coram nobis on ground that over 60 days were allowed to elapse between date of filing information and trial. Pen.Code, § 1382.

5. Criminal Law ⇐304(16)

On writ of error coram nobis, record in criminal prosecution in Superior Court could be judicially noticed by Superior Court.

6. Criminal Law ⇐997

On writ of error coram nobis, Superior Court judge, who had tried the criminal prosecution, was not required to believe uncontradicted affidavit of defendant alleging that assistant public defender, who was defendant's counsel, did not come near defendant in jail to discuss case or to prepare a defense, though requested to do so.

7. Habeas Corpus ⇐48

Folsom Prison is not within the habeas corpus jurisdiction of the District Court of Appeal in and for the First Appellate District.

Joseph L. Bortin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with robbery, and with one prior conviction of robbery. He admitted the prior, and was found guilty by a jury of second degree robbery. He was sentenced to the state prison on January 24, 1951. No appeal was taken from that judgment. On February 13, 1952, he filed in the Superior Court *in propria persona* a notice of motion to annul, vacate and set aside the judgment, a petition for a writ of error *coram nobis,* and a motion for a court order for permission to appear at the hearing. These applications were denied February 21, 1952. Defendant appeals from the order "denying the Motion to Annul, Vacate and Set-Aside the judgment as petitioned for in his petition for a Writ of Error Coram Nobis." At defendant's request, counsel has been appointed to represent him on this appeal.

In the petition filed in the lower court petitioner urged that the judgment was erroneous because of the insufficiency of the evidence, that over sixty days were allowed to elapse between the filing of the information and trial, and that he was furnished incompetent and inadequate legal assistance at his trial.

[1–3] So far as the claimed insufficiency of the evidence is concerned, such problem cannot be passed upon in this proceeding. Judicial error that could have been corrected upon a motion for a new trial or upon an appeal from the judgment is not

subject to review upon a writ of error *coram nobis*. People v. Maringer, 101 Cal. App.2d 586, 225 P.2d 656; People v. Wahrmund, 91 Cal.App.2d 258, 206 P.2d 56; People v. Pryor, 87 Cal.App.2d 352, 196 P.2d 948; People v. Ward, 96 Cal.App.2d 629, 216 P.2d 114; People v. Coffman, 105 Cal.App.2d 164, 233 P.2d 117; People v. Chapman, 106 Cal.App.2d 51, 234 P.2d 716; People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13. The writ "is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum*." People v. Martinez, 88 Cal. App.2d 767, 774, 199 P.2d 375, 379.

[4] So far as the claimed error in granting continuances is concerned, appellant failed to furnish this court a record to show that he had failed to consent to such continuances. At the oral argument, such supplemental record was ordered prepared and filed. It shows, contrary to the averments of petitioner, that most of the continuances were granted with consent. The information was filed October 13, 1950, and the cause was tried on January 22, 1951. That is, of course, beyond the sixty days provided for by section 1382 of the Penal Code. The record shows that defendant was arraigned October 18, 1950; that with "consent" the cause was continued to October 23, 1950, to plead; that on that date appellant admitted the prior, pleaded not guilty to the offense charged, and with "consent" the cause was continued for trial until November 14, 1950; that on that date by "consent" it was continued to November 29, 1950; that on that date by "consent" it was continued to December 18, 1950; that on that date the defendant refused to consent to a further continuance, whereupon the court ordered the statutory time to commence to run as of that date, but with consent of counsel the cause was continued to January 9, 1951; that on that date a motion to dismiss was denied, and without consent of appellant the cause was continued to January 12, 1951; that on that date another motion to dismiss was denied, and with consent of counsel, but without consent of appellant, the cause was continued to January 15, 1951; that on that date, without appellant's consent but with consent of counsel, the cause was continued to January 17, 1951, and similarly continued on that date to January 24, 1951, but was subsequently advanced to January 22, 1951. Thus the record shows that continuances, with consent of appellant's counsel and without objection from appellant, were granted until December 18, 1951. The cause was brought to trial within thirty-five days thereafter. Thus compliance was had with the provisions of section 1382 of the Penal Code. See cases collected 8 Cal.Jur. p. 207, § 279. It should be mentioned that appellant filed a petition for habeas corpus in this court on January 16, 1951, contending that his detention was illegal because in excess of the sixty-day period. Such petition was denied, without opinion.

Even if the provisions of section 1382 of the Penal Code had been violated, it is very doubtful if such point can be raised on a writ of error *coram nobis*. Obviously, if error existed, appellant knew it at the trial and hence he could have raised the point on a motion for a new trial and upon appeal. People v. Bronaugh, 100 Cal.App.2d 220, 223 P.2d 256. It would seem to be too late to raise it now.

[5] Neither the question of the sufficiency of the evidence nor the point in reference to the continuances is raised by counsel appointed by the court to represent appellant on this appeal. Such counsel raises but one point, namely, that appellant was deprived of his constitutional rights in that the assistant public defender inadequately represented him at the trial and refused to consult with him in the preparation of his defense. The claimed inadequate representation revolves partly around the contention that the assistant public defender erroneously informed the court that the continuances from October 23, 1950, to Decemeber 18, 1950, were with consent. The record supports the admission of counsel. It shows that the continuances granted on October 23, 1950, November 14, 1950, and November 29, 1950, which resulted in the continuance to December 18, 1950, were all with "consent of respective counsel." Appellant for the first time refused his consent on December 18, 1950. This record

could, of course, be judicially noticed by the trial court. Thus, these averments of the petition are refuted by the record itself.

[6] The appellant does charge that "Not once did petitioner's counsel [the assistant public defender] come near him while in the jail to discuss the case nor to prepare a defense, even though the accused requested it many times." This allegation stands uncontradicted, the assistant public defender not having been required to file, nor voluntarily filing, a counter-affidavit. Undoubtedly, such a counter-affidavit should have been filed. But the trial court was not required to believe even this uncontradicted affidavit. People v. Chapman, 106 Cal. App.2d 51, 234 P.2d 716; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13. The judge who passed on the petition was the same judge who tried the case. He knew whether appellant had had adequate representation at the trial.

[7] Moreover, inasmuch as the failure to consult with appellant, if it be a fact, is a fact that was known to appellant at the time of trial, and could have been urged on a motion for new trial, it is extremely doubtful whether such point can now be raised on a petition for a writ of error *coram nobis*. People v. Bronaugh, 100 Cal. App.2d 220, 223 P.2d 256; In People v. Sorensen, 111 Cal.App.2d 404, 244 P.2d 734, it was held that the contentions that the court appointed counsel failed to make investigations, call witnesses, improperly waived a jury trial, and improperly consented to excluding the public from the trial, could not be raised on *coram nobis* but should be raised, if at all, on habeas corpus. This is not a mere technical distinction. This is not a case where the appellant has simply misnamed his writ. Appellant is in Folsom Prison, which is not within the habeas corpus jurisdiction of this court. People v. Coffman, 105 Cal.App.2d 164, 233 P.2d 117. Therefore, the point cannot now be considered.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

118 Cal.App.2d 136

PEOPLE v. RUSSELL.

Cr. 2432.

District Court of Appeal, Third District, California.

May 26, 1953.

Defendant was charged with the crime of robbery. The Superior Court, San Joaquin County entered judgment on verdict of guilty in second degree and denied motion for new trial, and defendant appealed. The District Court of Appeals, Van Dyke, P. J., held that evidence was insufficient to sustain conviction in that necessary element of use of force or fear in consummation of the offense was not established.

Judgment and order reversed.

1. Robbery ⇐6, 7

Although proof that a taking was accomplished by use of either force or fear is sufficient for robbery conviction, proof of the use of one or the other must be made if a conviction is to be upheld. Pen.Code, § 211.

2. Robbery ⇐24(5)

Evidence in robbery prosecution was insufficient, on the element of use of force or fear in consummation of the offense, to sustain conviction. Pen.Code, § 211.

John L. Briscoe, Public Defender, San Joaquin County, Stockton, for appellant.

Edmund G. Brown, Atty. Gen. and Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was charged with the crime of robbery and was convicted by a jury of that crime in the second degree. He appeals from the judgment and from the order denying his motion for a new trial.

About midnight on August 20, 1952, two police officers in a patrol car noticed a "scuffle" in front of St. Mary's Parish House near the intersection of Washington and Hunter Streets in Stockton. They stopped two men who were walking away from the scene, one of whom was appel-

lant. The officers searched the men and questioned them. Appellant told them that a drunken white man had staggered into him, called him a "nigger" and that he had shoved the man out of his way. At the time one Claud Dollar was sitting on or leaning against the steps of the parish house. He got up, walked over and leaned against an iron railing, and the officers testified that he appeared to them to be apparently normal and not injured in any way, although they did not examine him closely. They told appellant and his companion to be on their way and the officers drove on. But one of them said to the other that all did not seem to be right, so they turned their car and drove back to the scene. They then saw appellant walking across the street, away from the parish house, and they found Claud Dollar lying down on or by the front step. His left eye was cut and bleeding. They searched appellant and removed a wallet from his right front trousers' pocket. It was the wallet of Claud Dollar. They also found in appellant's left front trousers' pocket two $20 bills and one $10 bill. He also had a $1 bill. It is stated in respondent's statement of facts that this money was identified as being that of Claud Dollar, but that statement is not borne out by the record. Appellant was asked why he had returned to the parish house and he said he had gone back to look for a newspaper he had dropped, that he had not found it, had given up the search and was walking across the street when the officers stopped him. A newspaper such as he described was found by the officers lying on the sidewalk near the parish house. Appellant said he had picked up the wallet from the sidewalk and denied taking it from Dollar. The prosecuting witness, Claud Dollar, had been drinking. He said he left his residence in the afternoon with about $57, two twenties, a ten, a five and some change. He had played draw poker in the Savoy Bar where he did his drinking. He recalled starting home and had no further recollection of what occurred that night until he found himself in the hospital where the cut on his eye was being sutured. He said he did not recall ever having seen appellant until the preliminary hearing. He knew nothing of the incidents above related. He identified his wallet. But as to what occurred after he left the bar he said his mind was just a blank. Appellant claimed that the money found on him was his own; that he had earned it in part and in part had received it from his father in Texas. In support of this statement he produced the manager of the Stockton office of the Western Union Telegraph Company who produced the records of his company to show that on the day before the alleged offense the sum of $50 had been transmitted to appellant by telegraph from Texas, by one Willie Russell.

[1, 2] Appellant contends that the evidence is insufficient to support the judgment of conviction. Specifically he asserts there is no proof of the necessary element of the use of force or fear in the consummation of the alleged robbery. That this element is essential appears from the definition of robbery in Penal Code Section 211, which declares: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." See also People v. Welsh, 7 Cal.2d 209, 60 P.2d 124. Proof that the taking was accomplished by the use of either force or fear is sufficient, People v. Kuranoff, 100 Cal.App.2d 673, 678, 224 P.2d 402, but proof of the use of one or the other must be made. No attempt is made, and none could successfully be made, to find support in this record for a conclusion that fear was used. The prosecuting witness eliminates that element conclusively by his testimony that from a time considerably before the time definitely fixed by the officers as the time of the commission of the crime, if it was committed, the prosecuting witness was in a state of amnesia. In the presence of this testimony, and in the absence of anything to contradict it, there is nothing upon which to base a finding of the use of fear in the consummation of the alleged robbery. A much closer question is presented as to the use of force. Both the upper and the lower lids of appellant's eye were cut, and suturing required five stitches. The record is utterly barren of any

evidence as to how this wound was inflicted. Dollar had been drinking and, as he put it, had passed out. He weaved when he walked. It is sheer speculation to conclude that he had been struck by appellant rather than that he fell and suffered the damage to his eye. That appellant had Dollar's wallet, even that the money found upon appellant belonged to Dollar, goes no further than to prove some of the elements of robbery. It equally tends to prove petty theft. But the additional necessary element to support a conviction of robbery, towit, that the money or the wallet was taken by appellant through the use of force upon Dollar rests upon nothing but speculation.

The judgment and the order appealed from are reversed.

SCHOTTKY and PEEK, JJ., concur.



117 Cal.App.2d 787

KIENTZ v. HARRIS.

Civ. 8418.

District Court of Appeal, Third District, California.

May 15, 1953.

Death action wherein after judgment for plaintiff was entered by the Superior Court, Mono County, defendant gave notice of intention to move for new trial and then appealed. Plaintiff moved to dismiss appeal on ground that court had no jurisdiction of appeal, since notice of appeal was not timely filed. The Court of Appeal, Van Dyke, P. J., held that where notice of intention to move for new trial was timely filed but notice was not stamped until clerk's filing fee was received and after time for filing such notice had expired, notice did not operate to extend time within which notice of appeal could be filed.

Motion to dismiss granted.

1. Appeal and Error ⇐356

It is policy of appellate courts to decide all matters appealed to them on merits and such courts are reluctant to dismiss appeals for any oversight in procedural matters, but in respect of time of filing, no forgiveness of oversight is possible since appeal must be filed in time or appellate court has no jurisdiction. Rules on Appeal, rules 2, 3(a)(2).

2. New Trial ⇐138

Where notice of intention to move for new trial was timely filed but clerk's filing fee was not transmitted with notice, clerk properly refused to perform official service of filing notice until he received fees, even though, as a consequence, notice of intention to move for a new trial was filed too late. Code of Civ.Proc. § 659; Government Code, §§ 14, 6100, 6110, 24000(c), 24350.5, 26820, 26830.

3. Appeal and Error ⇐345(1)

Where notice of intention to move for new trial was timely filed, but notice was not stamped until clerk's filing fee was received and after time for filing such notices had expired, notice of intention to move for new trial did not operate to extend time within which notice of appeal could be filed. Rules on Appeal, rules 2, 3(a)(2); Code Civ.Proc. § 659.

4. Appeal and Error ⇐22

Respondent was not estopped to deny that notice of intention to move for new trial was filed with clerk after statutory period even though respondent in trial court imposed no objection to notice's being filed too late but on the contrary joined with counsel for appellant in arguing same and only after notice of appeal, claimed that notice of intention had been filed too late and that, as result, notice of appeal likewise was too late. Rules on Appeal, rules 2, 3(a)(2); Code Civ.Proc. § 659.

5. Appeal and Error ⇐21, 22

Jurisdiction cannot be conferred on appellate court by consent or stipulation of parties, estoppel, or waiver. Rules on Appeal, rules 2, 3(a)(2).

Hoge & Fenton, Monterey, and Verne Summers, Bridgeport, Bronson, Bronson & McKinnon, San Francisco, for appellant.

C. Ray Robinson, Merced, for respondent.

VAN DYKE, Presiding Justice.

Victor Vincent Kientz, as plaintiff in the trial court, filed an action against Arthur O'Dell Harris, wherein he sought damages for the alleged wrongful death of Ruth Evelyn Kientz. On November 17, 1952, a judgment was entered in the action that plaintiff recover the sum of $25,000. Notice of entry of judgment was, after service, filed on November 22, 1952. It was received by counsel for the appellant on November 22d. Notice of intention to move for a new trial was filed on behalf of defendant, appellant here. It was stamped as having been filed December 5th. It had actually been received at the office of the clerk on December 1st. That official, noting that no fee had been forwarded with the notice and being, as he states in his affidavit filed with this Court, in doubt as to his legal right to stamp the paper as filed on that date without payment of the filing fee, did not stamp the notice as filed, but immediately mailed to counsel for appellant his invoice acknowledging receipt of the notice and requesting the filing fee. On December 5th the clerk received from counsel for the appellant, again through the mail, a check for the fee and on that day stamped the notice as filed. Section 659 of the Code of Civil Procedure, so far as material here, provides that a party intending to move for a new trial must within ten days after receiving written notice of the entry of judgment "file with the clerk" and serve a notice of his intention to so move. The section further provides that the specified time shall not be extended by order or stipulation. It is to be noted that if the notice of intention be considered as filed when received by the clerk on December 1st the filing was within time, but if considered as filed when, after receipt of demanded fees, the clerk stamped it as being filed the filing was too late and the court had no jurisdiction to pass upon the motion. 20 Cal.Jur. "New Trial", secs. 109, 110. A notice of appeal must be filed within 60 days from the date of entry of judgment unless the time is extended by the filing of a valid notice of intention of moving for a new trial. Rules on Appeal, 2 and 3. A notice of intention to move for a new trial which is not served and filed within the time specified in Section 659 of the Code of Civil Procedure is not such a valid notice of intention as is required by Rule 3(a)(2) Rules on Appeal and therefore does not serve to extend the time within which a notice of appeal must be filed. King v. Wilson, 101 Cal.App.2d 242, 243, 225 P.2d 270. The trial court made no order on the motion for new trial. On February 16, 1953, appellant herein filed with the clerk his notice of appeal. Unless the time was extended by valid proceedings for new trial this filing of the notice of appeal was late and this Court has no jurisdiction of the appeal. Respondent, therefore, basing his motion upon the foregoing record, has filed his motion to dismiss the appeal herein upon the ground this Court has no jurisdiction thereof. The motion to dismiss must be granted.

The following sections of the Government Code are material to the decision of the motion. Section 14 provides that "shall" as used in the code is mandatory and "may" is permissive. Section 24000(c) lists county clerks, ex officio clerks of the superior court, as county officers. Section 6100 declares that officers of a county shall not perform any official service unless upon the payment of the fees prescribed by law for the performance of the services, with certain exceptions with which we are not here concerned. Section 24350.5 provides that county officers *shall*, and township officers *may*, demand the payment of all fees in civil cases, in advance. Section 6110 provides that upon payment of the fees provided by law, the officer shall perform the services required. Section 26820 provides that the county clerk shall charge and collect the fees fixed for service performed by him. Section 26830 provides that the fee for filing a notice of intention to move for a new trial in a civil action is $3.

[1–3] It is of course the policy of appellate courts to decide all matters appealed to them upon the merits, and such courts are reluctant to dismiss appeals for any

oversight in procedural matters, but it is well settled that in respect of the time of filing no forgiveness of oversight is possible since the appeal must be filed in time or the appellate court has no jurisdiction. In this case it cannot be said that the clerk of the trial court acted in any wise except in strict accordance with the law which governs him. The foregoing code sections make it clear that the legislature has mandatorily required that filing fees in civil actions must be paid in advance. Not only do they declare that they shall be so paid and that the clerk shall so collect them before he shall perform any official act, that is to say, receive for filing and file any document for the filing of which the payment of a fee is required, but the legislature has also provided, by way of interpretation of its own language, that the word "shall" is mandatory. It further illustrated its meaning in the provisions governing county clerks as to filings and fees therefor, by setting up a distinction between them and township officers, when it provided that the clerks should collect fees in advance in all civil cases while township officers might do otherwise. Under the plain code provisions it must be held that the clerk properly refused to perform the official service of filing the notice until he received the fees therefor.

If we look to the case law we arrive at the same result. In Davis & Son v. Hurgren & Anderson, 125 Cal. 48, 50, 57 P. 684, 685, the court said: "Section 639, Code Civ.Proc., provides that a party intending to move for a new trial must, within 10 days after the verdict of the jury, file with the clerk his notice of intention. In the case at bar the 10 days expired on the 23d of February. On that day the appellants sent their notice of motion to the clerk, but the clerk did not file the same, because the fee therefor was not paid; and three days afterwards, at the request of the appellants, who then paid the fee, the clerk indorsed it as filed February 23d. The act of March 28, 1895 (St. 1895, p. 267, et seq.), provides that, on the filing of a notice of a motion for a new trial, the party filing the same must pay to the clerk a fee of two dollars, and that 'county officers must * * * demand the payment of all fees in civil cases in advance'. The notice, therefore, was not filed in time. The mere fact that the clerk received it on the 23d did not constitute a filing. It was not his duty to file it without the fee. He did not file it, and he could not have been compelled to file it, on that day." See also Boyd v. Burrel, 60 Cal. 280.

Appellants contend that the notice of intention must be considered as having been filed with the clerk when it was received by him through the mails and by him retained. They argue that Section 659 of the Code of Civil Procedure requires that the notice be filed "with" the clerk within the 10-day period; that it does not require that it be filed "by" the clerk at that time; and that filing with the clerk satisfies the legislative intent. They argue that a distinction exists between filing *with* the clerk and filing *by* the clerk in case of motions for new trial and in support of that argument they cite Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 395, 121 P.2d 829 and Dempsey v. Market Street Ry. Co., 23 Cal.2d 110, 115, 142 P.2d 929. Concluding, they say a paper is filed with the clerk when it is presented to the clerk and received by him to be kept in his official custody, citing Tregambo v. Comanche M. & M. Co., 57 Cal. 501, 506. We have examined the cases cited in support of this contention. We think it unnecessary to discuss them. The facts were not like the facts presented to us by this motion. To give effect to appellant's argument would be to say that notwithstanding the plain mandate of the statute a party by merely mailing to the clerk a notice of new trial could compel that official to accept and treat the same as filed without payment of the fees. Clearly that would violate the legislative intent which is so plainly stated in the code provisions we have referred to.

[4, 5] Appellant further asserts that respondent is estopped to deny that the notice was filed with the clerk within the statutory period. In support of this contention they say that respondent in the trial court interposed no objection to appellant's notice of motion for new trial as being filed too late, but on the contrary agreed on a date

for argument and joined with counsel for the appellant in arguing the same; only after notice of appeal did the respondent for the first time claim the notice of intention had been filed too late and that, as a result, the notice of appeal likewise was too late. The answer to this argument is that jurisdiction of this Court in the matter of an appeal cannot be conferred by estoppel. Jurisdiction depends expressly upon the timely filing of these notices. Whatever may be the conduct of one party toward another the reviewing court is without jurisdiction unless the filing of notice of appeal is done within the time required by the statute. Estate of Hanley, 23 Cal.2d 120, 123, 142 P.2d 423, 425, 149 A.L.R. 1250. Said the court in that case: "Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver".

The motion to dismiss is granted and the appeal herein is dismissed.

PEEK and SCHOTTKY, JJ., concur.



117 Cal.App.2d 810

Victor Vincent KIENTZ, Plaintiff, Cross-Defendant and Respondent, v. Arthur O'Dell HARRIS, Defendant, Cross-Complainant and Appellant.

District Court of Appeal, Third District, Civ. 8417. California.

May 15, 1953.

Appeal from Superior Court, Mono County; Evans, Judge.

Hoge & Fenton, Monterey, and Verne Summers, Bridgeport, Bronson, Bronson & McKinnon, San Francisco, for appellant.

C. Ray Robinson, Merced, for respondent.

VAN DYKE, Presiding Judge.

In Kientz v. Harris, Cal.App., 257 P.2d 41, we held that upon the facts stated the appeal should be dismissed for want of jurisdiction in this Court to entertain the same. Motion to dismiss this appeal has been made upon the same ground. The facts in each case as to jurisdiction are identical. There is no need, therefore, to file an extended opinion herein.

Upon the authority of that case, the motion to dismiss is granted and the appeal herein is dismissed.

PEEK and SCHOTTKY, JJ., concur.



118 Cal.App.2d 122

PEOPLE v. BURCH.

Cr. 4946.

District Court of Appeal, Second District, Division 2, California.

May 26, 1953.

Defendant was convicted of poolselling and bookmaking and of accepting a bet. The Superior Court, Los Angeles County, Clement D. Nye, J., entered an order denying defendant's motion for a new trial, and defendant appealed. The District Court of Appeal, McComb, J., held that the evidence sustained the convictions.

Affirmed.

1. Gaming ⇐98(2, 3)

Convictions for poolselling and bookmaking and for accepting a bet were sustained by evidence. Pen.Code, § 337a, subds. 1, 6.

2. Criminal Law ⇐1134(4)

On appeal in criminal case from order denying motion for new trial, court may consider only such errors or irregularities as occurred between time of joining of issues of fact and rendition of judgment. Pen.Code, §§ 1203.01, 1237, subd. 1.

3. Criminal Law ⇐1134(10)

An order granting probation is not reviewable upon an appeal from an order denying a motion for new trial, even though order granting probation is appealable. Pen.Code, §§ 1203.01, 1237, subd. 1.

Edmund G. Brown, Atty. Gen., Ellis Peter Miller, Deputy Atty. Gen., for respondent.

Gordon, Schaffer & Lang and Walter L. Gordon, Jr., Los Angeles, for appellant.

McCOMB, Justice.

From an order denying defendant's motion for a new trial after a judgment of guilty of violating (a) subdivision 1 of section 337a of the Penal Code (poolselling and bookmaking) and (b) subdivision 6 of section 337a of the Penal Code (accepting a bet) following trial before the court without a jury, defendant appeals.

Viewing the evidence as we must in the light most favorable to the people (respondent) the record discloses that on May 30, 1952, two Los Angeles police officers observed defendant in front of a barbershop conversing with two men and consulting a newspaper. Shortly after the discussion defendant entered a public telephone booth located outside of the barbershop and made a telephone call. On leaving the telephone booth he reapproached the two men and nodded his head, whereupon the two men left.

Shortly thereafter the police officers observed defendant talking with two women seated in an automobile in front of the barbershop. Defendant had been seen to consult a newspaper and hand it back to the women immediately prior to his entering the telephone booth. He then returned to the car and one of the officers heard the woman behind the wheel say, "Give me two dollars to win on Willow Way in the first race at Hollywood Park." Defendant stated, "O.K." The passenger in the car then stated to defendant, "And give me one dollar to win on Red Bachelor in the first race at Hollywood Park." As the women started to place some money in defendant's hand they observed one of the officers standing behind defendant and immediately replaced the money in their pockets. Thereupon the officers identified themselves and took from defendant's hand a copy of the Los Angeles Daily News, dated May 30, 1952. The paper was turned to the sports section containing the Hollywood Park handicap. The officers found upon examining a National Daily Reporter scratch sheet that both Willow Way and Red Bachelor were running in the first race at Hollywood Park on that date.

At the trial, after qualifying as an expert, one of the officers testified that the conversation which had been overheard between defendant and the women in the automobile disclosed a form of oral bookmaking which was typical in Los Angeles. He also testified that, "Two dollars to win on Willow Way in the first at Hollywood Park" meant a two-dollar bet placed on a horse to win in the first race at Hollywood Park and gave a similar interpretation of the statement alluding to "Red Bachelor in the first race at Hollywood Park."

After defendant's motion for a new trial was denied, defendant was placed on probation for a period of five years, the first six months of the probationary period to be spent in the County Jail.

[1] *Questions:* First: *Was there substantial evidence to sustain the finding that defendant was guilty of a violation of section 337a, subdivision 1, of the Penal Code?*

Yes. Subdivision 1 of section 337a of the Penal Code reads in part as follows: "Every person, 1. Who engages in * * * book-making, with or without writing, at any time or place * * * Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year." The provision quoted states clearly that the offense of bookmaking can take place without a writing. There is no requirement that the bet be recorded. For a case under an identical statute, directly in point, see People v. Busco, Sp.Sess., 46 N.Y.S.2d 859, where, at page 868 the court says: "* * * Under the old decisions, it was necessary that a writing be made. The term itself implies that some written memoranda be used. However, the Legislature, in order

to cope with the clever devices and subterfuges employed, amended the section and gave a new meaning to the word bookmaking. * * * It is clear, therefore, that oral bookmaking is as much a violation of the statute as is written bookmaking. In view of the express mandate of the Legislature, in giving a new definition to the term 'bookmaking,' many of the opinions rendered by our courts must now be disregarded." Clearly from the facts set forth above defendant engaged in bookmaking, a violation of subdivision 1 of section 337a of the Penal Code.

Second: *Was there substantial evidence to sustain the finding that defendant was guilty of violating subdivision 6 of section 337a of the Penal Code?*

Yes. Section 337a of the Penal Code reads in part as follows: "Every person, * * * 6. Who * * * offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest of skill, speed or power of endurance of man or beast, * * * Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

The evidence set forth above shows without question that defendant accepted a wager upon a trial or purported trial of speed between beasts (horses). It is unnecessary that there be a volume of gambling or business of gambling. One instance of accepting a wager under the prohibited circumstances constitutes a violation of the code section. In re Roberts, 157 Cal. 472, 108 P. 315, relied upon by defendant, is inapplicable herein for the reason that since the decision in such case the statute has been amended so that it is no longer required that in order to constitute a violation of section 337a there must be proof that the wager was for gain, hire or reward. Under the law as it now stands the acceptance of the bet is the offense, irrespective of the gain to defendant.

Defendant relies on certain decisions from other jurisdictions, such as, People of State of New York v. Bennett, C.C., 113 F. 515, Murphy v. Board of Police, 11 Abb. N.C., N.Y., 337, People v. Laude, 81 Misc. 256, 143 N.Y.S. 156, Spies v. Rosenstock, 87 Md. 14, 39 A. 268 and Board of Commissioners v. Grodecki, 33 A.2d 115, 21 N.J.Misc. 241. These cases are not here in point for the reason that they are from other jurisdictions predicated upon statutes dissimilar to the Penal Code provisions in California and contrary to the decisions of the appellate courts of this state. Therefore they are not here controlling.

Third: *Did the trial court err in placing defendant on probation for the period of five years in view of section 1203.01 of the Penal Code which reads, in part, as follows?:*

"The court, judge or justice, in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; provided, however, that where the maximum possible term of such sentence is three years or less, then such period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over three years;"

[2, 3] This question will not be considered by us for the reason that defendant has appealed from the order denying his motion for new trial *only*. The rule is established that on an appeal in a criminal case from an order denying a motion for new trial the court may consider only such errors or irregularities as occur between the time of joining of the issue of fact and the rendition of the judgment. On appeal from the order of the court denying the motion for new trial the appellate court is confined to a review of the proceedings within these limits. People v. Galloway, 202 Cal. 81, 91[2], 259 P. 332.

Section 1237 of the Penal Code provides in part, "An appeal may be taken by the defendant: 1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section;"

Under the foregoing rules it is thus apparent that an order granting probation is not reviewable upon an appeal from an order denying a motion for a new trial. However, the order granting probation is appeal-

able. Since in the present case no appeal was taken therefrom, any alleged errors in the granting thereof may not be reviewed by this court.

Affirmed.

MOORE, P. J., and FOX, J., concur.



117 Cal.App.2d 772

PEOPLE v. NEFF.

Cr. 4883.

District Court of Appeal, Second District, Division 3, California.

May 15, 1953.

Hearing Denied June 11, 1953.

Defendant was convicted of manslaughter. The Superior Court of Los Angeles County entered judgment and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that instructions given were prejudicially erroneous.

Judgment and order reversed.

1. Criminal Law ⇐1023(12)

Order granting probation to one convicted of manslaughter was a "final judgment" from which appeal would lie. Pen. Code, § 1237, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

2. Homicide ⇐68

Manager of hotel, in which guests were killed from carbon monoxide poisoning caused by fumes from gas heater, was not guilty of manslaughter, on ground that he committed an unlawful act because he failed to enlarge wall vent so that it was of minimum area required by State Housing Act. Health and Safety Code, § 16902; St.1951, p. 2895, § 41; Pen.Code, § 192.

3. Homicide ⇐68

Manager of hotel, in which guests were killed from carbon monoxide poisoning caused by fumes from gas heater, was not guilty of manslaughter, on ground that he committed an unlawful act because he failed to obtain approval of heater by a nationally recognized testing agency, as required by the Health and Safety Code. Health and Safety Code, § 16900; Pen. Code, § 192.

4. Homicide ⇐68

Manager of hotel, in which guests were killed from carbon monoxide poisoning caused by fumes from gas heater, was not guilty of manslaughter, on ground that he committed an unlawful act in failing to close holes in top of heater. Health and Safety Code, § 16905; Pen.Code, § 192.

5. Homicide ⇐68

Manager of hotel, in which guests were killed from carbon monoxide poisoning caused by fumes from gas heater, was not guilty of manslaughter, on ground that he committed an unlawful act in not repairing connection between vent pipe and heater. Health and Safety Code, § 16905; Pen.Code, § 192.

6. Homicide ⇐268

In manslaughter prosecution of manager of hotel in which guests were killed from carbon monoxide poisoning caused by fumes from gas heater, whether manager was guilty of involuntary manslaughter in commission of a lawful act, which might produce death, in an unlawful manner, without due caution and circumspection was for jury. Pen.Code, § 192.

7. Homicide ⇐309(1), 340(1)

In manslaughter prosecution of manager of hotel in which guests were killed from carbon monoxide poisoning caused by fumes from gas heater, instructions which submitted to jury issue whether manager acted without due caution and circumspection, and instructed jury in words of statute requiring due caution and circumspection, and as to what due caution and circumspection need not amount to, and regarding ordinary negligence and criminal negligence were prejudicially erroneous. Pen.Code, § 192.

C. Ransom Samuelson and Simpson & Wise, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was charged in two counts with the crime of manslaughter, in that, on January 12, 1952, he unlawfully and without malice killed two persons. The deaths resulted from carbon monoxide poisoning, which was caused by fumes from a gas heater in a hotel where defendant was employed as manager. In a trial by jury, he was found guilty as charged in each count. His motion for a new trial was denied. Imposition of sentence was suspended, and probation was granted upon the condition that he serve six months in the county jail. He appeals from the order denying his motion for a new trial and from the judgment. An order granting probation is a final judgment. Pen.Code, § 1237, subd. 1.

Appellant contends that the judgment is contrary to law, and that the court erred in instructing the jury.

On January 1, 1950, the Farmers and Merchants Bank and Mr. and Mrs. D. S. Snyder entered into a written lease agreement whereby the bank leased the Grant Hotel in Long Beach to Mr. and Mrs. Snyder. During said month the Snyders employed defendant, their son-in-law, as manager of the hotel. From that time to the time of trial, defendant continued to work in that capacity. Mrs. Snyder died on November 26, 1951. Thereafter, Mr. Snyder lived at the hotel part of the time, and was living there in January, 1952.

On January 11, 1952, Ronald Wallace, Jr., and Wanda Wallace, husband and wife, registered at the hotel and occupied room 12. On January 12th, about noon, a maid entered the room and found that Mr. and Mrs. Wallace were dead. They were on a bed, and, according to the maid's testimony, the gas radiator was burning "full blast."

Room 12 was approximately 12 feet long and 11 feet wide. The door of the room was in the west wall, and there was a double window in the east wall and a double window in the north wall. Inside the room there were two beds, a dresser, a small table, a washbasin and the gas radiator. The bed on which Mr. and Mrs. Wallace were lying was near the door. The gas radiator was connected to a gas supply pipe which extended from the south wall. In the said wall, by the gas pipe, and about 18 inches above the floor, there was a circular opening into a rectangular cement vent or flue within the wall. Said vent or flue extended from said circular opening to the roof and its inside dimensions were 2 inches by 4 inches. A police officer, who made a drawing of the floor plan of the room (People's Exhibit 1), testified that, according to marks on the floor which could have been made by that radiator, the radiator was about 3 feet from the bed on which Mr. and Mrs. Wallace were found, and the back of the radiator was about 6 inches from the south wall. Said radiator was approximately 30 years old and was manufactured by the Pacific Gas Steam Radiator Company. In the top of the radiator there were two holes, each being one-half inch in diameter, which apparently had been drilled after the radiator was purchased. In the back of the radiator there was a vent outlet. The outlet, which was below the level of the burner, had been enlarged from its original size. Between the radiator and the south wall there was a vent pipe, one end of which was inserted into the opening in the wall and connected with the cement vent within the wall. The other end of the vent pipe fitted loosely into the vent outlet of the radiator—leaving a space between the pipe and "the outside diameter of the hole."

The maid, called as a witness by the People, testified that when she opened the door of the room the fumes rushed at her, and the flame was coming out from under the open heater; she went to the radiator, turned the gas off, and observed that the vent pipe was out of the radiator and lying on the floor; the other end of the vent pipe was in the (wall) socket; she then left the room, saw defendant in the hall and told him there were two bodies on the bed and for him to "Take over"; defendant

and his wife walked into the room and closed the door—this was about 12:15 p. m.; they stayed in there for "a while"; she (witness) stood there five seconds and then went upstairs to work; thereafter the defendant came to the witness and told her to practically close her eyes to what she had seen and to keep her mouth shut—that he would take care of what had happened; about 3 p. m., she entered room 12 again and observed that the pipe was "shoved into the radiator." She testified further that on two occasions prior to the deaths of Mr. and Mrs. Wallace she had called defendant's attention to the vent pipe because she had observed the pipe on the floor like she found it on the 12th, and defendant told her that he would take care of it; the first time she told defendant about the vent pipe was in the fall (1951), when she had moved an occupant of room 12 to another room; defendant asked her why she moved the occupant from room 12, and she told him that the occupant had objected to gas fumes; she told defendant "that gas is leaking in that heater," and it is time that he "took care of that before some danger comes to someone"; the second time she mentioned the vent pipe to defendant was about five days before the deaths of Mr. and Mrs. Wallace, at which time she told defendant, "You haven't fixed that vent pipe into that radiator as yet. Do something about it before some danger will come to someone." On cross-examination, counsel for defendant read testimony of the witness, from the transcript of the preliminary examination, to the effect that she saw the vent pipe out of the radiator on January 11th and she did not attempt to put it back and she did not tell the defendant about it; and that she did not see the pipe out of the radiator the week before January 12th. She testified further that she commenced work at the hotel in August, 1951; when she observed anything that needed repair she reported it to defendant and he would have the condition remedied; during the time she worked there, she and defendant quarreled frequently; she quit while she was angry with him, after a quarrel at which time defendant said something about a clock that had disappeared from a tenant's room; the reason she became angry on that occasion was that he was always after her—it was not about the clock, but "about this case."

The superintendent of distribution for the gas department of the City of Long Beach, called as a witness by the People, testified that on January 16th he went to the hotel; he went into room 12 and ascertained the size of the orifice in the radiator (size No. 51); it would permit 18 to 20 cubic feet of gas per hour to go through the valve; in his opinion that size heater is not capable of burning that much gas properly; the product of incomplete combustion is carbon monoxide.

Another employee of that gas department, called as a witness by the People, testified that he was a "trouble shooter" for the department and had worked there about 31 years; he had become familiar with various types of gas heating equipment; on January 16th he went to room 12 to connect the heater; he noticed that the part of the vent which goes into the heater was very loose and barely inserted into the heater; when he lighted the heater the flame came through the two holes; he considered this was an improper adjustment, and he removed the orifice, which was a No. 51, and put in a smaller orifice, which was a No. 57; on January 17th, he returned to room 12, disconnected the heater and turned it over to the police department; on February 4th, he went to room 12 and installed the heater, as nearly as he could, in the same "spot" it was in before he removed it; on February 16th, he removed the heaters from all the rooms in the hotel at the request of defendant, and 20 of the 47 or 49 heaters were similar to the heater in room 12.

Mr. Berry, called as a witness by the People, testified that he had been a consulting gas engineer since 1926; he had been employed by the district attorney to make an investigation in this case; on February 4th, he went to room 12 and conducted certain tests in the presence of another engineer, defendant and others; he examined the old flue—it was a rectangular cement flue, very commonly used in the old buildings; the cement type of vent heats much more

slowly and thus creates an upward draft of air much more slowly than a metal vent; a cold flue, particularly of cement construction, creates practically no draft until some heat has been supplied from a heater; they found that, before the heater was connected to the flue, there was a flow of air down the flue instead of an upward flow of air; he made an examination of the heater, and in his opinion it is a dangerous appliance; the two holes in the top of the heater were not there originally and evidently were drilled subsequent to the purchase of the heater; while he was present, the heater was lighted; the effect of lighting the cold heater would be that some of the unburned gas would escape through the two holes in the top and would probably be very high in carbon monoxide; when the heater was hot, the gas would burn "in the open air" at the top of the heater; he did not think the holes in the top of the heater had much bearing one way or the other upon whether the heater was safe. He testified further that all hot products of combustion have a tendency to rise and it is difficult to get them down without a positive draft; with the vent outlet of the heater below the level of the burner, the heater would not burn with real combustion unless connected with a vent and provided with a draft to pull the products of combustion out of the heater; until there was enough warm air in the vent to create a considerable draft, these products would be spilling out of the opening below and through the holes in the top; without a vent connection, the amount of gas which could be safely burned in that heater would be infinitesimal; with a vent connection, a supply of 18 to 20 feet into that heater would be entirely excessive, at least while the flue was cold and had not created a very substantial draft; it also would be excessive with those two holes in the top—where the draft would not pull out the products that were escaping from the top; the heater, without the vent being connected, might burn a very low rate of gas satisfactorily, but if it were turned on fully, with a No. 51 orifice, it could not burn satisfactorily and the effect would be dangerous; when the burner is above the vent outlet it is bad construction as far as safety is concerned; the heater could be dangerous even with a vent properly connected unless it established a draft in the chimney quickly.

Another witness, called by the People, testified that he was assistant manager of the American Gas Association Laboratories, Incorporated, a nationally recognized testing laboratory for gas appliances; its function, in making tests for manufacturers of gas appliances, is to determine whether the appliance is safe; they keep a record of the manufacturing concerns and the various types of space heating equipment which have been inspected and approved generally; that the heater here involved is not listed in their directory, which includes all approved gas appliances; the vent pipe of the heater herein is not connected tightly with the heater, and it could be knocked off by bumping it.

Mr. Fairchilds, called as a witness by defendant, testified that he is a consulting gas engineer; he was in room 12 when Mr. Berry conducted the tests; they were fairly and scientifically conducted, and the proper equipment was used; within a few minutes after the heater was lighted there was a strong odor of aldehydes which indicated that there was carbon monoxide present in substantial quantities; the heater was overfired and overpiped; the safe quantity of gas which could be piped into the heater and burned in that room would not be over 7 cubic feet an hour; the holes in the top of the heater would take care of some of the overfiring, and they would tend to cause additional combustion; the heater is the only one of that description he has ever seen with holes in it; it is not necessarily true that, with the two holes in the heater, some of the gas would escape into the room unconsumed; without the holes in the top, the heater would be apt to go out and not burn at all when first lighted; he did not consider that the heater was of a safe design, and he would not recommend that the heater have holes in the top; the vent, being below the burner, precludes the removal of all the noxious fumes; a concrete vent is one of the poorest types for a heater of this kind; they went to the roof and "checked," and after the heater

had been burning for two hours the vent was not handling the fumes from that heater.

Defendant's wife testified that she has been employed at the hotel continuously as a clerk or manager since her father bought the hotel; after the bodies were discovered she saw defendant go into the room and he did not close the door; she (witness) did not go into the room with him but remained near the door; the maid never made any complaint to defendant in her presence that the heater was out of working order.

Defendant testified that he had worked at the hotel since January, 1950; his duties were to check people in, see that they were comfortable and act as clerk and manager of the hotel; he did not pay the insurance or the rent on the hotel—Mr. Snyder did that; when the plumbing and heaters had to be replaced he had nothing to do with it—Mr. Snyder and the bank had them replaced; prior to January 12, 1952, he never had any heaters disconnected and capped, or removed from the hotel; he never had any notice from any one that any heater was defective prior to that time; the maid did not tell him, prior to January 12, 1952, that the tenants were complaining about the heaters; she never told him that a woman had complained to her that the pipe was out of the heater in room 12; she never told him that the vent pipe was disconnected from the heater; after she told him on January 12th that something was wrong in room 12, he entered the room, went over and saw that the gas was off, looked toward the bodies on the bed and walked out; he did not touch anything; he did not notice the vent pipe; he had no arguments with the maid—she would ask about something to do and he would tell her what to do; he had a disagreement with her over the disappearance of a clock on the day she quit; the maid never reported anything that needed fixing to him; at all times he and his wife were the persons in charge at the hotel.

It does not appear whether appellant knew, prior to the deaths, that Mr. and Mrs. Wallace had registered at the hotel or that they were occupants of room 12.

As above shown, appellant was charged in two counts with manslaughter, and he was found guilty as charged. The following instruction was given: "Manslaughter is the unlawful killing of a human being without malice. One kind of manslaughter, the definition of which is pertinent in this case, is involuntary manslaughter, being that which is done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." It cannot be determined whether the verdict was based upon a finding that appellant committed an unlawful act, or that he committed a lawful act in an unlawful manner or without due caution and circumspection.

A question herein is whether appellant committed an unlawful act. The People argue that appellant violated certain provisions of the State Housing Act. Health & Saf. Code. The provisions, referred to, are: that the internal area of the vent (in the wall leading to the outside air) shall not be less than 12 square inches, Health & Saf. Code, § 16902; that every gas burning appliance shall be approved by a nationally recognized testing agency, Health & Saf. Code, § 16900; and that every gas vent or gas appliance shall be maintained in good repair, Health & Saf. Code, § 16905.

Defendant contends that the duty to comply with those provisions of the State Housing Act did not rest upon him as an employee of the lessee.

[2] As above shown, the internal area of the cement vent in the wall was 8 square inches, which was smaller than the minimum area required by the State Housing Act (12 square inches). In order to increase the size of the wall vent to comply with the statutory requirement it would have been necessary, of course, to make a major structural alteration of the hotel building. It does not appear that the defendant was authorized by the owner or lessee or any one to make any structural change in the building. He had no statutory duty to make a structural change in the building. Furthermore, it is provided in

section 41, chapter 1127, p. 2895, of the Statutes of 1951 Regular Session, that no provision of the act "shall be construed to require a structural addition, structural alteration or a structural change in or on an existing building or the replacement of an existing appliance which requires a structural addition, structural alteration or a structural change in or on an existing building where such is not required by law prior to the effective date of this act." An instruction was given which embodied the provisions of said section 41. There was no evidence that the hotel building was not in existence prior to the enactment of the statute, in 1937, requiring that the internal area of a vent be not less than 12 square inches. The appellant did not commit an unlawful act in failing to enlarge the wall vent.

[3] The provision of the State Housing Act that "Every gas burning appliance shall be approved by a nationally recognized testing agency" is uncertain and vague. It cannot be determined from that act or any statute (1) what is meant by the words "a nationally recognized testing agency" or (2) whether any such testing agency exists by virtue of any statute; or (3) whether any such agency is empowered by law to issue any certificate of approval. Section 15004.2 of the Health and Safety Code does state that "'Approved agency' means an established and recognized agency regularly engaged in conducting tests or furnishing inspection services, and approved by the enforcement agency." That section, however, does not define "a nationally recognized testing agency." "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. In any event, even if the testing agency, so referred to, were a duly authorized and specifically designated governmental agency, it does not appear that appellant was authorized or had the duty to (1) ascertain whether approval of the heater by such agency had been given, (2) obtain such approval, or (3) remove the heater if it had not been so approved. The appellant did not commit an unlawful act in failing to obtain approval of the heater by "a nationally recognized testing agency."

[4, 5] As above shown, the vent outlet of the heater was below the level of the burner. The expert testimony was that such construction was unsound, the design was unsafe, and the heater might be dangerous even when properly connected to the vent pipe. There were similar heaters in approximately 20 other rooms in the hotel. It is apparent that the cost of purchasing and installing heaters of different construction and design would be extensive. The appellant was manager of the hotel. He testified that his duties were to act as clerk and manager, and to check people into the hotel. He also testified that when the heaters and plumbing had to be replaced the bank (owner) and Mr. Snyder (lessee) had them replaced. There is no evidence that appellant was required under any agreement with the owner or lessee to purchase and install new heaters or repair the heaters which were in the hotel. The two respects in which the heater was allegedly in disrepair, as distinguished from the faulty construction and design of the heater, were: (1) the two holes in the top of the heater, and (2) the oversize of the vent outlet, in the back of the heater, which caused the vent pipe to fit loosely in the heater. Each of said two holes was one-half inch in diameter. The holes were not the result of deterioration, but were placed in the heater after it had been purchased, apparently for the purpose of improving it. There was expert testimony that if the holes were not there, it is likely that the heater would "go out" when first lighted. Also, there was expert testimony that the holes did not have much bearing on whether the heater was safe, and that with the holes in the heater the draft would not pull out all "the products" and they would escape into the room. It does not appear that appellant knew that the holes were not a part of the original construction and design of the heater. Even if appellant, by reason of the mere fact that he was manager, had a legal duty to maintain the heaters in good

repair, it is not reasonable to conclude, under the evidence herein, that he had a duty to close those holes in the heater. The appellant did not commit an unlawful act in failing to close those holes. As to the matter of repairing the loose connection between the vent pipe and the heater, it cannot be concluded, merely because appellant was manager, that he committed an unlawful act in not repairing the connection. He was not charged with knowledge of the loose connection merely because he was the manager. It was a question of fact, whether he, as manager, knew or should have known of the loose connection.

[6] Another question herein is whether appellant committed a lawful act without due caution and circumspection. As above shown, there was evidence to the effect that the maid notified appellant on two occasions prior to the deaths that the end of the vent pipe (which connected with the heater) was out of the heater and lying on the floor. Appellant testified to the effect that he had not been so notified; and that he did not know that the vent pipe connection or the heater was defective. The maid testified further that she and appellant quarreled frequently during the time she worked at the hotel, and when she quit working there she was angry with him. The evidence as to whether appellant knew or should have known of the defective condition of the vent pipe connection was conflicting,—it was legally sufficient to support either a finding that he knew or should have known of such condition, or a finding that he did not know and should not have known of it. Appellant argues to the effect that, in view of that close question of fact, certain instructions given at the request of the People were erroneous. He refers (1) to an instruction defining negligence and ordinary care as those words are usually defined in civil cases (People's instruction No. 18); and (2) to instructions which include statements to the effect that in a manslaughter case negligence, or lack of due caution and circumspection, does not need to amount to wantonness or recklessness (People's instructions Nos. 30 and 16). The instructions so referred to, except No. 16, are quoted in the margin below.[1] Instruction No. 16 was as follows: "Due caution and circumspection, as those words are used in the instruction just given, mean such caution and circumspection as are reasonably appropriate to avoid injury to one's self and others, under the conditions at hand as they would be viewed by an ordinarily reasonable person in the same situation as the person whose conduct is in question. To exercise due care and circumspection is to take those proper precautions which a person of ordinary prudence would use in the same circumstances. [*Conduct does not need to amount to wantonness or to recklessness to show and to constitute a lack of due care and circumspection.*]"

1. Instruction No. 18.—"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management, control and use of one's property or person. Ordinary care is that care which persons of reasonable and ordinary prudence exercise in the management of their own affairs in order to avoid injury to others.

"In deciding whether or not a person was negligent in a given case, the conduct in question must be considered in the light of all the surrounding circumstances and the danger that reasonably should have been apprehended."

Instruction No. 30.—"You are instructed that when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances, and the death of another results therefrom, his act of negligence is a criminal act against the person so killed, *even though his negligence does not amount to a wanton or reckless disregard of human safety or life.*

"With reference to a lawful act done in an unlawful manner, in order to constitute this kind of manslaughter, the act may be lawful but it must be one which might produce death and which does produce death and it must be committed without due caution and circumspection. *The lack of due caution and circumspection need not go to the extent of being wanton or reckless.*" (Italics added.)

(Italics added.) Section 192 of the Penal Code, which defines manslaughter, states in part that "Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds: 1. Voluntary * * *. 2. Involuntary—* * * in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; * * *. 3. In the driving of a vehicle * * *." As above stated, the court instructed the jury as to involuntary manslaughter in the words of that statute—(in part) that involuntary manslaughter might be committed in the commission of a lawful act "without due caution and circumspection". Appellant asserts that the instruction defining "Negligence" and "Ordinary Care," which was given herein, is not applicable in a trial upon a charge of involuntary manslaughter "in the commission of a lawful act * * * without due caution and circumspection". It is to be noted that the word "negligence" is not used, in said section 192, in defining involuntary manslaughter. That word is used in said section in defining manslaughter "In the driving of a vehicle"—it is there stated that such manslaughter might be committed in the commission of a lawful act with or without gross negligence. It would seem that if the Legislature had intended that the words "due caution and circumspection" should be synonymous with ordinary negligence it would not have used those different expressions in defining said two kinds of manslaughter. In People v. Wilson, 78 Cal.App.2d 108, 177 P.2d 567, wherein the charge was manslaughter committed while driving an automobile with gross negligence, it was held that it was not error to give an instruction defining ordinary negligence. In People v. Anderson, 58 Cal.App. 267, at page 269, 208 P. 324, at page 325, wherein the charge was manslaughter, it was held that all the words in the expression "'due caution and circumspection' are in common and daily use, and are understood by the average person", and it was not error to refuse to give an additional instruction that said words mean the same as criminal negligence. The court said therein, 58 Cal.App. at page 271, 208 P. at page 326: "Ordinarily, the language employed by the legislature in defining a crime is deemed to be best suited to that purpose, and error cannot be predicated upon its use in informations and instructions." It was also said therein, 58 Cal. App. at page 271, 208 P. at page 326: "'Negligence' is a word that has acquired a highly specialized meaning, and whole volumes have been written upon it; but the words 'due caution and circumspection' as used by the trial court have their common and ordinary meaning and no other. When these words are stated to the jury they import to them this common meaning without further amplification." In certain instructions which were given, the court attempted to amplify the meaning of the words "due caution and circumspection." As above shown, instruction No. 30 (marginal note 1) ends as follows: "The lack of due caution and circumspection need not go to the extent of being wanton or reckless." Instruction No. 16, quoted above, ends as follows: "Conduct does not need to amount to wantonness or to recklessness to show and to constitute a lack of due care and circumspection." In People v. Pociask, 14 Cal.2d 679, 96 P.2d 788, wherein defendant was convicted of negligent homicide under section 500 of the Vehicle Code then in effect (driving an automobile in a negligent manner), the court instructed the jury that a verdict of guilty on a charge of negligent homicide might be returned if the jury should find that the defendant was guilty of negligence resulting from a failure to exercise ordinary care. The defendant therein claimed error in the refusal of the court to give his requested instruction to the effect that the negligence must be such as would amount to a flagrant and reckless disregard of the safety of others, or consist of the doing of a lawful act in a culpably reckless manner. The court therein said, 14 Cal.2d at page 683, 96 P.2d at page 791, "But, in answering the question of what constitutes criminal negligence, the court is bound to apply an appropriate definition enacted by the legislature. Only when the legislature has not properly defined a term is it necessary for the courts to look to the meaning thereof as understood in the common law.

* * * This court has consistently refused to add to the words of pertinent statutes any formulae clearly not included within the plain language thereof. * * * In denying a hearing in this court * * * in People v. Seiler, 57 Cal.App. 195, 207 P. 396 (conviction of manslaughter growing out of the negligent driving of an automobile), this court expressly disapproved the use of the words 'wanton' and 'reckless', and indicated the inaptitude of the word 'culpable', in describing the idea to be conveyed by the phrase, 'without due caution and circumspection' used in the statute." It was also stated in the Pociask case, 14 Cal.2d at page 686, 96 P.2d at page 792: "When the legislature has so spoken and the court has stated the law to the jury in the language of the applicable statutes, it is not required to do more. People v. Fowler [178 Cal. 657, 174 P. 892], supra; People v. Anderson, supra. Therefore, what may amount to a lack of 'due caution and circumspection' in cases of involuntary manslaughter committed in the doing of a lawful act, or what may constitute the driving of a vehicle 'in a negligent manner', are questions to be decided by the jury according to the particular facts in each case guided by appropriate instructions from the court." That statement is quoted in People v. Amick, 20 Cal.2d 247, 253, 125 P.2d 25. The court should not have included in its instructions the statement to the effect that due caution and circumspection need not amount to wantonness or recklessness. People's instruction No. 16, except for the statement therein in brackets (to the effect that the conduct need not amount to wantonness or recklessness), was a proper insruction.

[7] It is also to be noted that the court gave three instructions pertaining to criminal negligence. In instruction No. 30 (marginal note 1), it was stated in effect that an act of negligence may be a criminal act even though the negligence does not amount to wanton or reckless disregard of human safety or life. Another instruction was as follows: "In crimes such as those of which defendant is accused * * * there must exist a union or joint operation of act and intent or criminal negligence." A further instruction was to the effect that the word "negligence" is a relative term, and that in deciding whether "certain conduct in question amounted to criminal negligence," the conduct must be considered in the light of all the surrounding circumstances. It thus appears that, in submitting to the jury the issue as to whether appellant acted "without due caution and circumspection", the court, in addition to instructing the jury in the words of the statute regarding due caution and circumspection, gave instructions as to what due caution and circumspection need not amount to; and also gave instructions regarding ordinary negligence and criminal negligence. Therefore, the jury had for its consideration, in determining whether appellant acted without due caution and circumspection, instructions pertaining to four classifications or kinds of conduct, namely, ordinary negligence, criminal negligence, due caution and circumspection, and conduct not amounting to wantonness or recklessness. Such instructions tended to confuse the jury as to the standard of conduct required of appellant. If the verdict herein was based upon a finding that the deaths resulted from conduct of appellant in committing a lawful act, it cannot be determined, in view of such instructions, whether such conduct was ordinary negligence, or criminal negligence, or without due caution and circumspection, or was conduct that did not amount to wantonness or recklessness. The court erred prejudicially in giving said instructions.

The judgment and the order denying the motion for a new trial are reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.

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HORWATH et al. v. ROOSEVELT HOTEL CO. et al.

Civ. 19320.

District Court of Appeal, Second District, Division 1, California.

May 20, 1953.

Hearing Denied July 15, 1953.

Action on an account stated, an oral agreement for professional services by plaintiffs as certified public accountants in connection with a proposed additional income and excess profits tax assessment against defendant hotel corporation, and a common count for indebtedness incurred at defendant's request. From a judgment of the Superior Court of Los Angeles County for defendant and an order retaxing costs, plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported the judgment and the trial court's finding that payment for plaintiffs' services, costs and traveling expenses became due when proceedings before the Internal Revenue Bureau were determined thereby, not on subsequent final adjudication of the matter by the Tax Court in defendant's favor, but that the amount of costs taxed should be reduced pursuant to defendant's agreement.

Judgment and order modified and affirmed as modified.

1. Appeal and Error ⇐931(1), 1010(1)

Generally, appellate court will view evidence in light most favorable to respondent and indulge all intendments in favor of finding of trier of facts and will not weigh evidence or disturb such finding, if supported by substantial evidence in record.

2. Appeal and Error ⇐1011(1)

Where witnesses differ, decision of trier of facts is final.

3. Contracts ⇐350(1, 2)

In action on oral agreement for professional services by plaintiffs as certified public accountants in connection with proposed assessment of additional income and excess profits taxes against defendant, evidence supported judgment for defendant and trial court's finding that payment for such services and plaintiffs' necessary costs and traveling expenses became due when proceedings before Internal Revenue Bureau were determined, not on subsequent final adjudication of matter by Tax Court in defendant's favor.

4. Limitation of Actions ⇐49(2)

Certified public accountants could not recover from hotel corporation on common count for indebtedness incurred for professional services, alleged to have been rendered by them at corporation's request in connection with Internal Revenue Bureau's proposed assessment of additional income and excess profits taxes against corporation within two years before filing of their action against corporation on June 29, 1950, where plaintiffs rendered no services to corporation after May 3, 1948, when one of them testified before Tax Court, with which corporation filed petition on such plaintiff's suggestion after adverse ruling by technical staff of internal revenue service. Code Civ. Proc. § 339.

5. Limitation of Actions ⇐183(2)

Where particular code section pleaded in answer as barring action contains two or more subdivisions, answer must plead applicable subdivision number, as well as section number, to present defense of statute of limitations. Code Civ.Proc. § 458.

6. Limitation of Actions ⇐185

The rule that answer pleading particular code section, containing two or more subdivisions, as bar to action, must plead applicable subdivision number, as well as section number, to present defense of statute of limitations, is not self-operating, but depends for its enforcement on plaintiffs' diligence in objecting to insufficiency of plea either by demurrer to answer or by timely objection at trial. Code Civ.Proc. § 458.

7. Limitation of Actions ⇐185
New Trial ⇐26

Where answer alleging that action filed on June 29, 1950, was barred by two year statute of limitations, was not demurred to, question of insufficiency of answer was not raised until counsel's final argument just before submission of cause for decision on September 28, 1951, and insufficiency of answer was made basis for ground of plaintiffs' motion for new trial that decision was against law after filing of trial judge's

memorandum opinion, finding that all causes of action were barred by limitations, on April 1, 1952, and entry of judgment for defendant on April 17, 1952, plaintiffs' objection came too late to raise such question, so that no ruling on defendant's request for leave to amend answer was required. Code Civ.Proc. § 339.

8. Appeal and Error ⇐1151(2)

On plaintiffs' appeal from order retaxing costs after granting their motion to strike from defendant's memorandum of costs an item of $50 for extra court reporter's fee as to $10 of such amount, where defendant agreed that $40 more should have been stricken from cost bill, order retaxing costs will be modified by District Court of Appeal by reducing costs awarded by such amount.

Herbert Gall and Edward Fitzpatrick, Los Angeles, for appellants.

George R. Maury, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiffs are certified public accountants and operate nationally as a copartnership. Mr. Loyd S. Pettegrew heads the firm in Los Angeles. In November of 1944, Mr. Pettegrew and Mr. Thomas E. Hull, President of defendant hotel company, had some consultations concerning an assessment proposed to be levied against defendant by the Bureau of Internal Revenue for additional income and excess profit taxes for the years 1940, 1941, 1942 and 1943.

As a result, plaintiffs were orally employed to resist the proposed assessment. A protest was prepared, and plaintiffs appeared and presented it to the Conference Section of the Bureau of Internal Revenue. A ruling adverse to defendant followed.

Thereafter, in the spring of 1946, a hearing on the same matter was had before the Technical Staff of the Internal Revenue Service. This likewise resulted in an adverse ruling.

In December of 1946, Mr. Pettegrew, who had conducted both of these hearings, suggested to Mr. Hull that a petition should be filed with the Tax Court of the United States; and that this would require the services of an attorney, since plaintiffs "didn't appear in court actions." Accordingly, the law firm of Latham and Watkins of Los Angeles was engaged to represent defendant before the Tax Court. Final adjudication by that court in favor of defendant was entered on December 9, 1949.

On December 31, 1946, defendant received from plaintiffs a bill for $1,166.86 which was paid. In April of 1950, Mr. Pettegrew made oral demand on Mr. Hull for payment of fees for handling the tax case, and on April 21, 1950, he rendered a statement for $15,000. Defendant denied liability.

Thereafter on June 29, 1950, this action was commenced. The first cause of action alleged in the complaint was an account stated for $15,000. The second cause of action was based on an oral agreement for professional services in connection with the proposed assessment, payment to be made "when there was final adjudication of the matter", which was alleged to be March 9, 1950. The third cause of action was on a common count for indebtedness incurred "within two years last past" at the request of defendant.

By its answer defendant denied the indebtedness and set up the statute of limitations as an affirmative defense.

The trial court found in favor of defendant company, to-wit: As to the first cause of action, there was no account stated between the parties in excess of $1,166.86, which was found due and paid early in 1947.

As to the second cause of action, it was found (I) that on or about March 1, 1945, the parties entered into an oral agreement whereby appellants were to render professional services "in connection with a proposed assessment by the United States Bureau of Internal Revenue"; (II) that payment for such services and for necessary costs and traveling expenses would become due when proceedings before the Bureau of Internal Revenue were determined and decided by the Bureau; and that said proceedings were determined and decision made in December, 1946, whereupon appellants rendered their bill for services, nec-

essary costs and traveling expenses for $1,166.86, which was paid.

On the quantum meruit count, the court found that "the last services ever performed by the plaintiffs for the defendant were performed not later than May 3, 1948" which was more than two years prior to the filing of the complaint.

The court also found that all three causes of action were barred by the provisions of section 339, Code of Civil Procedure.

Plaintiffs appeal from the judgment which followed, and also from the order retaxing costs and from the order denying their motion for new trial.

It is here urged that the evidence is insufficient to support the judgment, particularly with respect to Fnding II of the second cause of action heretofore recited. This for the reason that it was agreed that payment would be made upon *final adjudication* of the case and was not limited to services before the Bureau of Internal Revenue.

From the very beginning, appellants believed that respondent would not be compelled to pay the proposed assessment. The arrangement for payment of fees was made orally, and the record discloses three separate versions of the conversation which took place when the fees were discussed:

(1) Mr. Pettegrew testified that this conversation took place between him and Mr. Hull, in the presence of Mr. Hal Farrar, secretary for respondent hotel company, in December, 1944, or January, 1945, to-wit:

"Mr. Hull asked me how we were making out on the case, particularly how Haber was doing. I said, 'I talked to him in New York yesterday afternoon, and they are quite enthusiastic about their prospects. We really believe you can forget about paying this proposed assessment.' * * * He said, 'That's fine. * * * By the way, how much is this going to cost?' * * I said, 'Well, you will have to pay Haber's traveling expenses out here and back. I can't tell you how much it is going to cost, because we have no knowledge at this time as to how much time is going to be involved, how much work we are required to do.' * * * Mr. Hull said, 'Well, can we make a deal on a contingent basis?' * * * I said, 'Well, when accepting a contingent fee we are required to file the full details of it with the Bureau of Internal Revenue. * * * Furthermore, this case may involve a million dollars all told. Now,' I said, 'a 25 per cent contingent fee, that would be $125,000, Tom.'

"So he said, 'Well, let's forget that.' So I said, 'Suppose we go ahead and do the work, let the question of fee go until we find out how much time we are required to put in on it, and what the final outcome of the matter is.' * * * Mr. Hull said, 'That's agreeable to me. Let's do it that way.'"

(2) Mr. Farrar testified that when the final fee arrangement was discussed by Mr. Hull and Mr. Pettegrew and himself, it was agreed that "If the undertaking was successful, we were to pay $10,000. If unsuccessful, we were to pay some nominal fee, which I believe was based on expenses and time involved."

(3) With respect to the same conversation, Mr. Hull testified that "Mr. Pettegrew said, 'We will take this for $10,000.00 if Horwath & Horwath win this case.' He said, 'But, in the event we don't,' he said, 'we will ask for some expense money and some time.' I said, 'What, about?'

"'Oh,' he said, '$1,000.00 and expenses, or something like that.'"

On cross-examination, Mr. Hull testified:

"The deal was this: If Horwath & Horwath won the case, we were to pay them $10,000.00. If they lost the case, we were to pay them a reasonable expense account.

"Q. You said a while ago that you were to pay them a reasonable expense account, plus $1,000.00, isn't that right? A. There was $1,000.00 mentioned, and expenses, for which we got a bill of $1,166.00 which we paid."

Neither the bill nor the check in payment was produced. Mr. Pettegrew testified that he thought the bill specified $186 for traveling expenses and $1,000 retainer fee, but that this was erroneous because it was for costs and traveling expenses and not for services. He explained that Mr. Haber, the income tax specialist attached to appellants'

New York office, made two plane trips from New York at a cost of $400 per round trip, or $800; that he remained in Los Angeles seven days the first trip and four days the second time, and that the $1,166 was for reimbursement of these expenses incurred by Mr. Haber.

[1] "It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof." Kling v. Crown Finance Corp., 63 Cal.App.2d 33, 36, 146 P. 2d 54, 56.

[2] Where witnesses differ, under our system, the decision of the trier of fact is final. Lovelady v. Sacramento City Lines, 102 Cal.App.2d 28, 29, 226 P.2d 722.

[3] Under Mr. Hull's version, if appellants did not win the tax case, they were to get $1,000 and expenses.

Mr. Pettegrew testified that the fee was to depend upon the amount of work required in the case and the final outcome. Also, that when the agreement was made, a hearing before the Tax Court was not contemplated. He admitted that appellants were not licensed to practice before that court. Therefore, "final outcome" could only refer to the proceedings before the Bureau of Internal Revenue where the case was lost.

When asked, "Do you consider that you won the case or your firm won it?"—Mr. Pettegrew replied, "I don't consider that we won or lost the case. We carried it up to a point."

The evidence amply supports the judgment and the finding complained of.

Appellants next assert that there was no cessation of work by them after December, 1946, and that respondent has never contended that it paid for that portion of the services.

In this connection, Mr. Latham testified that his firm charged a fee of $9500 for handling the case before the Tax Court; that appellants rendered assistance in preparation and trial, to-wit: "Well, when we drew the petition, we had before us their prior protests. Then, when the case came on for trial * * * they produced certain information, figures, for us. I believe they prepared, at our request, what is called a flow sheet, indicating usage in the hotel. And Mr. Pettegrew was one of our witnesses. * * * I think from time to time during the preparation, we consulted them—I am sure we did with Mr. Pettegrew on various matters involved. We did prepare the petition. We tried the case and wrote the briefs."

Mr. Pettegrew testified that appellants' testimony before the Tax Court was concluded on May 3, 1948, after which no further work was done by any member of the partnership.

Under the trial court's construction of the oral agreement, any assistance rendered by appellants in the Tax Court was not within the contemplation of the parties at the time the agreement was made and consequently was not included within its terms.

[4] The third cause of action was one for alleged professional services rendered within two years preceding June 29, 1950, the date when the instant action was filed. Appellants admitted, and the court found, that no services were rendered after May 3, 1948, when Mr. Pettegrew testified before the Tax Court. As a result, no recovery may be had under this cause of action.

The answer affirmatively alleged, and the court found, that all three causes of action were barred by the statute of limitations, to-wit: section 339, Code of Civil Procedure, because not brought within two years.

Appellants here urge that the finding is erroneous because the statute was improperly pleaded, i. e., without citing the particular subdivision of section 339 relied upon, as required by section 458, Code of Civil Procedure.

[5] "It is now the settled law in California that where the particular code section pleaded as a bar to the action, contains two or more subdivisions, the answer must

plead the subdivision number as well as the section number to present the defense of the statute of limitations; that an answer that merely pleads such section number without also pleading the proper subdivision number does not present the defense that the action is barred by a statute of limitations. Overton v. White, 18 Cal.App. 2d 567, 64 P.2d 758, 65 P.2d 99." Hart v. Slayman, 30 Cal.App.2d 556, 558, 86 P.2d 861.

[6] In Davenport v. Stratton, 24 Cal.2d 232, 248, 149 P.2d 4, upon the authority of Churchill v. Woodworth, 148 Cal. 669; 84 P. 155, as approved in Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 773, 128 P.2d 665, 678, the strictness of the statutory requirement is thus limited:

"The rule as to the proper plea of the statute of limitations is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea either by demurrer to the answer or by timely objection at the trial."

[7] Here, no demurrer was interposed to the answer and the insufficiency of the pleading was not raised until after the close of testimony, to-wit: in the final argument of counsel just prior to submission of the cause for decision on September 28, 1951.

Respondent's Request for Leave to Amend Answer dated September 28th was filed on October 23, 1951. This was never disposed of.

The trial judge filed a memorandum opinion on April 1, 1952, and judgment was entered on April 17, 1952. Thereafter, on appellants' motion for new trial, the insufficiency of the pleading was made the basis of the ground "The decision is against law". That motion was denied.

The statute of limitations was an issue in the case, and the trial court found that all three causes of action were barred by it. In the circumstances, appellants' objection was not timely. Made after the case was closed, it came too late to raise the sufficiency of the pleading and thereby cure appellants' waiver thereto. As a result, no ruling on respondent's request to amend was required.

[8] Appellants moved the trial court to strike from respondent's memorandum of costs Item 2 for $50 for extra court reporter's fee for two days, on the ground it was not legally chargeable to costs. The motion was granted as to $10 of the item, and costs were retaxed in the sum of $403.-94. Appellants claim this as error and urge that the entire charge of $50 should have been struck from the memorandum.

On the authority of Corona Foothill Lemon Co. v. Lillibridge, 12 Cal.App.2d 549, 55 P.2d 1210, which was cited by appellants, respondent agrees that $40 more should have been struck from the cost bill, making the total sum of $363.94 allowable in the trial court.

For the reasons stated, the order retaxing costs and the judgment are, and each of them is, modified by taxing costs in the sum of $363.94 instead of $403.94. As so modified, the order retaxing costs and the judgment are affirmed, appellants to bear the costs of appeal. The appeal from the order denying a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.



117 Cal.App.2d 768

TRIGGS v. ZICOVICH et al.

Civ. 15374.

District Court of Appeal, First District, Division 2, California.

May 15, 1953.

Action by bailor of truck against bailee to recover rentals due and for damage to the truck during bailment. The Superior Court, County of Santa Clara, granted a nonsuit and entered judgment thereon, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that bailee was not entitled to challenge the title of the bailor by setting

up title in a third party, when that third party did not appear to assert her right to the property.

Judgment reversed and cause remanded for new trial.

1. Bailment ⇐27

Generally, in an action by bailor, bailee will not be allowed to set up title in a third party, unless the third party appears and asserts his right to the article in question.

2. Bailment ⇐27

Defendant, as bailee for hire of truck from plaintiff, was not entitled to dismissal of plaintiff's suit for rentals due and damage to truck, by asserting that title to the truck was not in plaintiff, but was in plaintiff's wife, when wife did not appear and assert any right to the truck.

3. Automobiles ⇐20

Under rule relating to nonsuits, bailor of truck to defendant for hire had benefit of disputable presumption of ownership of property arising from possession and exercising of acts of ownership, even though it was shown that registered ownership stood in name of bailor's wife. Code Civ.Proc. § 1963, subd. 12.

4. Replevin ⇐70

Trover and Conversion ⇐35

One suing for conversion of an article or to replevy it is not required to prove title or anything beyond the right of possession.

5. Automobiles ⇐20

The ownership certificate of a motor vehicle is not conclusive of the question of title, and fact that title to a truck bailed to defendant for hire stood in name of wife of bailor did not preclude ownership in bailor.

John R. Kahle, Maurice L. Martin, San Jose, for appellant.

Edward M. Fellows, Emery J. Delmas, San Jose, for respondents.

GOODELL, Justice.

In this action a nonsuit was granted and this appeal was taken from the judgment entered thereon. The record, made up under rule 7(a), Rules on Appeal, consists of the judgment roll and a settled narrative statement.

Plaintiff alleged that on October 21, 1949 defendant hired from him a 1946 Chevrolet dump truck for 38 weeks, and promised to pay a reasonable rental; that $2.54 per hour, or a total of $3,860, was such rental; that it became due on July 17, 1950 and was unpaid. The prayer was for $4,353.55 which includes $492.75 for alleged damage to the truck. (The rental was apparently calculated on a 40-hour week.)

The answer denied all these allegations, and set up a counterclaim for $370.

Plaintiff testified that he owned the truck and had paid for it with his own funds. Defendant, called under § 2055, Code Civ. Proc. testified: "that on or about the 21st day of October, 1949, * * * he acquired possession of the truck * * * from the plaintiff; that he had used said truck at various times between that date and the 17th day of July, 1950; that plaintiff removed said truck from his premises thereafter and with his consent on or about the 17th day of July, 1950."

When it appeared from plaintiff's own testimony that the pink slip for the truck stood in the name of Marie Barrett (who at the time of trial had become his wife) defendant moved for a dismissal on the ground "that plaintiff was not a proper party to maintain the action", which motion was denied as premature. Plaintiff then moved to amend so as to add Marie Triggs as a party plaintiff, which motion was denied.

At the close of plaintiff's case defendant's motion for nonsuit was granted on the ground previously urged, i. e., that plaintiff could not maintain the action because he was not the registered owner of the truck. It was granted despite the testimony of Mrs. Triggs—which on such motion had to be taken as true—"that said truck had been purchased by plaintiff with his own funds prior to their marriage, and, that the ownership certificate (pink slip) had been taken in her name at that time, with her knowledge and consent. She further testified that she had and claimed no interest whatever in said truck, now or at any time; that said truck had at all times been in the possession

and control of plaintiff and was owned by him."

[1] The broad question presented for decision is whether a bailee, when sued for the rental of a chattel, can challenge the title of the bailor from whom he hires it. "The general rule is that in an action by the bailor the bailee will not be allowed to set up title in a third party". Hayden v. Davis, 9 Cal. 573, 574. Brown v. Roland, 40 Cal. App.2d Supp. 825, 827, 104 P.2d 138, follows the Hayden case. See also 4 Cal.Jur. p. 13. The Hayden case recognized (and enforced) the exception to the rule, where a third party asserted title to the property while it was in the bailee's possession. At p. 575, of 9 Cal., however, the court, quoting from King v. Richards, 6 Whart. 418, 427, says that "Where the real owner of the property does not appear to assert his right to it, * * * the * * * bailee should not be permitted, of his own mere motion, to set up [as] a defense against the bailor, such right for him." Palmtag v. Doutrick, 59 Cal. 154, 165–166 restates the same rule.

[2] The instant case is not within the exception, since here no claim of title was asserted by any third person. This bailee, in other words, does not find himself caught between two adverse claims of title. Nor does he find himself faced with the possibility of a new action being brought by the holder of the pink slip since she testified that the possession, control and ownership of the truck had always been in the plaintiff, which of course forecloses her, as far as this transaction and these parties are concerned, from asserting ownership in herself.

[3] Defendant admits that at the time of the bailment the truck was in the possession of the plaintiff and there is, of course, a disputable presumption of ownership of property arising "from exercising acts of ownership over it, or from common reputation of his ownership". Code Civ.Proc. § 1963, subd. 12. Under the nonsuit rule plaintiff has the benefit of that presumption. It was not dispelled by the showing that registered ownership stood in the name of his wife, since her testimony (which on a nonsuit must be taken as true) shows that he is the real and beneficial owner. Moreover defendant's own testimony shows that he obtained possession from the hands of the plaintiff (and from nobody else), that he had the use of the truck for about nine months, and that it was repossessed by plaintiff (and by nobody else).

The only parties to this contract of hiring were the plaintiff and the defendant, hence they alone would be the only parties who could sue thereon, 6 Cal.Jur. p. 468.

[4] Moreover, if defendant had refused to redeliver the truck and plaintiff had sued for its conversion or to replevin it he would not have had to prove title or anything beyond the right of possession. Moody v. Goodwin, 53 Cal.App. 693, 200 P. 733.

[5] The ownership certificate is not conclusive of the question of title. Henry v. General Forming, Limited, 33 Cal.2d 223, 200 P.2d 785, following Parke v. Franciscus, 194 Cal. 284, 228 P. 435; see also George, Ltd. v. Barnett, 65 Cal.App.2d Supp. 828, 150 P.2d 591, cited approvingly in the Henry case.

Plaintiff's wife testified that the truck was bought and paid for "with his own funds prior to their marriage." If he borrowed the money wherewith to buy the truck, that fact is of no concern to this respondent and does not make the truck any the less his property. We find no merit in respondent's contentions respecting the financial antecedents of this immediate transaction.

Nor is there any basis for defendant's apprehension that plaintiff's wife might file another action on the theory that she was a third-party beneficiary of the rental contract. In the first place we fail to see how she was such beneficiary and, secondly, it already appears that she would be precluded from maintaining such action by her testimony in this case.

The judgment is reversed and the cause remanded for a new trial.

NOURSE, P. J., and DOOLING, J., concur.

118 Cal.App.2d 28

PEOPLE v. HYMER.

Cr. 4945.

District Court of Appeal, Second District, Division 1, California.

May 21, 1953.

Defendant was charged with burglary. The Superior Court of Los Angeles County, Charles W. Fricke, J., denied defendant's motion for new trial after verdict of guilty, and defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that evidence sustained conviction.

Order affirmed.

1. Criminal Law ⇐59(5)

Before one can be stigmatized as an abettor he must have instigated or advised the commission of the crime, or have been present for the purpose of assisting in its consummation.

2. Criminal Law ⇐1160

A verdict of the jury in a criminal case, which has been approved by the trial court, cannot be set aside by appellate court on ground of insufficiency of the evidence, unless, it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

3. Criminal Law ⇐1160

Where circumstances reasonably justify verdict of jury in criminal case, which has been approved by trial court, opinion of reviewing tribunal that those circumstances might also reasonably be reconciled with innocence of accused will not warrant interference with determination made by the duly constituted arbiters of the facts.

4. Criminal Law ⇐552(4)

The law makes no distinction in a criminal case between direct and circumstantial evidence in the degree of proof required, but requires only that evidence of the one character or the other, or both, be sufficient to establish guilt beyond a reasonable doubt.

5. Burglary ⇐41(1)

Fact that defendant charged with burglary involving $294 had some $5000 worth of tangible assets in his possession at time of his apprehension, and a job paying $70 per week, did not compel conclusion that defendant had not participated in the crime because he had no motive therefor, when defendant had also testified as to meeting a virtual stranger who he drove to scene of burglary on representation from stranger that defendant would be given a couple of dollars to buy gasoline. Code Civ.Proc. § 1960.

6. Burglary ⇐41(1)

Evidence sustained conviction of defendant of burglary in the second degree.

7. Criminal Law ⇐396(2)

The rule that when a part of the conversation has been shown in evidence, the remainder of that conversation may be brought in by the opposing party, is subject to the qualification that court may exclude those portions of conversation not relevant to items or subject matter thereof which have been introduced. Code Civ.Proc. § 1854.

8. Criminal Law ⇐396(2)

In prosecution for burglary, wherein defendant testified on direct examination that he had driven virtual stranger to scene of burglary in return for offer of a "couple of bucks to get gas", and officer testified as to statement of defendant that his passenger asked him if he "wanted to make a fast buck", refusal of trial judge to permit balance of conversation between defendant and such officer to be shown in evidence was not an abuse of discretion, when refusal was based upon ground that balance of conversation was hearsay and a self serving declaration. Code Civ.Proc. § 1854.

Percy Drabin and Stanley C. Poster, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of burglary, in that he did on or about May 5, 1952, wilfully enter a factory and building occupied by Z.M.R. Manufacturing Company, a corporation, with the intent to commit theft

Following entry of a plea of not guilty, the cause proceeded to trial before a jury, resulting in a verdict finding defendant guilty as charged, and fixing the offense as burglary of the second degree.

Defendant's motion for a new trial was denied. Proceedings were ordered suspended and defendant was granted conditional probation. From the order denying his motion for a new trial defendant prosecutes this appeal.

Epitomizing the factual background surrounding this prosecution, we find in the record testimony by Sydney Rubin, secretary and treasurer of the Z.M.R. Manufacturing Company, that the business of this corporation was located on a portion of the third floor of a seven-story building at 224 East 11th Street, in the city of Los Angeles. That there was a large double door which was the main entrance, with two smaller and swinging doors on each side. That the building had a stairway and the front elevator was automatic after 6:00 p. m. The entrance to the manufacturing company's premises on the third floor was off a hallway. That there was a wooden frame double door which had three locks.

This witness testified he was the last person to leave the company's premises on the evening in question. That he departed about 5:00 p. m. and locked up the premises. That his company was engaged in the business of manufacturing ladies' and misses' coats and that a stock of such garments was maintained on the premises.

Lyle L. Sandlin, a Los Angeles City police officer, testified that on the night here in question he was near the aforesaid building, was in uniform, and stationed at the southeast corner of 11th and Santee Streets. That just prior to 7:00 p. m. (it was still daylight and the sun was shining) he observed defendant seated on the driver's side of his automobile parked at the curb and headed west on 11th Street on the opposite side thereof from 224 East 11th Street. That he was about 150 feet from the vehicle. The witness observed a man run out of the main entrance of the building with an armful of ladies' coats. This man ran to the rear of defendant's automobile; at about the time he reached it, defendant got out, opened the trunk and the other person threw the garments inside. Defendant slammed the cover down. A red sleeve on one of the coats stuck out from under the trunk lid. Defendant raised the lid, shoved the coat sleeve in again, slammed the door down and got into the driver's side of the automobile. In the meantime, the other person ran back across the street and reentered the building. The placing of the coats in the trunk and the closing of the trunk took place very rapidly. After defendant got back in his automobile he started the motor, drove west 35 or 40 feet to an alley, made a U-turn and came back and parked directly in front of 224 East 11th Street.

The officer started to walk across the street toward where defendant was. The latter looked in the officer's direction then looked in the direction of the main entrance of the building "and made a negative shake of his head and a motion with his hand * * *. Shaking his head from side to side in a negative manner while looking in the direction of the doorway of this building, then made this hand motion in the negative manner." (swinging his hand from side to side with the palm up towards the entrance of the building).

After about two minutes, defendant drove the automobile toward the officer at a slow rate of speed. The officer was about 30 or 40 feet from the automobile when it started to move. Defendant was about 25 or 30 feet away from the entrance when the officer told him to stop the automobile. The officer directed defendant to get out of the automobile on the passenger side, which he did.

The officer instructed defendant to open the trunk of the automobile. Defendant walked to the rear of the automobile, took a key from among the keys on his key-ring and opened the trunk. This was after some urging by the officer and after trying several keys.

When the trunk of the automobile was finally opened the officer observed the coats therein.

Concerning what thereafter transpired, the officer testified, "I looked at the defendant. The defendant looked at me. I looked

at the defendant. The defendant looked at me. I didn't say anything. And the first words he said to me—he spread his hands with the palms open, up like this, and he says, 'Well, you have got me.' He says, 'let's go.' "

While walking the defendant toward the sidewalk the officer enquired, "Who is your buddy up in the building?", to which the former replied, "I wouldn't give you the time of day".

Shortly thereafter, the officer observed the person who had put the coats into defendant's car running very fast out the small door farthest from the officer and defendant towards an alley, headed west on 11th Street. The officer and defendant were about 25 or 30 feet east of the main entrance of the building. The officer put further questions to defendant as to who this individual was but could get no answer.

At the request of the officer, a passing pedestrian put in a telephone call for "help", resulting in the arrival of other officers and the aforesaid Mr. Rubin. The latter accompanied the police up to the premises of the manufacturing company. The double door that opened into the premises had been tampered with. "The door was slammed through. The two Yale locks were snapped. It was pushed in. The double-bar lock was broken and hanging to one side of the door with part of the jamb from the other side of the door hanging to the lock."

An inventory taken on the following morning disclosed that fourteen coats were missing from the premises. At the trial Mr. Rubin identified a coat found in defendant's automobile as one of the missing articles of merchandise.

Sworn as a witness in his own behalf, defendant testified that on the day in question he stopped at a market to get some cigarettes. That when he returned to his automobile he was accosted by a man whom he had previously seen and spoken to in that neighborhood but whose name he did not know. That when the latter asked defendant to drive him "down town" and that he would "give you (defendant) a couple of bucks to get you some gas", the defendant agreed to do so. That his passenger directed him to a location and asked him to "wait a minute" across the street from 224 East 11th Street. Defendant testified that he saw the police officer standing in a filling station on the corner of 11th and Santee Streets as he approached the place where his passenger directed him to stop. That the man left the automobile, walked into the building and after five or ten minutes emerged therefrom with an armful of coats. That this man asked him to open the automobile trunk, which he did, and the coats were deposited therein. That the man asked him to turn his automobile around and stop in front of the building because there were a few more pieces to get and then they would leave. Defendant testified that he made the U-turn when he observed the officer approaching; that his automobile "may have crept towards" the officer because defendant had released presure on the brakes. That the officer approached the automobile, "stuck his head in the door, saying, 'I got you.' " That the automobile, that one of the coats must have officer directed him to open the trunk of the been caught in the lock inasmuch as defendant had to twist the key continuously to get the lock open. Defendant testified that he was apprehensive lest the officer might harm him because of the delay in getting the trunk lock open. That he asked the officer to wait a minute and the latter said he had defendant "with the goods". Defendant denied he made any signals with his hands but that he held them "straight up", palms open, because he feared the officer might shoot him. That the officer asked him who his "buddy" was in the building. That he replied he did not know the person's name and enquired of the officer why the latter did not wait there and intercept him. That the officer said, "You don't know a damn thing. You don't even know the time of day." On cross examination defendant denied that the person he transported in his automobile said to him, "Do you want to make a fast buck?", but said only, "I will give you a couple of bucks to get you some gas". However, on re-cross examination defendant admitted he had a conversation with officer Billingsley on November 5th, and when asked whether, in that conversation, he did not state that

the man he picked up asked him, "if you cared to make a fast buck", replied, "No. I don't think I did, because I was frightened. I don't know. I may have". Officer Billingsley, however, testified positively on rebuttal, that in the aforesaid conversation, defendant told him, "that the person he picked up at Central and Adams asked him if he wanted to make a fast buck".

The principal attack upon the judgment of conviction herein is that the evidence is insufficient to support the verdict. In that regard appellant asserts that, "there is not one scintilla of evidence in the record to indicate a conspiracy or knowledge on the part of the appellant of the unlawful intent of suspect number two".

[1–3] Undoubtedly, it is the law that before one can be stigmatized as an abettor he must have instigated or advised the commission of the crime, or have been present for the purpose of assisting in its consummation. In the instant case we are satisfied that the facts therein proven require that the order appealed from be affirmed. It was the province of the jury to declare appellant's guilt or innocence, and unless we can say that it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below, the verdict of the jury, which has been approved by the trial court, cannot be set aside upon the ground "of insufficiency of the evidence". And, if the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing tribunal that those circumstances might also reasonably be reconciled with the innocence of the accused will not warrant interference with the determination of the duly constituted arbiters of the facts.

Bearing these well established rules in mind, we are here confronted with the following incriminatory circumstances.

(1) Possession by defendant of the stolen property;

(2) Defendant assisting the thief on the latter's emergence from the building where the theft was committed, in placing the property in defendant's automobile, which was done hastily; then defendant driving his automobile nearer the building after the thief ran back in;

(3) Defendant looking in the direction of Officer Sandlin when the latter started toward where defendant was parked, then defendant looking in the direction of the main entrance of the building which the thief had reentered and making "negative" signs with his head and hand;

(4) Defendant's automobile starting in motion thereafter;

(5) Defendant's hesitancy in picking out the key to and opening the trunk of his automobile at the officer's direction;

(6) Defendant's admission to the officer, after he had opened the trunk which contained the stolen property, "Well, you have got me", and his statement "Let's go", in conjunction with spreading his hands with the palms open.

[4] The law makes no distinction between direct and circumstantial evidence in the degree of proof required. It requires only that evidence of the one character or the other or both be sufficient to establish guilt beyond a reasonable doubt in the minds of those bound to act conscientiously upon it.

Appellant insists that there was no motive for the theft. That "Appellant had in his possession at the time of his apprehension some $5,000.00 worth of tangible assets, and had a job paying $70.00 per week, not to mention an outside source of income. Obviously, the purpose of theft is to acquire money, and yet on the meager amount of evidence available, the jury found that a man in the financial position of the appellant would commit burglary for some $294.00 worth of coats."

[5, 6] However, when it is remembered that an inference is founded upon such a deduction from a fact legally proven "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature", Code Civ. Proc. § 1960, it is difficult to understand how a person financially situated as appellant was would be interested in driving a practi-

cal stranger from Adams Boulevard and Central Avenue to downtown Los Angeles to obtain for himself "a couple of bucks to buy gasoline". The very circumstances adverted to by appellant impress us that the jury was justified in concluding that his testimony lacked the essence of verity, and that he was a knowing and willing participant in the crime charged.

Finally, appellant complains that the court erred to his prejudice in excluding testimony of the entire conversation had with officer Billingsley, and, as to a portion of which the officer testified on his direct examination.

In that regard the record reflects that on rebuttal, the officer testified:

"Q. Did you have a conversation with the defendant on the night of May 5, 1952, at the City Hall in the presence of a couple of other officers? A. I did.

"Q. In that conversation did the defendant tell you that the person he picked up at Central and Adams asked him if he wanted to make a fast buck? A. He did."

On cross examination the following occurred:

"Q. By Mr. Drabin (Appellant's counsel): Officer Billingsley, what else did he tell you at that time?

"Mr. Donnellan (Deputy District Attorney): Objected to as not cross examination.

"The Court: It calls for hearsay. Sustained.

"Q. By Mr. Drabin: Officer, did you ask him at that time whether or not he had stolen these coats?

"Mr. Donnellan: Objection. Improper cross examination.

"The Court: Objection sustained. It calls for hearsay, a self-serving declaration. Sustained. The only question is whether he did or did not make that particular statement."

On direct examination appellant testified that the person he drove to the scene of the burglary had stated he would give him, "a couple of bucks to get gas". On cross examination appellant denied that this person asked him if he "wanted to make a fast buck". And, on re-cross examination appellant testified he did not think he made a statement to officer Billingsley that his passenger had asked him if he, "wanted to make a fast buck".

[7, 8] In support of the proposition that when part of a conversation is admitted in evidence the opposing party may have the entire conversation admitted, appellant relies upon section 1854 of the Code of Civil Procedure; People v. Connelly, 195 Cal. 584, 596, 234 P. 374, and People v. Brac, 73 Cal.App.2d 629, 638, 167 P.2d 535. However, the cited cases go no farther than to hold that when one part of a subject matter is brought out by a party it is proper for the opposing party to bring out all that was said on the subject. In other words, the rule that where part of a conversation has been shown in evidence, the remainder of that conversation may be brought out by the opposing party, is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items or subject matter thereof which have been introduced. In the instant case it was not shown that disclosure of the entire conversation would have any bearing on the limited point of challenge of appellant's credibility, People v. Horowitz, 70 Cal.App.2d 675, 691, 161 P.2d 833. As cogently stated by the trial court, "The only question is whether he (the witness) did or did not make that particular statement".

We are satisfied that the trial judge did not err or abuse the discretion vested in him in limiting the cross examination as he did.

For the foregoing reasons the order denying defendant's motion for a new trial from which this appeal was taken, is affirmed.

DORAN, J., concurs.

117 Cal.App.2d 752

TAYLOR v. NEWTON et al.

Civ. 8198.

District Court of Appeal, Third District, California.

May 14, 1953.

Hearing Denied July 9, 1953.

Action to have a corporation and a copartnership declared alter egos of plaintiff's judgment debtor and to recover the amount due plaintiff on the judgment. From a judgment of the Superior Court, Butte County, McGregor, J., declaring the corporation the debtor's alter ego and both of them jointly and severally liable for the judgment debt, they appealed. The District Court of Appeal, Schottky, J., held that the complaint stated a good cause of action and that the evidence supported the trial court's conclusion that the corporation was the debtor's alter ego.

Judgment affirmed.

1. Limitation of Actions ⇐24(2), 37(2), 39(6)

An action, brought in 1950, to have a corporation, to which plaintiff's judgment debtor transferred all his property without consideration at time of and since its incorporation in 1938, declared such debtor's alter ego and to recover from them amount due on judgment, rendered in 1948, was not barred by statutes of limitations applicable to actions to set aside fraudulent conveyances. Code Civ.Proc. §§ 337, 338, 343.

2. Corporations ⇐1

In action to have a corporation declared the alter ego of plaintiff's judgment debtor and to recover from them amount due on judgment, evidence supported trial court's finding and conclusion that corporation was such debtor's alter ego and that adherence to fiction of corporation's separate existence would promote injustice to plaintiff and other creditors of judgment debtor.

3. Corporations ⇐1

Though a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will disregard such distinct existence and treat corporation and stockholders as identical when necessary to circumvent fraud, protect third persons' rights, and accomplish justice.

4. Corporations ⇐1

To justify court in disregarding corporation's existence separate and distinct from its stockholders in order to circumvent fraud, actual fraud need not be shown, but showing that refusal to recognize identity of corporate existence with that of individual stockholder would bring about inequitable results is sufficient.

5. Corporations ⇐1, 398(3)

A corporation may be mere instrumentality through which individuals owning all of its capital stock transact their business for their convenience in which case law and equity, looking to substance rather than form, will hold corporation obligated for such stockholders' acts.

6. Pleading ⇐129(2)

In action to have corporation declared the alter ego of plaintiff's judgment debtor and recover from him and corporation amount due on judgment, defendants' contention that there was no evidence that judgment debtor ever owed plaintiff any money was without merit, where allegations of complaint as to original obligation, filing of actions resulting in two judgments against debtor, his failure to pay anything on last judgment, and amount due thereon, were not denied in defendants' answer and they made no contention at trial that anything was paid on judgment.

7. Pleading ⇐122

In action to have corporation declared alter ego of plaintiff's judgment debtor and recover from him and corporation amount due on judgment, where complaint alleged that execution was issued against debtor and returned unsatisfied and only denial of such allegations was on lack of information and belief, defendants' contentions that there was no evidence of such facts was without merit.

8. Pleading ⇐122

A matter of which defendant has personal or presumptive knowledge cannot be denied on information or belief, but must be denied positively in answer, else such denial may be disregarded as evasion.

9. Pleading ⇐122

Issuance of execution on judgment and filing of return unsatisfied were matters of public record and could not be denied solely on information and belief by defendants in action for amount due on judgment.

10. Corporations ⇐1

In action to have corporation declared the alter ego of plaintiff's judgment debtor and to recover from him and corporation amount due on judgment, complaint alleging debtor's original obligation, filing of actions resulting in two judgments, against debtor, his failure to pay anything on last judgment, amount due thereon, issuance of execution against debtor, and return thereof unsatisfied, stated good cause of action.

Charles A. Christin, San Francisco, for appellants.

Raymond A. Leonard, Oroville, Ben F. Griffith, Los Angeles, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendants above named, seeking to have it decreed that defendants N. H. Development Company and The Newton Company be declared to be the alter ego of defendant Noel Newton, Sr., and to recover from said defendants the sum of $4575.52 alleged to be due plaintiff on a judgment rendered against Noel Newton, Sr., on September 23, 1948.

The complaint alleged that on November 2, 1935, plaintiff loaned defendant Noel Newton, Sr., the sum of $2500 upon his promise to repay said amount on or before three years from said date; that plaintiff filed suit against defendant Noel Newton, Sr., in the Superior Court of Los Angeles County on September 23, 1942, and judgment was rendered in her favor on September 13, 1943, for the sum of $3382.85; that no part of said judgment having been paid, plaintiff, on July 29, 1948, filed an action in the Superior Court of Butte County against defendant Noel Newton, Sr., based upon said unsatisfied judgment, and on September 23, 1948, judgment was entered in favor of plaintiff and against said defendant for the sum of $4563.52; that nothing has been paid upon said judgment, and on November 7, 1949, an execution was issued upon said judgment, which execution was returned by the sheriff wholly unsatisfied, and that said judgment is still unsatisfied.

The complaint further alleged that defendant Noel Newton, Sr., is insolvent, and has divested himself of all property out of which the judgment can be satisfied by the following chain of events: That for a long time prior to 1938 and ever since, defendant Noel Newton, Sr., has engaged in general real estate dealings, etc.; that on or about November 22, 1938, the defendant Noel Newton, Sr., caused to be incorporated the defendant N. H. Development Company; that defendant Noel Newton, Sr., has at all times personally owned all of the issued capital stock of the defendant corporation, to wit, 100 shares at $1.00 par value; that defendant Noel Newton, Sr., at all times has been the president and general manager of defendant corporation; that the officers and directors are dummies, they being paid or unpaid employee relatives of defendant Noel Newton, Sr., to wit, his two sons, daughter, and wife. Plaintiff alleges further that no stockholders' meetings or election of any board of directors or officers has ever been held, or any adoption of by-laws had or considered; that all office furniture, fixtures, books and business of said defendant corporation are kept and maintained by Noel Newton, Sr., at his home; that the incorporation of defendant corporation was a mere fraudulent plot, plan, scheme and conspiracy to hinder, defraud, cheat and delay creditors, and, in particular, the plaintiff; that the corporation is merely Noel Newton, Sr.'s alter ego through which Noel Newton, Sr., may act in his business affairs, using it as a cloak or shield to elude creditors' claims; that on February 28, 1948, Noel Newton, Sr., caused to be formed for his own purposes The Newton Company, a partnership comprised of John R. Newton and Noel Newton, Jr., his sons, Ida Mae Richardson, his daughter, and Elda Mills Newton, his wife; that this partnership was formed for the same fraudulent purposes as the defendant

corporation, and is subject to the sole and exclusive control of defendant Noel Newton, Sr.; that in reality neither this partnership nor the defendant corporation was formed for lawful purposes; that the profits from the partnership go to the defendant corporation, and the profits from the defendant corporation go to defendant Noel Newton, Sr.; that the above named relatives of Noel Newton, Sr., who make up the partnership and officers and directors of defendant corporation are really under the exclusive control and direction of defendant Noel Newton, Sr., and have no financial interest in said partnership or defendant corporation except to collect their earnings as employees; that in furtherance of this fraudulent scheme, at numerous times and ever since October 19, 1938, the defendant Noel Newton, Sr., has deeded and transferred various real properties to the defendant corporation and the partnership, these transfers being made without consideration, and therefore fraudulent as to plaintiff, a creditor of Noel Newton, Sr.; that to better cloud and obscure the property transactions, the defendant corporation agreed in writing to sell, and the partnership would in the same instrument agree to buy from the defendant corporation, all of its property at $2,000 per acre, payable if and when the partnership selected any of the properties described in the agreement; that the partnership was also to farm all of the cultivable land and pay over the profits from the crops to the defendant corporation, in addition to the purchase price of said land; that Noel Newton, Sr., was to deposit in escrow the 100 shares of stock in the defendant corporation, which stock was to be held subject to large fictitious claims of unknown amounts in favor of his wife and his attorney at law; that as a result of the foregoing fraudulent scheme, plot, and plan, the profits and benefits from Noel Newton, Sr.'s alter egos, the defendant corporation and the partnership, plaintiff is unable to recover any of said benefits or profits to apply on her judgment; that plaintiff is unable to reach any assets of defendant Noel Newton, Sr., since he is insolvent, he having secreted his assets in the foregoing manner, and that if the affairs continue to be conducted by defendant Noel Newton, Sr., the corporation, and partnership as separate entities, plaintiff will suffer irreparable injury and detriment, and all assets of said business which should be used to satisfy plaintiff's claim will be lost forever. For a second cause of action plaintiff alleges the foregoing, and, in effect, that the defendant corporation and the partnership were set up merely as instrumentalities of defendant Noel Newton, Sr., to use in defrauding his creditors, and that all of the property and assets of the defendant corporation were transferred and disposed of to the partnership so that the defendant corporation and Noel Newton, Sr., might further shield themselves from the lawful debts and defraud their lawful creditors; that the placing in escrow of the 100 shares of stock in the defendant corporation by defendant Noel Newton, Sr., was for the ostensible purpose of making profits and earnings accruing to said stock subject to first and second fictitious liens of unknown amounts in favor of defendant Noel Newton, Sr.'s wife and attorney at law, respectively; that this was done to further the fraudulent scheme and plan of placing assets out of the reach of lawful creditors of Noel Newton, Sr.

Defendants filed a general and special demurrer, and among the grounds of demurrer was one that the action was barred by the provisions of sections 337 and 338 of the Code of Civil Procedure. The demurrer was overruled and the defendants filed an answer in which they denied various material allegations of the complaint and denied also that the debt was ever owed; that the defendant corporation was not a valid one; that there was any fraudulent scheme or plan on their part to defraud creditors; and also set up the statute of limitations as a defense. Code Civ. Proc., §§ 337, 338 and 343.

Following a trial before the court sitting without a jury, the court found substantially as follows:

1. That the various property transactions between defendants Noel Newton, Sr., and the corporation and partnership were as alleged.

2. That the taking of the 100 shares of stock in the defendant corporation and placing in escrow subject to liens of unknown amounts by defendant Noel Newton, Sr., was as alleged.

3. That Noel Newton, Sr., does preside over, manage and control defendant corporation, and that there were no meetings, by-laws, etc. of said corporation, and that the records, fixtures, and office of said corporation are in the home of defendant Noel Newton, Sr., as alleged.

4. That none of Noel Newton, Sr.'s relatives, who make up the officers and directorate of the defendant corporation, have any financial interest therein other than to collect wages, as alleged.

5. That Noel Newton, Sr., has used the defendant corporation for his own purposes, and the separateness and individuality of the defendant corporation and Noel Newton, Sr., does not exist, and has not existed since on or about October 19, 1939, and that these circumstances unjustly deprive plaintiff of money due her, in that Noel Newton, Sr., has divested himself of all of his property, thereby rendering him insolvent, as alleged.

6. That the defendant corporation is the alter ego of the defendant Noel Newton, Sr.

7. That the partnership, Newton Company, is not the alter ego of defendant Noel Newton, Sr., nor is it or its members parties of any fraudulent actions.

8. That plaintiff did recover the alleged judgments against defendant Noel Newton, Sr., as alleged.

9. That the defendants Noel Newton, Sr., and corporation are jointly and severally indebted to plaintiff.

From the foregoing facts the court concluded that the N. H. Development Company was the alter ego of defendant Noel Newton, Sr., and that said defendants were jointly and severally liable to plaintiff for any debt or judgment outstanding against defendant Noel Newton, Sr. Judgment was entered in accordance with said findings and conclusions, and defendants Noel Newton, Sr., and N. H. Development Company have appealed from said judgment.

[1] Appellants first contend that the court erred in overruling their demurrer. They argue that any cause of action must be predicated on one which arose in 1938 when appellant Noel Newton, Sr., caused appellant N. H. Development Company to be incorporated, as it was then that appellant Noel Newton, Sr., was alleged to have acted fraudulently. Therefore, argue appellants, the complaint in the instant action was filed on September 11, 1950, and that the action was barred by the statute of limitation, whether sections 337, or 338, or 343 of the Code of Civil Procedure are the applicable sections. Appellants seem to assume that the instant action is one to set aside a fraudulent conveyance but, as respondent correctly points out, she is not seeking to set aside any transfer, fraudulent or otherwise, but is merely seeking to have the fictitious identity of appellant corporation disregarded, and hence sections 337, 338 and 343 have no application here as the action is based on a 1948 judgment obtained by plaintiff against appellant Noel Newton, Sr.

[2] Appellants' next and principal contention is that the evidence is insufficient to support the judgment. They argue first that the evidence does not support the finding that appellant corporation was the alter ego of appellant Noel Newton, Sr. However, the record clearly shows the following facts:

1. Appellant Noel Newton, Sr., holds all the stock in appellant corporation.

2. This stock is subject to liens of unknown amounts in favor of appellant's wife and attorney.

3. Appellant Noel Newton, Sr., is the president and general manager of the corporation.

4. The directors and officers of the appellant corporation are members of appellant Noel Newton, Sr.'s family who act for little or no compensation under his control and direction.

5. There were no formal meetings held, either stockholders' or directors'.

6. There were no adequate or accurate records of the corporation's affairs kept.

7. There are no by-laws available.

8. The office of the corporation is at the home of appellant Noel Newton, Sr.

9. Appellant Noel Newton, Sr., transferred Rancho Golden and other property to appellant corporation without receiving any consideration therefor.

10. Property of the corporation was transferred to the defendant partnership, no consideration being received therefor.

The following statement by the court in its memorandum opinion is fully supported by the record:

> "It is the opinion of the Court that a preponderance of the evidence in this case establishes that the N. H. Development Company, a corporation, is the alter ego of Noel Newton, Sr., and that the facts in this case are such that to adhere to the fiction of a separate existence of the said corporation would promote an injustice to the creditors of said Noel Newton, Sr., and particularly to the plaintiff creditor herein."

[3] The law in California as to the doctrine of alter ego is well summarized in Kohn v. Kohn, 95 Cal.App.2d 708, at page, 718, 214 P.2d 71, at page 76:

> "As stated in 6a Cal.Jur., p. 75: 'It is the law in California as elsewhere that, although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect the rights of third persons and accomplish justice, disregard this distinct existence and treat them as identical.' The issue is not so much whether, for all purposes, the corporation is the 'alter-ego' of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form. 1 Fletcher, Cyc. Corporations pp. 134, 136, 143 and 165. The case law of California is in support of this generally recognized view, the cases expressing the doctrine of disregard of the entity in varying language, sometimes rather broad and sometimes more narrow. The leading and most often cited case in California, Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 696, 227 P. 723, 731, states it as follows: 'While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.' In Continental Securities [etc.] Co. v. Rawson, 208 Cal. 228, 238, 280 P. 954, 958, after stating the doctrine substantially as it appears above, the court said: 'When the corporation is organized or perpetuated for the particular purpose of carrying out the plans of partners or associates in business, the same rule has been held to apply. (Citations.) Whether the corporation be deemed a "one man" corporation or, as here claimed, a "two man" corporation, the rule would be the same and the two essential elements must be present.' (The significant elements were stated to be (1) control, and (2) a state of facts upon which an adherence to the separate entity would be unjust.) In a recent case, Katenkamp v. Superior Court, 16 Cal.2d 696, 700, 108 P.2d 1, Justice Traynor expresses the doctrine thusly: '* * * while a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, whenever necessary to circumvent fraud, or protect the rights of third persons, disregard this distinct existence and treat

them as identical.' [Citing 10 California cases.]"

[4] In Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, at page 698, 227 P. 723, at page 732, the court said:

"True, there is no showing or claim of fraud in the instant case on the part of Caroline S. Wenban or the corporation plaintiff. Still, as previously indicated, it is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the fact of the identity of the corporate existence with that of the individual would bring about inequitable results. All of the facts and circumstances surrounding the inception of and attending the controversy in suit bring the case clearly within the two requirements declared in Minifie v. Rowley, supra, to be sufficient to constitute the cause of action stated in the cross-complaints of the several appellants."

In the case of Gordon v. Aztec Brewing Co., 33 Cal.2d 514, at page 522, 203 P.2d 522, at page 527, the court said:

"The cases mentioned illustrate in a factual context similar to that before us the rule that where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Puccetti v. Girola, 20 Cal.2d 574, 578, 128 P.2d 13; Shea v. Leonis, 14 Cal.2d 666, 669, 96 P.2d 332. It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 698, 227 P. 723; Minifie v. Rowley, 187 Cal. 481, 488, 202 P. 673. Here confusion would be promoted and an unjust result be accomplished if the maintenance of the two entities controlled by the same persons and having an identical name were permitted to frustrate a meritorious claim."

[5] And in Hillman v. Hillman Land Co., 81 Cal.App.2d 174, at page 183, 183 P.2d 730, at page 736, the court said:

"* * * A corporation may be but the mere instrumentality through which, for their convenience, the individuals who own all the capital stock transact their business. Looking to substance rather than to form the law and equity will hold the corporation obligated for the acts of the sole owners of its stock." (Cases cited.)

See, also, Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390; Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 200 P.2d 836.

[6] Appellants contend also that there is no evidence that appellant Noel Newton, Sr., now owes or ever owed plaintiff any money. However, the pleadings show that plaintiff alleged the original obligation and also alleged the filing of the actions which resulted in the judgments of 1942 and 1948. The complaint also alleged that nothing had been paid on the 1948 judgment and the amount due thereon. These allegations were not denied in appellants' answer and no contention was made at the trial that anything had been paid.

[7–9] Equally without merit is appellants' contention that there was no evidence that either an execution was issued against Noel Newton, Sr., or that it was returned unsatisfied. The complaint made these allegations and the only denial was on lack of information and belief. It is well settled that a matter of which defendant has personal knowledge, or a matter which is presumptively within his knowledge, cannot be denied on information or belief, but must be answered positively or such denial may be disregarded as an evasion. 21 Cal. Jur., § 98, p. 148, and cases cited. The issuance of the execution and the filing of the return were also matters of public record and could not be denied solely on information and belief. 21 Cal.Jur., § 101, p. 150.

No other points raised require discussion.

[10] We are satisfied that the complaint states a good cause of action and that the

trial court's conclusion that appellant N. H. Development Company was and is the alter ego of appellant Noel Newton, Sr., is abundantly supported by the evidence and by the authorities. It is clear from the record that the trial court was fully justified in concluding, as it did conclude, that to adhere to the fiction of a separate existence of appellant N. H. Development Company would promote an injustice to the creditors of appellant Noel Newton, Sr.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



118 Cal.App.2d 72

WARMING v. SHAPIRO.

Civ. 15435.

District Court of Appeal, First District, Division 1, California.

May 25, 1953.

Assignee of tenant brought action against landlord to recover deposit made by tenant. The Superior Court of the County of Monterey, Anthony Brazil, J., entered judgment adverse to assignee, and assignee appealed. The District Court of Appeal, Peters, P. J., held that where deposit is made by tenant under lease, and deposit is liquidated damages, deposit is a penalty and is illegal and may be recovered by tenant.

Affirmed.

1. Appeal and Error ⇐1008(3)

Where trial court interpreted lease without aid of extrinsic evidence, District Court of Appeal was not bound on appeal by such interpretation, but was required to construe the lease for itself.

2. Landlord and Tenant ⇐213(5)

Where deposit made by tenant under lease is an advance payment of rent, and lease is terminated due to fault of tenant, landlord may retain deposit.

3. Landlord and Tenant ⇐34(1)

Where deposit made by tenant under lease is a bonus or consideration for execution of lease, and lease is terminated due to fault of tenant, landlord may retain the deposit.

4. Landlord and Tenant ⇐184(2)

Where deposit is made by tenant under lease, and deposit is liquidated damages, deposit is a penalty and is illegal and may be recovered by tenant.

5. Landlord and Tenant ⇐184(2)

Where deposit is made by tenant under lease to secure faithful performance of terms of lease, and lease is terminated due to fault of tenant, deposit is retainable by landlord only to extent of amount of damage actually suffered.

6. Landlord and Tenant ⇐34(2)

Where ten-year lease fixed rental at $1,000 a month or total rental for ten-year period of $120,000, and provided that as part consideration for making of lease tenant had paid landlord $12,988, $1,000 of which was for first month's rent, and provided that if tenant fully performed for nine years rent for last year would be $1,000 a month, and lease was terminated due to assignment of lease in violation of lease during fifth year of lease, the $12,988 paid by the tenant was a "bonus" for execution of lease and could not be recovered from landlord.

See publication Words and Phrases, for other judicial constructions and definitions of "Bonus".

O. Vincent Bruno, San Jose, Michael DiLeonardo, San Jose, of counsel, for appellant.

J. T. Harrington, Salinas, for respondent.

PETERS, Presiding Justice.

Plaintiff, as assignee of the tenant under a lease, brought this action against the landlord to recover $11,988 paid by the tenant to the landlord at the time of the execution of the ten-year lease, the lease having been terminated by reason of its assignment by the tenant without consent of the land-

lord in violation of a covenant in the lease. The landlord had the assignee evicted because of such breach, the tenant assigned his interest in the fund to the plaintiff, and this action was instituted. The trial court determined that the money had been paid to the landlord either as advance rent or as part consideration for the execution of the lease, and that for either or both reasons was not recoverable by the tenant or his assignee. Judgment was entered accordingly. Plaintiff appeals, his main contention being that the sum involved, under the terms of the lease, properly interpreted, was paid as a deposit to secure faithful performance of the terms of the lease, and, as such, is recoverable by the tenant or his assignee where the lease is terminated prior to its fixed term.

The property involved is a motel in Salinas. The lease provided that it was to run from November 4, 1946, to November 3, 1956. The tenant, pursuant to the terms of the lease, upon its execution, deposited $12,988 with the landlord, $1,000 of which was for the first month's rent. The lease contained a condition prohibiting its assignment by the tenant without the consent of the landlord. The tenant assigned without consent. The landlord brought an unlawful detainer action against the tenant and the assignee, based on such breach, as a result of which the lease was terminated and the assignee, who is the plaintiff in the instant action, was forced to quit the premises in January of 1951. The tenant assigned to the plaintiff all his rights in the $11,988 remaining in the hands of the landlord.

The lease contains the following pertinent clauses:

"That the Lessor, for and in consideration of rents, covenants and agreements hereinafter set forth in the part and on the behalf of said Lessees to be paid and performed, has leased and demised and by these presents does lease and demise unto the Lessees, and Lessees have leased, hired and taken and by these presents do lease, hire and take of and from the Lessor that real property situated in the City of Salinas, County of Monterey, State of California, described as follows, to wit: * * *

"To Have And To Hold the said demised premises for the term of ten years, beginning on November 4, 1946, and ending on November 3, 1956, yielding and paying therefor a cash rental in the sum of $120,000.00, payable in advance in lawful money of the United States of America, as follows, to wit: $1000.00 per month on the 4th day of each and every calendar month, beginning with November 4, 1946, and continuing to November 3, 1956; provided, however, that as part consideration for the making of this lease, the Lessees have paid to the Lessor the sum of Twelve Thousand Nine Hundred Eighty-eight Dollars ($12,988), the receipt of which is hereby acknowledged, $1,000.00 of which is to be applied as the payment of the first month's rent hereunder, and in the event that all of the conditions and agreements of this lease have been kept and performed by said Lessees up to the 4th day of November, 1955, then and in that event, the rent for the months beginning with November 4, 1955 and continuing to November 3, 1956, shall be One Dollar ($1.00) each; and provided, further, however, that as part consideration hereunder, the lease is subject and pursuant to the following terms, covenants, provisions and conditions to which each of the parties hereto has mutually and expressly agreed, and by these presents does hereby agree as follows, to wit: * * *"

Next follows a list of some twenty-six covenants, expressly made conditions. Covenant 10 provides that the landlord is empowered to terminate upon breach of any condition, and covenant 13 contains the provision against assignment without consent of the landlord.

There was no extrinsic evidence introduced on the issue of the proper interpretation of this lease. The trial court found that the $11,988 involved was an "absolute payment" made by the tenant to the landlord "as a consideration for the execution of said Lease and as prepaid rental to be applied on the last twelve months of the term of said Lease." It concluded that the fund belonged to the landlord.

[1] Both sides agree that, inasmuch as the trial court interpreted the lease without the aid of extrinsic evidence, the appel-

late court is not bound by such interpretation, but must construe the document for itself. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825.

[2–5] There is little or no dispute over the law applicable to deposits made under a lease, the difficulty being in applying that law to the terms of a particular lease. The admittedly applicable law was summarized as follows in Thompson v. Swiryn, 95 Cal.App.2d 619 at page 625, 213 P.2d 740 at page 744: "A–1 Garage v. Lange Investment Co., 6 Cal.App.2d 593, 44 P.2d 681, summarizes the nature of the monies paid upon the execution of a lease and states that they fall into four classes: (1) advance payment of rent; (2) as a bonus or consideration for the execution of the lease; (3) as liquidated damages; and (4) as a deposit to secure faithful performance of the terms of the lease." Appellant concedes that if the payment was made under the first two classes it may be retained by the landlord if the lease is terminated due to the fault of the tenant. Payments under class three are penalties, result in forfeitures, are invalid as such, and may be recovered by the tenant. Payments made under the fourth class are retainable by the landlord only to the extent of the amount of damage actually suffered.

It is the contentions of appellant that this payment was not made under the first two classes, but either under classes three or four; that the payment was merely security for the rent for the last few months of the lease, and not an absolute prepayment of such rent; that the trial court has found that the payment was both a bonus consideration and advance payment of rent; that the two categories are mutually exclusive and therefore the findings are inconsistent; that if the payment was a deposit to secure faithful performance, which he claims it was, respondent may not retain any portion of the fund because the prior judgment in the unlawful detainer action was in full satisfaction of the tenant's liability under the lease; that if the landlord is permitted to retain the amount in controversy, the result will be harsh, unfair and unreasonable; and that such an interpretation should not be favored.

The difficulty with appellant's arguments is that, under the terms of this lease, his assignor has contracted and agreed that the payment was made as part consideration for the execution of the lease and as prepayment of part of the rent for the last year. The lease fixes a total rental for the ten-year period of $120,000, payable in advance at the rate of $1,000 a month, "provided, however, that as part consideration for the making of this lease" the tenant has paid $12,988, $1,000 of which is for the first month's rent. Then it is provided that if the tenant fully performs for nine years, for the last year the rent will be $1 a month. There appears to be no ambiguity in these clauses. They provide, as clearly as language can do, that the payment is made as part consideration for the execution of the lease, and as a prepayment of the last year's rent of $12,000 in the amount of $11,988.

If cases are necessary to support this interpretation of the language used, such cases exist. In A–1 Garage v. Lange Investment Co., 6 Cal.App.2d 593, 44 P.2d 681, the lease acknowledged payment of $1,000 " 'In further consideration for the execution of this lease by lessor,' " and then provided, in the event of faithful performance by the lessee, that progressive rebates during the eight-year term and particularly towards the end of the lease should be made to the lessees. This lease was held to be unambiguous and to compel, as a matter of law, the construction that the payment was made as a bonus consideration for the execution of the lease. The case is also helpful to respondent because it held that the clause providing a rebate by way of rent credits did not interfere with the interpretation that the payment was a bonus consideration for the execution of the lease.

The cases of Ramish v. Workman, 33 Cal.App. 19, 164 P. 26, and Wood v. Hipwell, 107 Cal.App. 680, 290 P. 1040, are directly in point in favor of respondent. In those cases express credits upon the latter months of the leases " 'as a further

consideration'" (Ramish) or "'as a consideration'" (Wood) were held not to affect the character of the lump sum payments which were construed as "bonus considerations." The Ramish case reasoned that the lessees could not claim the fund in the absence of performance of the specified conditions of satisfactory performance under the lease, and distinguished cases in which the payment had been characterized by the parties as a "guaranty," "indemnity," "penalty," or "for security." See, also, Ace Realty Co. v. Friedman, 106 Cal.App. 2d 805, 236 P.2d 174.

Appellant contends that the cases of Bacciocco v. Curtis, 12 Cal.2d 109, 82 P.2d 385, and Thompson v. Swiryn, 95 Cal.App.2d 619, 213 P.2d 740, are contrary to the above discussed cases. It is true that in these cases it was held that a clause providing for credit upon the last month's rentals created an ambiguity with the consideration clauses of the leases. These leases not only provided for crediting the payment made upon future rentals, but also had clauses to the effect that upon destruction of the building the money not already applied on the rent should be refunded to the tenant. In the instant case the lease has no provision setting forth any contingency under which the tenant would be entitled to a refund of the payment. In the Bacciocco case, indeed, there was a provision for the intermediate payment of interest by the landlord upon the sum paid over by the tenant. These clauses were held to create an ambiguity with the consideration clause, in view of which extrinsic evidence was admissible to explain the ambiguity, which evidence supported the finding that the payment was made as security.

[6] The finding here that the payment was a bonus consideration for the execution of the lease is the reasonable and proper interpretation of the lease. This conclusion makes it unnecessary to determine whether the payment was an absolute prepayment of rent. But see Wetzler v. Patterson, 73 Cal.App. 527, 238 P. 1077; Pigg v. Kelley, 92 Cal.App. 329, 268 P. 463; McArthur v. Kluck, 75 Cal.App. 785, 243 P. 453. If the payment was made as a bonus consideration alone, or was also made as an absolute prepayment of rent, the tenant or his assignee cannot recover. There is no reason why the payment could not be consideration for both promises. Therefore, there is no inconsistency in the finding.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



118 Cal.App.2d 112

PEOPLE v. YOUNG.

Cr. 4894.

District Court of Appeal, Second District, Division 1, California.

May 25, 1953.

Defendant was accused by information of rape and violation of Pen.Code, § 288, and convicted on two counts of such information. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment, and defendant appealed therefrom, and, from order denying motion for new trial. The District Court of Appeal, Doran, J., held that where defendant neither objected to statements of deputy district attorney and judge, made at time of dismissal upon state's motion, of first count of information, nor moved to strike testimony relating to such count, taken before count was dismissed, nor asked court to instruct jury to disregard the remarks or the testimony, defendant could not argue for the first time on appeal that he was prejudiced by court's failure to instruct that such remarks and testimony be disregarded, as any prejudicial effect thereof could have been removed by an admonition.

Judgment and order affirmed.

1. Criminal Law ⇐1038(3)

Defendant who failed to request instruction on alibi defense at trial, could not raise such question for first time on appeal.

2. Criminal Law ⇐1037(1, 2), 1044

Where defendant made no objection to statements of deputy district attorney and judge, made at time of dismissal of one count of information upon motion of state, and failed to move that testimony previously taken, relative to such count be stricken and to ask court to instruct jury to disregard such remarks and testimony, defendant could not argue for first time on appeal that he was prejudiced by failure of court to instruct jury to disregard such remarks and testimony, as any prejudicial effect thereof could have been removed by an admonition.

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was accused by information with rape and the violation of section 288 of the Penal Code. In Count I the alleged victim was Glenda Wroten; in Counts II and III, Margaret House. Following the testimony of Glenda Wroten Count I was dismissed on motion of the district attorney. Defendant was adjudged guilty by the jury on Counts II and III.

It is contended on appeal that "The court erred in failing to instruct the jury upon the defense raised by the evidence introduced by defendant pertaining to his alibi."; and that "The District Attorney committed prejudicial error by introducing evidence on Count One."

[1] Appellant failed to request an instruction on the so-called alibi defense at the trial. In the circumstances revealed by the record it is too late to raise such a question for the first time on appeal. People v. Whitson, 25 Cal.2d 593, 154 P.2d 867.

In connection with appellant's second contention, it is argued that, "It should be here pointed out that no place in the trial transcript is it evident that the court undertook to instruct the jury to disregard the testimony of the witness Glenda Wroten. On the contrary, the record reflects that, although the count was dismissed, *the jury received no instruction concerning the testimony of the witness.* Though the error might have been cured by the Trial Judge, it was not. It thus becomes clear that the jury could not but have gained the impression that counsel for the People and the Court were both of the belief that convictions should be had on Counts II and III of the information." (Emphasis included.)

[2] This issue too is raised for the first time on appeal. Respondent's reply, which is supported by the record, is as follows:

> "The appellant here made no objection to the statements of the Deputy District Attorney or the Judge; he did not move to strike the testimony of Glenda Wroten; nor did he ask the court to instruct the jury to disregard either the remarks or the testimony. In the absence of such objection, motion and request, he cannot for the first time on appeal argue that he was prejudiced by the failure of the court to instruct the jury to disregard the remarks and the testimony, as any prejudicial effect thereof could have been removed by an admonition of the court. * * *
>
> "Further, we submit that the jury could not have gained the impression from the remarks of the Deputy District Attorney and the Judge that they both believed that convictions should be had on Counts II and III. The remarks were directed to Count I only, and the Deputy District Attorney of that count said that it was his opinion that there was not enough evidence to justify or sustain a conviction, and asked for a dismissal of that count. The court merely agreed, saying that he believed that there would have to be further evidence to sustain a conviction and warrant submitting the matter to the jury. Surely the jury could only have received the impression from the statements that it was up to them to decide whether a conviction should be had or not, on any

count, but that as to Count I there was no evidence upon which they could find him guilty."

The judgment and order are affirmed.

WHITE, P. J., concurs.



118 Cal.App.2d 106

PEOPLE v. COWEN.

Cr. 2873.

District Court of Appeal, First District, Division 2, California.

May 25, 1953.

Petition for writ of error coram nobis. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, First Appellate District, Dooling, J., held, inter alia, that the contention of entrapment could have been considered on motion for new trial or on appeal, and therefore, was not to be considered on petition for writ of error coram nobis.

Affirmed.

1. Criminal Law ⇐997

Contention that dismissal of second count of information, which was followed by accusation of two prior convictions, also dismissed prior convictions so that they should not have been considered in connection with first count of information could have been considered on motion for new trial or on appeal, and were therefore not to be considered on petition for writ of error coram nobis.

2. Criminal Law ⇐997

Alleged entrapment could have been considered on motion for new trial or on appeal, and therefore would not be considered on petition for writ of error coram nobis.

3. Criminal Law ⇐997

Contention that confiscation proceeding against automobile for unlawful transportation of marijuana was had without notice to automobile owner and by fraud of arresting officers and district attorney and that such proceeding constituted double jeopardy in view of prior prosecution of owner for possession of marijuana should have been raised in civil confiscation proceeding and would not be considered in proceeding on petition for writ of error coram nobis.

4. Criminal Law ⇐997

In proceeding on petition for writ of error coram nobis, evidence was insufficient to support contention that petitioner's counsel had practiced fraud on petitioner by failing to file notice of appeal after advising petitioner that such action would be taken.

5. Criminal Law ⇐997

Even if counsel for petitioner seeking writ of error coram nobis had failed to perfect appeal from judgment of conviction after advising petitioner that appeal would be taken, such action would not constitute that type of factual error or omission which could be reviewed on writ of error coram nobis, in view of fact that it was not such as would have prevented verdict of guilty or would have prevented a valid trial if known at time of trial.

Thomas F. Poggi, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appeal from an order denying a petition for a writ of error coram nobis. Appellant was tried and convicted of possession of marijuana, a second count of transportation having been dismissed. Two priors, also charged, were found to have been on appellant's record. No appeal was taken from the judgment of conviction.

The petition filed below is scattered with innumerable charges of fraud, collusion, lack of evidence, lack of due process, etc., all of which are but conclusions and find no support in any record on this appeal. There are allegations of fact in the petition which can be outlined as follows: (1) Count II of the information was dismissed, and since it was followed by accusation of two prior convictions it was improper to consider the priors at all, the thought being that the charges of priors were thereby dismissed also; (2) that a confiscation proceeding against petitioner's automobile was had without notice to him and by fraud of the arresting officers and the district attorney and that it constituted double jeopardy; (3) there was evidence at the trial of an entrapment of the arresting officer where it was shown that he masqueraded as a druggist and bought marijuana from petitioner; (4) that his trial counsel failed to perfect an appeal from his judgment of conviction after advising him that such action would be taken. The appeal is based on these four allegations.

[1–3] It is clear that any error coming within the first and third allegations stated above could have been considered on a motion for new trial or on an appeal and are therefore not to be considered on a petition for a writ of error coram nobis. In re Rogers, 91 Cal.App.2d 394, 205 P.2d 667. As to the second allegation, that is a matter that should have been brought up in the civil confiscation proceedings. It has nothing to do with this action.

[4, 5] As to the last allegation, there is no evidence in the record that petitioner's counsel practiced any fraud on him by failing to file notice of appeal. Even if this were thought to be extrinsic fraud, as it is characterized by appellant, it is not that type of factual error or omission which can be reviewed on a writ of error coram nobis. It is not a fact that, if known at the time of trial, would have prevented the verdict of guilty or prevented a valid trial, In re Rogers, supra, 91 Cal.App.2d 394, 205 P.2d 667; People v. Tuthill, 32 Cal.2d 819, 198 P.2d 505; People v. Pryor, 87 Cal.App.2d 352, 196 P.2d 948, and is not reviewable by this type of writ, People v. Bailey, 91 Cal. App.2d 578, 205 P.2d 418.

The appeal is presented for the appellant by counsel appointed by the court at appellant's request. He has presented the arguments, as is his duty to his client, but he has been unable to find authority to support them.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.



RECORD MACHINE & TOOL CO. v. PAGEMAN HOLDING CORP.*

Civ. 19414.

District Court of Appeal, Second District, Division 2, California.

May 26, 1953.

Rehearing Denied June 15, 1953.

Hearing Granted July 22, 1953.

Buyer brought action against seller for declaratory relief, for an accounting, and to require seller to convey title to property under conditional sales contract. The Superior Court of Los Angeles County, Leon T. David, J., entered judgment adverse to seller, and seller appealed. The District Court of Appeals, McComb, J., held that tender which had been made by the buyer to seller was valid.

Judgment affirmed.

1. Tender ⇐15(1)

When a tender is made and refused, reasons for rejection must be specified. Civ.Code, § 1501.

2. Tender ⇐21

In rejecting tender, one to whom tender was made, necessarily admits knowledge of it and arrangements proposed.

3. Tender ⇐15(3)

One objecting to a tender must specify the objections, or they are waived. Civ.Code, § 1501; Code Civ.Proc. § 2076.

* Subsequent opinion 266 P.2d 1.

4. Patents ⇐197
Vendor and Purchaser ⇐170

Where plaintiff and defendant entered into conditional sales contract by terms of which defendant agreed to sell to plaintiff certain realty and personalty and five United States letters patent, it was legal and proper for plaintiff to make tender depend on concurrent delivery of instruments of title by defendants. Civ.Code, §§ 1439, 1498.

5. Patents ⇐203
Vendor and Purchaser ⇐170

Where plaintiff, who had entered into conditional sales contract with defendant by terms of which defendant agreed to sell plaintiff certain realty and personalty and five United States letters patent, in writing offered to pay full amount of unpaid balance due under contract, and stated that for such purpose an escrow had been opened at certain bank and that bank had been instructed to pay defendant principal and interest due, tender was valid, though performance of plaintiff depended on making loan proceeds available, and though such proceeds were not available unless defendant deposited deed to realty. Civ.Code, §§ 1439, 1485, 1489, 1491, 1493, 1495, 1498, 1501, 1655, 1761, 1762; Code Civ.Proc. § 2076.

6. Vendor and Purchaser ⇐266(1)

Where, under conditional sales contract, purchaser had right to tender entire balance due for realty, and vendor held legal title as security to assert its vendor's lien, refusal by vendor of valid tender by purchaser released land from any further claim by vendor, who was remitted to action for purchase price. Civ.Code, §§ 3046, 3050.

7. Sales ⇐202(1)

A valid tender by buyer to seller immediately vests title in buyer to all chattels to be conveyed.

8. Declaratory Judgment ⇐386

In action for declaratory relief, for an accounting, and to require conveyance of property covered by conditional sales contract, trial court, in order to avoid further litigation, would, as far as possible, order method of completing performance under the contract.

Max Tendler and Olin N. MacKay, Los Angeles, for appellant.

Fred N. Howser, Arcadia, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for (1) declaratory relief, (2) an accounting, and to require defendant, in accordance with the terms of a contract with plaintiff to convey title to certain property, to deposit in an escrow the necessary documents, in compliance with the terms of such contract, defendant appeals.

In April, 1946, plaintiff and defendant entered into a conditional sales contract by the terms of which defendant agreed to sell to plaintiff certain real and personal property; also five United States letters patent, for the sum of $100,000, payable as follows: "The sum of Ten Thousand Dollars ($10,000.00) upon the execution of this agreement, the receipt of which is hereby acknowledged (same having been paid under option to purchase), and the sum of One Thousand Dollars ($1,000.00) or more plus interest at the rate of four percent (4%) per annum upon the unpaid balance on the first (1st) day of each and every month commencing on the first (1st) day of June, 1947, and continuing until the full amount of the purchase price has been paid."

Plaintiff in due time, not being in default under the terms of his contract, offered to pay the balance due and demanded performance by defendant. Defendant has failed to perform and in fact is unable to deliver part of the material consideration for the contract as will hereinafter appear.

The Honorable Leon T. David, the trial judge, prepared and filed an opinion which fully sets forth the facts, defendant's contentions on appeal and the law applicable thereto. Since we have reached the same conclusions as the learned trial judge no

useful purpose would be served by our rephrasing the opinion prepared by Judge David. Therefore we adopt the same with minor modifications:

"On or about August 23, 1951, plaintiff purported to make a tender in full payment and satisfaction of its then existing obligation under a contract with defendant entered into on April 16, 1947, demanding performance by the defendant.

"As of that date, and now, the defendant corporation was not the owner of the letters patents #2133022, 2151347, 2151348, 2155040 and 2215264. Although in a position to speedily acquire the others, it is established that prior to the date of the contract and ever since, the exclusive license to manufacture, use and sell drill bits under patent 2133022 had been ceded away to another, and defendant cannot be or at least has not been, able to perform. The defendant is in a position to make the required conveyances, etc. otherwise.

"Because of such disability to perform, plaintiff seeks a declaration of its rights, pointing out that further payments by it under the contract will damage it, since defendant will not be able to perform when payments are made in entirety. Likewise, it is prayed that an accounting be had to determine the balance due; that defendant be ordered to deposit in escrow the necessary documents required for performance, to be delivered to plaintiff when plaintiff pays such balance into escrow.

"It then is claimed that $5,000 is due to plaintiff, as damages due for a lost opportunity for sale of a lathe by failure of defendant to convey title on the tender; and by failure to perform under the tender plaintiff has lost $120 day rentals for machinery from September 14, 1951, to date. Under the contract of April 16, 1947, on or about September 5, 1951, the plaintiff owed defendant $26,524.33. Since that date, the principal was reduced by payments of $5,000 and $2,000 more since the trial began. On the face of the instrument, $19,524.33 still is owing. On or about September, 1951, the plaintiffs learned that the defendant corporation did not own letters patent #2133022 and the other dependent patents concerned in the agreement, contrary to the assertions of the agreement; and while the ownership of the letters themselves, except as to #2133022 might readily be obtained by defendant; it conclusively appears that from a date prior to the execution of the agreement, the ownership of the basic patent #2133022 was and is now shared by several individuals; and, moreover, the grant of the 'exclusive license to manufacture, use and sell rotary bits and tools in accordance with the inventions and claims set forth' for the life of the conditional sales contract is rendered nugatory, and the assignment of the patents 'free and clear of any liens or encumbrances' upon full performance by plaintiffs is apparently conceded to be impossible by defendant. This arises out of the fact that such exclusive license rests in one Koontz, who also apparently owns 24% of the patent in question. Two witnesses have testified that in their opinion the patent rights involved are of considerable value.

"Under these circumstances, plaintiffs ask for a declaratory judgment: that defendant is not entitled to further payment unless and until it demonstrates its ability to convey the rights in question by depositing in escrow the agreements required, concurrently with a tender by plaintiff of any balance found due.

"Continued payments, under the contract it is urged, may work to damage of the plaintiff, if at the end of the period the defendant is unable to perform.

"The court finds that as of September 5, 1951, plaintiff owed defendant $26,524.33 for principal and interest on the contract. On or about August 22, 1951, plaintiff in writing offered 'to pay the full amount of the unpaid balance', and stated that for this purpose an escrow had been opened at the Bank of America and that the escrow holder had been instructed to pay defendant $26,549.18 as the principal and interest to September 5, 1951.

"Demand was made that the defendant deliver the deeds, conveyances, title insurance policies, transfers and assignments called for under the terms of the contract on or before September 5, 1951, to the

escrow holder, with directions they be delivered concurrently with the payment to them of the unpaid balance.

"The plaintiff paid all escrow charges and advised defendant thereof.

"Asserting that it could perform (though it now is certain it could not, and that fact was known to its attorney and to Mr. Pageman, individually and as corporate president) the defendant refused to proceed.

[1, 2] "The basic issue relates to the tender, since defendant claims it legally was insufficient. When a tender is made and refused, it is required the reasons for rejection be specified. (Civil Code, Sec. 1501.) In rejecting the tender, the defendant necessarily admits knowledge of it and of the arrangements proposed.

"On the trial, defendant contended

"(a) the vendor did not agree to handle the concurrent exchanges through escrow, nor did it agree to the escrow holder;

"(b) the arrangement went beyond reasonable requirements;

"(c) the vendor did not waive objections to these requirements;

"(d) since the payment proposed was in part to be derived from a loan on the realty required to be conveyed to the plaintiff, the tender was of unavailable funds;

"(e) the payment was not made by mail to the vendor;

"(f) the amount tendered was insufficient.

"No counter directions were given but it was indicated that if plaintiff wished to make any arrangements under an escrow holder satisfactory to the Pageman Holding Corporation it 'will give such matter consideration', but that it would perform in accordance with the 'full tenor' of the conditions of the conditional sales contract.

"It appears that at all times the defendant was, and still is, unable to assign to plaintiffs Patent #2133022, 'free and clear of any liens or encumbrances,' and that defendant was not, and is not now the owner of any of the patents to be assigned, though R. A. Pagemen, their owner in whole or in part, individually is willing to make assignments of his interests. The court concludes that defendant at the time of its rejection of the tender, was not able to perform, and that this was the underlying and unexpressed reason for rejection of the tender.

"At all times during the contract to date, the court finds that the defendant is and was in default in that it could not and did not in fact give plaintiff the exclusive license to manufacture the articles covered by said letters patent.

[3] "The law requires one objecting to a tender to specify the objections, or they are waived. (Civ.Code, Sec. 1501; Code Civ.Proc., Sec. 2076.) The offer conforms to Civil Code, section 1485, in the intent to extinguish the obligation; the question then becomes: was the offer in conformity with the rules prescribed?

[4] "It was not an offer of partial performance, (Civ.Code, Sec. 1486); it was made by the debtor or by some person on his behalf and with his assent, (Civ.Code, Sec. 1487); it was made to the creditor (Civ.Code, Sec. 1488); it was made at a proper time, (Civ.Code, Sec. 1491); and was made in good faith (Civ.Code, Sec. 1493). It was legal and proper to make the offer depend on the concurrent (Civ. Code, Sec. 1439) delivery of instruments of title by the defendant (Civ.Code, Sec. 1498), and in this connection, as the ordinary incident to a transaction of procuring a policy of title insurance, the defendant would first have to tender the deed, the plaintiff's payment being held in abeyance until the policy was produced. So far as this real estate transaction was involved, this procedure would follow as an ordinary, customary and usual incident of such a transaction. (Civ.Code, Sec. 1655.)

"The plaintiff must have been able and willing to perform according to his offer. (Civ.Code, Sec. 1495.) The court is satisfied that had the defendant proceeded as indicated, plaintiff was able, as well as willing; even though this depended on making loan proceeds available, not available unless the defendant deposited the deed to the realty. (Russell v. Ramm, 200 Cal. 348, 254 P. 532; McCabe v. Jones, 141 Wis. 540, 124 N.W. 486; Rosenblatt v.

Bergen, 202 App.Div. 220, 195 N.Y.S. 276; Walton v. Hudson, 82 Ohio App. 330, 79 N.E.2d 921, 925.)

"The code prescribes where the offer of performance may be made. (Civ.Code, Sec. 1489.) The offer itself was delivered to the creditor, at the place specified for payments. The defendant asserts the *performance* was to be by mail to the address specified. Such a direction given as to executory payments does not necessarily govern the final performance by the defendants which involves much more than payment, i. e. the transfer of the documents of title concurrently with the money. The tender of payment was made to the address designated in the contract.

"The defendant, in rejecting the tender, did not specify the terms he required (Code Civ.Proc. § 2076) except as to the amount as to which it was in error; and as to the *mail* payment, and refusal to proceed concurrently, it also was in error. It did not object to going to escrow, but only to this escrow; but it did not say it would open an escrow or give directions for one. It never did.

"It must be borne in mind this was a *tender,* not a *deposit,* (both of which seem to be confused in Wuchner v. Goggin, 9 Cir., 175 F.2d 261.)

"Certain of the items covered in the transaction were personalty. It is the duty of the seller to deliver the goods, and a fortiori, to deliver the instruments of title (Civ.Code, sec. 1761) and the payment and delivery are concurrent conditions (Civ. Code, sec. 1762), to be made at the place of delivery of the goods which, in this case, was at the plaintiff's place of business; and as the escrow holder is the agent of the buyer, the bank constituted the buyer's designated place of business for this purpose.

[5] "We conclude the tender was valid. (Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 P. 82, citing Civ.Code. secs. 1496, 1498; Hunt v. Mahoney, 82 Cal.App. 2d 540, 543, 187 P.2d 43; Hind v. Oriental Products Co., 195 Cal. 655, 665, 235 P. 438; Kofoed v. Gordon, 122 Cal. 314, 318, 54 P. 1115; Walker v. Houston, 215 Cal. 742, 745, 12 P.2d 952, 87 A.L.R. 937.)

"What was the effect of the tender?

"a. *Realty*

[6] "As to the realty, defendant held the legal title as security to assert his vendor's lien. (Civ.Code, secs. 3046, 3050.) Under the contract, the plaintiff had a right to tender the entire balance due, and upon refusal of a valid tender, the land is released from any further claim by the vendor, who is remitted to the action for the purchase price. (Haile v. Smith, 113 Cal. 656, 45 P. 872; Cf. Lichty v. Whitney, 80 Cal.App.2d 696, 182 P.2d 582; Civ.Code, sec. 1498.) The present contract permitted the payment of the entire amount due at any time. The principle announced in Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.,N.S., 338, and similar cases since is inapplicable.

"b. *Personalty*

[7] "A valid tender immediately vests title to all chattels to be conveyed in the purchaser. (Walker v. Houston, 215 Cal. 742, 745, 12 P.2d 952, 87 A.L.R. 937.)

[8] "To avoid further litigation, as far as possible, this court may order the method of completing performance under the contract. (Rolapp v. Fed. Bldg. etc. Ass'n, 11 Cal.App.2d 337, 53 P.2d 974.)"

Defendant's contention that it was reversible error for the trial court not to make a finding as to the value of the patent No. 2133022, which it is conceded defendant would be unable to assign to plaintiff, is without merit for the reason that the trial court in fact in the judgment made a finding relative to its value. The judgment says: "That in as much as damages alleged by the plaintiff are not proved with sufficient certainty and particularity, the plaintiffs take nothing on such claims in the present action for declaratory relief."

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

118 Cal.App.2d 66

MILLER v. INTERNATIONAL UNION OF OPERATING ENGINEERS et al.

Civ. 19314.

District Court of Appeal, Second District, Division 3, California.

May 22, 1953.

In proceedings brought to test propriety of order suspending plaintiff from membership in unincorporated labor association, the Superior Court, Los Angeles County, Philbrick McCoy, J., made a determination adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence justified association's board's finding that plaintiff had violated union's constitution.

Affirmed.

1. Declaratory Judgment ⇐366

In action for declaratory relief, damages, and annulment of order suspending plaintiff from membership in voluntary unincorporated labor association, question before trial court was whether general executive board had acted within its powers, in good faith, and in accordance with laws of association and the law of the land.

2. Labor Relations ⇐92

Constitution and by-laws of unincorporated labor association defined and measured relations between association and its members with respect to all internal affairs and constituted a contract binding upon both.

3. Labor Relations ⇐111

If trial culminating in suspension order was properly conducted by unincorporated labor association in absence of accused member, he would be deemed to have waived any objection to receipt of hearsay evidence at such trial.

4. Labor Relations ⇐119

In proceedings brought to test propriety of order suspending plaintiff from membership in unincorporated labor association, reviewing court could not re-weigh evidence or substitute its judgment for that of association's board if findings of board had substantial support in evidence.

5. Declaratory Judgment ⇐345

In proceedings brought to test propriety of order suspending plaintiff from membership in unincorporated labor association, evidence justified association's board's finding that plaintiff had violated union's constitution.

6. Declaratory Judgment ⇐345

In proceedings brought to test propriety of order suspending plaintiff from membership in unincorporated labor association, evidence would not sustain plaintiff's contention that he had not been given opportunity to confront witnesses against him before association's board and to be heard in his own defense; nor would it sustain plaintiff's contention that trial had not been conducted before an impartial board.

Aaron Sapiro, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, Raymond G. Stanbury, White McGee, Jr., Los Angeles, for respondents.

SHINN, Presiding Justice.

At the time of the occurrences which brought about this litigation, plaintiff was member of Local Union No. 12 of the International Union of Operating Engineers, an unincorporated association, a local subdivision of "The International Union of Operating Engineers," also an unincorporated association. The general offices of the parent association were in Washington, D. C. The membership of the local consisted principally of residents of Southern California and Southern Nevada. Since 1939 the parent association had been in control and management of the affairs of the local, through a supervisor appointed by the general president. A movement was under way to gain autonomy for the local, and in this effort plaintiff and five other members, hereinafter mentioned, were active. Appellant and the five other members published an occasional newspaper called "Autonomy News" which was distributed among some 10,000 members, contractors and others. Complaint was filed with the general executive board of the parent association charg-

ing the six members with having published articles defamatory of the general president. The national board took notice of the complaints and charges as acts in violation of the constitution of the Union. In a trial in the Drake Hotel in Chicago the accused were found guilty and, upon findings made, sentence was imposed that they be fined $450 each and be suspended from membership for six years; providing that if they should promptly pay the fines and dues as they accrued the sentences would be suspended, but without right of the accused to attend meetings or participate in nominations, elections or other internal affairs of the Union. Plaintiff brought this action against the two Unions and numerous of their officers and agents, seeking declaratory relief, annulment of the order, and damages. A prior action brought by a member for the same purpose had been tried and findings and judgment rendered therein in favor of defendant. In the trial of the instant action testimony given at the former trial, consisting only of the testimony of the general counsel of the parent Union, was introduced under stipulation. The findings in the former action, with a minor exception, were made the findings in the present action, by stipulation. Plaintiff did not appear at the Chicago trial and he did not introduce any evidence in the trial in the court below. Correspondence to which we shall refer, consisting of letters passing between plaintiff and his associates and the general secretary-treasurer, were attached to the complaint.

[1, 2] The question before the trial court was whether the general executive board acted within its powers, in good faith, in accordance with the laws of the Union and the law of the land. Smith v. Kern County Medical Association, 19 Cal. 2d 263, 120 P.2d 874; Davis v. Int. Alliance, etc. Employees, 60 Cal.App.2d 713, 141 P.2d 486. The constitution and by-laws of the Unions defined and measured the relations between the Union and its members with respect to all internal affairs and constituted a contract binding upon both. Dingwall v. Amalgamated Ass'n, 4 Cal.App. 565, 88 P. 597.

The trial court found that the general executive board acted within its constitutional powers, in good faith, and plaintiff and his associates were not deprived of the benefit of due process. The complete evidence that was before the general executive board was not produced at the trial in the instant case, but the evidence that was produced was ample to furnish a sound basis for the findings of the board.

Under Article XVI, § 1 of the constitution, any member was subject to discipline for publishing or circulating any literature defamatory of a candidate for office, or an officer, and was triable before the general executive board. Under Article V, § 7, the board could hold hearings and its findings of facts were final, conclusive and binding; the board had full power to determine the method of procedure and the times and places for holding hearings, trials and appeals.

The substance of the charges against the six members consisted of the publication and circulation of editions of the "Autonomy News" containing reprints from magazine articles, as to which the board found as follows: "That the said defendants published and circulated in said newspapers false and slanderous articles imputing to the General President acts of personal and official dishonesty, such as holding office for personal gain and illegally mulcting contractors; also imputing acts and allusions to so-called 'racketeering,' 'bad practices,' and 'criminal associations' by the General President. It is clear that the defendants intended to smear, defame and degrade not alone the person but the office as well, of the General President as is definitely shown by the clever manner in which the defendants cut out certain magazine articles and magazine photographs and re-assembled them in a composite photograph published by them in their issue of June 9, 1950, which composite photograph induced and was intended to induce the casual reader to believe an association existed between the General President and the notorious Capone and otherwise wrongfully and unfairly vilified, slandered and defamed him."

Plaintiff's points on the appeal may be stated as follows: (1) That the board received hearsay evidence consisting of letters and affidavits; (2) plaintiff was entitled to a trial in Los Angeles; (3) he had a right to bring to the attention of the members of the Union anything that was true in fact and of interest to them as members; (4) he was not tried before an impartial board; (5) he was entitled to a trial separate from the trial of the others who were jointly accused; and (6) that the board made one finding against him which is admitted to be untrue and the result of mistake.

[3–5] There is no merit in the claim that the decision of the board was subject to annulment merely because hearsay evidence and affidavits were considered. One answer to the claim is that the record merely shows that affidavits were used and does not disclose their contents. Another is that if the trial was properly conducted in the absence of the accused, plaintiff must be deemed to have waived any objection to the receipt of hearsay evidence. Fox v. San Francisco Unified School Dist., 111 Cal.App.2d 885, 245 P.2d 603; Smith v. Kern Co. Medical Association, supra, 19 Cal.2d 263, 120 P.2d 874. Moreover, the trial court found that the acts with which the accused were charged, and which are substantially admitted here by the pleadings, constituted violations of the constitution of the Union. The published articles were in evidence before the board and, of themselves, furnished substantial evidence to justify the findings of the board. Where the findings of the board have substantial support in the evidence, a reviewing court may not re-weigh the evidence or substitute its judgment for that of the board. Bush v. International Alliance, 55 Cal.App.2d 357, 363, 130 P.2d 788.

[6] The constitution did not give plaintiff the right to be tried in Los Angeles. It was within the discretion of the board under the constitution to hold the trial in Chicago. The accused were notified by letter of October 18, 1950, that a trial would be held November 14th. They demanded a trial in Los Angeles and they were informed by the general secretary-treasurer that if they attended the trial in Chicago their reasonable expenses would be approved and paid. Through their spokesman they replied, demanding payment of their expenses of travel and while in attendance upon the hearing, and also their wages during the time they would be away from work. They were then requested to select two of their number to appear at the trial as their representatives and provision was made by the secretary for two airplane tickets for the representatives to be selected. This procedure was rejected by the members. The hearing was postponed from November 14th to November 16th for the appearance of some representatives, but no appearance was made and the hearing was had on the 16th. The board found that the demands of the accused were unreasonable, that they had acted in bad faith and had no intention of attending the trial. Under these circumstances the contention that the accused were not given an opportunity to confront the witnesses and to be heard in their defense cannot be sustained.

Plaintiff says that he had a right to bring to the attention of the members the truth as to facts which were of interest to them. He does not deny that he participated in the publication and circulation of literature which was defamatory of the general president. It was defamatory, even if true, but plaintiff did not at any time attempt to prove the truth of the published articles.

There is no merit in the contention that the trial was not before an impartial board. The general president, being the only one defamed, did not participate in the proceedings.

It was within the discretion of the board to try the accused jointly where none of them appeared and demanded a separate trial. They were all charged with the same offense, and plaintiff's complaint that evidence introduced only against some of his associates might improperly have been considered as evidence against him, is purely imaginary. Moreover, if plaintiff had appeared at the hearing and requested a separate trial the request might have been granted. There is no merit in the claim that he was improperly tried jointly with the others.

Due to mistake, the board made a finding that plaintiff was the author of certain articles of which another member was the author, and that the initials R R M denoted a title, "Rabble Rouser Miller," which plaintiff had assumed. Plaintiff claims that this error was sufficient to invalidate the decision. Although the articles are not contained in the record, it does appear that they did not constitute the defamatory literature upon which the charges were founded. The evidence before the board sustained those charges and the findings thereon justified the decision.

The judgment from which the present appeal was taken is, in our opinion, the only one that could properly have been entered upon the pleadings, the evidence and the stipulations.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 59

SCHOUTEN v. CRAWFORD et al.

Civ. 19411.

District Court of Appeal, Second District, Division 2, California.

May 22, 1953.

Rehearing Denied June 17, 1953.

Hearing Denied July 15, 1953.

Action for damages arising out of automobile collision at street intersection. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment on a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Fox, J., held that the evidence was sufficient to support implied finding that plaintiff was negligent in entering intersection and that such negligence proximately caused or contributed to collision.

Judgment affirmed.

1. Automobiles ⇐244(43, 58)

Evidence that defendants' automobile was in crosswalk when plaintiff's automobile approaching from the right was 50 to 60 feet from intersection was sufficient to support implied finding that plaintiff was negligent in entering intersection and that such negligence proximately caused or contributed to collision.

2. Appeal and Error ⇐1001(1)

Jury's verdict, supported by substantial evidence, is conclusive on appeal.

3. Automobiles ⇐226(1, 2)

Motorist could not recover for damages arising out of collision at street intersection which was caused or contributed to by his own negligence in entering intersection.

4. Appeal and Error ⇐994(2), 1003

The credibility of witness and weight to be given his testimony were questions for jury, in absence of showing that such testimony came within the rule of inherent improbability.

5. Evidence ⇐588

Mere fact that testimony of passenger in defendants' automobile involved in collision with plaintiff's automobile at street intersection was in conflict with testimony of defendant driver, being more favorable to defendant driver than his own testimony, was not sufficient to invoke rule of inherent improbability as to testimony of passenger.

6. Automobiles ⇐242(7)

In action for damages arising from automobile collision, plaintiff had the burden of proving that collision was caused solely by negligence of driver of defendants' automobile.

7. Automobiles ⇐244(40)

Where evidence merely shows that plaintiff has failed in his proof that collision was caused solely by negligence of driver of defendant's automobile, a determination that accident was unavoidable is proper.

8. Automobiles ⇐246(57)

Where evidence in action for damages arising out of automobile collision at street intersection was conflicting on question of negligence of driver of defendants' automobile and problem was complicated by presence of sand on pavement in intersec-

tion, instruction on unavoidable accident was properly given.

9. Appeal and Error ⇐216(2)

Where jury during course of deliberations requested that instruction on unavoidable accident be read to it and plaintiff did not suggest any qualification of instruction or that other instructions on subject of negligence be read, plaintiff could not complain on appeal of repetition of such instruction without qualification and without repetition of other instructions on negligence.

10. Negligence ⇐141(9)

Evidence of plaintiff's negligence, placing him in position of danger from which he could not escape by exercising ordinary care, whether because of physical impossibility or total unawareness of danger, and evidence that defendant knew of plaintiff's dangerous situation and knew, or in exercise of ordinary care should have known, that plaintiff could not escape therefrom, that defendant had last clear chance to avoid accident by exercising such care, but failed to do so, and that plaintiff was injured as proximate result of such failure, justifies instruction stating last clear chance doctrine.

11. Automobiles ⇐246(58)

Refusal to instruct on last clear chance doctrine in action for damages arising out of automobile collision at street intersection was not error, in absence of substantial evidence that after defendant discovered plaintiff's perilous situation defendant had a clear chance to avoid collision by exercise of ordinary care or that he failed to exercise such care.

12. Automobiles ⇐227(5)

Plaintiff was not in a position of danger within meaning of last clear chance doctrine until he arrived at a point in intersection at which he could no longer stop or reduce or accelerate speed of automobile in time to avoid collision with defendants' automobile entering intersection from the left, though driver of defendants' automobile saw plaintiff a substantial distance from intersection.

13. Automobiles ⇐244(59)

Evidence as to relative speed and positions of automobiles entering intersection, presence of sand on pavement, sudden acceleration of speed by plaintiff and grade of street established that defendant had no clear chance to avoid collision by exercise of ordinary care or that he failed to exercise such care.

14. Automobiles ⇐244(5, 59)

In action for damages arising out of automobile collision at street intersection, evidence was sufficient to warrant application of sudden peril doctrine in favor of defendants, but was insufficient to invoke last clear chance doctrine in favor of plaintiff.

15. New Trial ⇐56

Where jury concluded that plaintiff was not entitled to recover for injuries sustained in automobile collision, misconduct of juror in checking on value of evidence as to character and extent of plaintiff's injuries and reliability of witnesses who testified on such matters was not prejudicial and denial of plaintiff's motion for new trial on ground of such misconduct was not abuse of discretion.

16. Trial ⇐317

Failure of plaintiff to move for a mistrial when alleged misconduct of juror in checking on value of evidence as to character and extent of plaintiff's injuries and reliability of witnesses who testified on such matters was drawn to counsel's attention before jury returned its verdict and statement that it was undoubtedly within approval of both counsel that jury was sent back for further deliberation constituted waiver by plaintiff of any right to later complain of such misconduct.

Arthur Garrett, Lewis Garrett, Los Angeles, for appellant.

Sampson & Dryden, Robt. E. Moore, Jr., Los Angeles, for respondents.

FOX, Justice.

This action arose out of an automobile collision in the intersection of Winona

Avenue and Lincoln Street in Burbank, California. The accident occurred at about 7:30 a. m., on November 15, 1950. Plaintiff was driving east on Winona, which is 42 feet in width. Defendant Petrone was driving south on Lincoln, which is 38 feet wide, in a Chevrolet which was registered to defendant Crawford. Henry L. Graham was a passenger with Mr. Petrone. The Chevrolet hit plaintiff's car at the left rear wheel and spun it around twice; it stopped against the curb close to the southeast corner of the intersection. A police officer, who was at the scene immediately following the accident, placed the point of impact at 12 feet from the west pedestrian crosswalk and 15 feet north of the south crosswalk. The collision thus took place in the southwest quadrant. The intersection was paved but the north portion of Winona east of the intersection was unpaved and sandy. There were 24 feet of skid marks made by the Chevrolet, starting at the south side of the north crosswalk. An automotive engineer, who was at the scene at 2:00 p. m. on the day of the accident, testified that it had rained a day or two before and "there was a great deal of sand on a portion of the highway." The depth of the sand "varied considerably * * *. Near the edges it was thinner. * * * there was some portion of it where there was lots about two inches high, gradually less and less. * * *" The sand, however, was dry and fine. The skid marks "went through the light part at first, then through the deeper part, and then again the light part." Defendant Crawford arrived soon after the collision. He testified that there was sand "in the immediate intersection" where the skid marks were; that it "more or less feathered out * * * from the intersection."

As not infrequently happens in accident cases, the testimony of the eye-witnesses is in sharp conflict. Plaintiff testified that as he entered the intersection he was going between 15 and 20 miles an hour and observed the Chevrolet "about 70 feet or so" north of the intersection traveling at about 35 or 40 miles an hour. He did not put on his brakes but increased his speed in an effort to avoid the accident.

On the other hand, Mr. Graham, who was riding with defendant Petrone, testified that when they reached the intersection Petrone "all of a sudden * * * hit the brakes hard"; that he looked to the right and saw plaintiff's car traveling at a considerable speed which he estimated at 35 miles an hour at the time of the impact; that the Chevrolet was "at the intersection first"; that when the Chevrolet was in the north crosswalk plaintiff's car was 50 to 60 feet from the west crosswalk.

Defendant Petrone testified that when he was just a little past a signpost marked "School" which was some distance north of the intersection, he observed plaintiff's car approaching the intersection. He put his foot on the brake but did not apply it until the front end of his car was past the north boundary of the intersection. At that time plaintiff was right in front of him and he slid into him. Defendant Petrone also testified that the impact was south of the center line of Winona, and that the left front wheel of his car was about five feet west of the center line of Lincoln when the collision occurred.

The investigating officer testified that plaintiff told him he was traveling "at 20 to 25 miles per hour as he was entering the intersection."

The jury returned a verdict for the defendants. Plaintiff appeals from the ensuing judgment.

[1–3] Plaintiff's first contention is that the judgment is not supported by substantial evidence. In this he is in error. The testimony of passenger Graham that the Chevrolet was in the north crosswalk when plaintiff was 50 to 60 feet from the intersection furnishes ample support for an implied finding that plaintiff was guilty of negligence in entering the intersection and that such negligence proximately caused or contributed to the accident. Having found substantial evidentiary support for the jury's verdict, we need not pursue the question of the insufficiency of the evidence further. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183. Hence, under established law, plaintiff was not entitled to recover.

[4, 5] Plaintiff attacks the testimony of Graham as unworthy of belief. His credibility and the weight to be given his testimony was, of course, a question for the jury's determination in the absence of a showing that his testimony comes within the rule of inherent improbability. No such showing is made. The most that can be said is that there is a conflict between his testimony and that of defendant Petrone. This is not sufficient to invoke the rule of inherent improbability. Peterson v. Peterson, 74 Cal.App.2d 312, 318–319, 168 P.2d 474; Hansen v. Bear Film Co., 28 Cal.2d 154, 183–184, 168 P.2d 946.

Plaintiff argues that it was error to instruct the jury on unavoidable accident and to repeat this instruction at the jury's request during the course of their deliberations without qualification and without again reading the other instructions on negligence.

[6–8] Plaintiff had the burden of proving that the collision was caused solely by the negligence of the driver of the Chevrolet. This, of course, would exclude unavoidable accident. "* * * a determination that an accident was unavoidable is also proper where the evidence merely shows '* * * that the plaintiff has failed in his proof' ". Parker v. Womack, 37 Cal.2d 116, 122, 230 P.2d 823, 826. Here there was a conflict in the evidence on the question of defendant Petrone's negligence. The problem was somewhat complicated by the presence of sand in the intersection. It was, therefore, entirely proper to give the instruction on unavoidable accident. Parker v. Womack, supra; Sherillo v. Stone & Webster Eng. Corp., 110 Cal. App.2d 785, 791, 244 P.2d 70.

[9] The jury, upon its return into court, only requested that the instruction on unavoidable accident be read. Plaintiff did not suggest any qualification thereof or that other instructions on the subject of negligence be read. He may not, therefore, complain on appeal. Sherrillo v. Stone & Webster Eng. Corp., supra, 110 Cal.2d at page 789–790, 244 P.2d 70.

[10] Plaintiff argues also that the court erred in refusing to give an instruction on the last clear chance doctrine. "An instruction stating the doctrine is proper when there is evidence showing: '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' " Daniels v. City & County of San Francisco, 40 Cal.2d 614, 255 P.2d 785, 788. To warrant the giving of this instruction there must be substantial evidence to establish each of the enumerated elements. Rodabaugh v. Tekus, 39 Cal.2d 290, 293, 246 P.2d 663; Jobe v. Harold Livestock Comm. Co., 113 Cal.App.2d 269, 273, 247 P. 2d 951.

[11–13] We may assume, but without deciding, that the evidence as to the elements mentioned in (1) and (2) quoted above was sufficient to justify giving the instruction, but there is no substantial evidence to show that *after* Petrone discovered plaintiff's perilous situation he had a *clear* chance to avoid the collision by the exercise of ordinary care or that he failed to exercise such care. In this connection "it is important to bear in mind that the mere fact that the evidence in a given case may be sufficient to sustain a finding of negligence on the part of a defendant does not justify the conclusion that such evidence is sufficient to permit the application of the last clear chance doctrine." Rodabaugh v. Tekus, supra, 39 Cal.2d at page 293, 246 P.2d at page 665. The fact that defendant Petrone saw plaintiff a substantial distance before the latter entered the intersection does not establish that plaintiff was in a position of danger while he was traveling such dis-

tance. Rodabaugh v. Tekus, supra, 39 Cal. 2d at page 294, 246 P.2d 663; Dalley v. Williams, 73 Cal.App.2d 427, 435–436, 166 P.2d 595. Plaintiff was not in a position of danger until he arrived at a point at which he could no longer stop or slow down or accelerate his speed in time to avoid a collision. Rodabaugh v. Tekus, supra; Dalley v. Williams, supra, 73 Cal.App.2d at page 435, 166 P.2d 595; Young v. Southern Pac. Co., 182 Cal. 369, 380, 190 P. 36. Here the evidence shows unmistakably that defendant Petrone did not realize plaintiff's position of peril until he was in the crosswalk. That is when he applied the brakes. His testimony, that of his passenger, and the beginning of the skid marks all point to that as a fact. Plaintiff testified that the Chevrolet was traveling at an estimated speed of 40 miles an hour when he "first saw the car entering the intersection" and "between 35 and 40" when Petrone "put the brakes on." Plaintiff was driving 4 to 6 feet south of the center line of Winona, which is 42 feet wide. This means that the Chevrolet was only some 25 to 30 feet away from plaintiff's car when defendant Petrone realized plaintiff's position of danger and applied his brakes. The accident then happened in a split second. At that point Lincoln Street is slightly down grade. It will be recalled that there was sand in the intersection and plaintiff accelerated the speed of his car. The 24 feet of skid marks give emphatic evidence of Petrone's earnest effort to stop his car upon realizing plaintiff's peril. Considering the relative time, speed and distance factors, the presence of sand in the intersection, plaintiff's sudden change of speed and the grade of the street, it is obvious that defendant Petrone had no *clear* chance to avoid the collision by the exercise of ordinary care, or that he failed to exercise such care.

[14] As was said in Rodabaugh v. Tekus, supra, 39 Cal.2d at page 294, 246 P.2d at page 666, "It is apparent that this case presents the picture of one of the usual types of intersection collisions between two rapidly moving vehicles." The court then observed: "It has been frequently stated that the last clear chance doctrine is ordinarily inapplicable under such conditions." Illustrative of this statement are Poncino v. Reid-Murdock & Co., 136 Cal. App. 223, 28 P.2d 932; Dalley v. Williams, supra; Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 182 P.2d 337; Berton v. Cochran, 81 Cal.App.2d 776, 185 P.2d 349; Allin v. Snavely, 100 Cal.App.2d 411, 224 P.2d 113; Jobe v. Harold Livestock Comm. Co., supra; Hazelett v. Miller, 115 Cal. App.2d 801, 252 P.2d 997. See, also, Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785. The evidence was sufficient to warrant the application of the imminent peril doctrine in favor of the defendants, but was insufficient to warrant the application of the last clear chance doctrine in favor of plaintiff for, as said in Bagwill v. Pacific Electric R. Co., 90 Cal.App. 114, 121, 265 P. 517, 519, "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. * * * The words mean exactly as they indicate, namely, last *clear* chance, not possible chance." Hence it was not error to refuse to instruct on that doctrine.

Plaintiff argues also that the verdict was the direct result of misconduct of a juror. This is based on an affidavit that a juror named Johnson who later became foreman had done, prior to the submission of the case to the jury, some checking on the value of electroencephalograms and had also consulted a book to check on the reputation, background and qualifications of the doctors who testified.

[15] While the juror undoubtedly violated the court's admonition, it is clear that his conduct was not prejudicial since it dealt with matters touching the character and extent of plaintiff's injuries and the reliability of the witnesses testifying on such matters. Such testimony, however, never became crucial since the jury came to the conclusion that plaintiff was not entitled to recover. In denying plaintiff's motion for a new trial on this ground the judge of the trial court undoubtedly concluded that the juror's conduct was not prejudicial. We certainly cannot say that the court abused its discretion in so finding.

[16] Furthermore, this incident was drawn to counsel's attention before the jury returned its verdict. Plaintiff did not move for a mistrial and stated "it was undoubtedly within the approval of both counsel that the jury was sent back for further deliberation." This constituted a waiver by plaintiff of any right to later complain of this circumstance.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.



118 Cal.App.2d 104

MORRIS v. HARRIS.

Civ. 15386.

District Court of Appeal, First District, Division 2, California.

May 25, 1953.

Hearing Denied July 22, 1953.

Action on common count, for money had and received, wherein plaintiff alleged that defendant had received sum as agent for, and for use and benefit of, plaintiff, which sum, being previously demanded, had not been paid. The Superior Court, Alameda County, Thomas J. Ledwich, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that no error was shown by the record presented.

Affirmed.

1. Appeal and Error ⇐901

It is incumbent on appellant to present record which affirmatively shows error.

2. Trial ⇐46(2)

In action on common count, for money had and received, wherein plaintiff alleged that defendant had received sum as agent for, and for use and benefit of, plaintiff, which sum, being previously demanded, had not been paid, trial court did not err in refusing to admit into evidence a written contract which contained a clause for liquidated damages, in absence of any offer of proof which would indicate how or why particular contract would establish some fact which would lead to situation where money was had and received.

3. Pleading ⇐248(3)

In action on common count, for money had and received, wherein plaintiff alleged that defendant had received sum as agent for, and for use and benefit of, plaintiff, which sum, being previously demanded, had not been paid, trial court, after refusing to admit into evidence a written contract which contained a clause for liquidated damages, properly denied plaintiff leave to amend complaint over objection that amendment would entirely change cause of action from one on common count to one of contract for liquidated damages.

Lawrence Sledge, Oakland, for appellant.

Pierre A. Fontaine, Oakland, for respondent.

DOOLING, Justice.

Appeal by plaintiff from a judgment for defendant. The complaint stated a common count for money had and received. It alleged that defendant received $3,900 as agent for, and for the use and benefit of plaintiff which sum, being previously demanded, has not been paid. No other cause of action is alleged. The answer is a general denial.

[1–3] The matter came on for trial and almost immediately plaintiff offered a written contract which (according to the trial judge) contained a clause for liquidated damages. The court thereupon refused to admit the contract into evidence. Plaintiff was denied leave to amend the complaint over objection that this would entirely change the cause of action from one on a common count to one on a contract for liquidated damages. The contract is not in the record nor before this court. Plaintiff and defendant both then rested and judgment was entered for defendant.

No offer of proof was made which would indicate how or why the particular contract would establish some fact that would lead to a situation where money was had and

received; hence it does not appear how this contract would be relevant to the ultimate issue.

It is incumbent on appellant to present a record which affirmatively shows error. Vaughn v. Jones, 31 Cal.2d 586, 601, 191 P. 2d 432; Utz v. Aureguy, 109 Cal.App.2d 803, 807, 241 P.2d 639; Dallman Supply Co. v. Smith-Blair, Inc., 103 Cal.App.2d 129, 134, 228 P.2d 886; Wyman v. Municipal Court, 102 Cal.App.2d 738, 741, 228 P.2d 89, 229 P.2d 491; Palpar, Inc., v. Thayer, 83 Cal. App.2d 809, 811, 189 P.2d 752. No error is shown by the record presented.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



118 Cal.App.2d 131

BAILEY et al. v. REIMAN.

Civ. 8221.

District Court of Appeal,
Third District, California.

May 26, 1953.

Action by co-partners in stock brokerage to recover from defendant on common count for money had and received for their use. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment from which plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that when an agent, openly and honestly acting as such, sells property of a principal, delivers property for the price and transmits price to principal, the agency is ended, and agent is not liable to any one for the money received, and is not entitled to inject himself further into affairs of former principal and recover the price transmitted.

Judgment affirmed.

1. Principal and Agent ⇐136(4)

When an agent, openly and honestly acting as such, sells property of a principal, delivers the property for price and transmits price to principal, the agency is ended, and agent is not thereafter liable to any one for the money received and transmitted to the principal.

2. Payment ⇐89(3)

Where defendant retained plaintiffs to sell certain shares of old stock subject to conversion at rate of ten old shares for one share of new stock, and plaintiffs in turn sold stock through a brokerage firm which was advised that it was old stock, but which erroneously paid plaintiffs for each old share at price per share for new stock, agency of plaintiffs had terminated at time of payment to defendant of selling price less commissions, and plaintiffs were not thereafter entitled to recover excess of selling price from defendant.

Landram & Silveira, H. K. Landram, Merced, for appellants.

C. Ray Robinson, W. Eugene Craven, Merced, for respondent.

VAN DYKE, Presiding Justice.

Appellants, co-partners in stock brokerage brought action against respondent in the form of a common count for money had and received for their use. The trial court, adopting the language of the complaint, found that these allegations were untrue and gave judgment for respondent.

In January, 1949, respondent purchased 500 shares of common stock of Waltham Watch Company, a corporation. Later in 1949 the company was reorganized and new stock was issued. It was placed in a voting trust. It was known as Waltham Watch Company, VTC. The old stock was made exchangeable for the new at 10 shares of old for one share of new and was taken off of the Exchange. Respondent retained his certificates, but in August of 1950 inquired of appellants' Merced office as to the selling price of his stock. Appellants, not members of the Exchange on which the new stock had been listed, consulted a brokerage firm, known in these transactions as Merrill Lynch, which firm was a member. Appellants were told the selling price was $2 per share. This was the selling price of the new stock. But appellants did not know this and in good faith told respondent his

stock could be sold for that price. Thereupon respondent instructed appellant to sell his stock at the price quoted. Respondent delivered his certificates to appellants. Appellants then instructed Merrill Lynch to sell respondent's stock. They had examined the stock and noted that it was old stock. They told Merrill Lynch it was old stock and told Merrill Lynch to "please check when they got the order in New York to sell the correct amount of shares" that this stock represented. Next day appellants were informed the stock had sold at $2. Thereupon they delivered respondent's certificates and received from Merrill Lynch $2 per share. This money they paid to respondent, less their commissions. Some two months later Merrill Lynch discovered that there had been an error and apparently made some sort of demand on appellants.

[1, 2] Under the facts narrated, and concerning them there is no dispute in the record, the trial court could have made no other decision than it did. When an agent, openly and honestly acting as such, sells property of a principal, delivers the property for the price and transmits the price to the principal, the agency is ended. The agent is not liable to any one for the money received. This money the agent receives for the principal, and in law it is received by the principal. Upon the case they made appellants were liable to no one with whom they dealt and their agency having been completed they had no right to inject themselves further into the affairs of their principal. Some one may have a cause of action against respondent, but appellants, on this record, have none. Bogart v. Crosby & Van Haren, 80 Cal. 195, 22 P. 84; Allen v. Globe Grain & Milling Co., 156 Cal. 286, 291, 104 P. 305; Becsey v. Calif. Title & Tr. Co., 192 Cal. 632, 634, 221 P. 356; Weiner v. Roof, 10 Cal.2d 450, 453, 74 P.2d 736; Weiner v. Roof, 19 Cal.2d 748, 753, 122 P.2d 896.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

118 Cal.App.2d 184

In re RANKIN'S ESTATE.

RANKIN v. HATFIELD et al.

Civ. 19493.

District Court of Appeal, Second District, Division 3, California.

May 27, 1953.

Proceeding in matter of estate of testator. Certain beneficiaries under testator's will appealed from a final decree of distribution entered by Superior Court, Los Angeles County, insofar as it declared that decedent's former secretary was a beneficiary. The District Court of Appeal, Shinn, P. J., held that where testator provided that, in event of his wife's death prior to distribution of estate, his former secretary should be added as a beneficiary of testamentary trust, "distribution of estate" referred to distribution in probate, and not distribution or division of corpus on termination of trust, and, the wife having survived distribution of estate, the secretary was not a beneficiary under the will.

Judgment reversed with directions.

1. Wills ⇐440, 470

Where testator spoke clearly, court could not presume that he intended anything other than what he said, in absence of strong reasons, derivable from the will as a whole, that he had intentions at variance with those expressed.

2. Wills ⇐656

Where testator provided that, in event of his wife's death prior to "distribution of my estate", his former secretary should be added as beneficiary of testamentary trust, quoted words referred to distribution in probate and not to distribution or division of corpus on termination of trust, and, the wife having survived distribution in probate, the secretary was not a beneficiary under the will.

See publication Words and Phrases, for other judicial constructions and definitions of "Distribution of My Estate".

O'Melveny & Myers, Louis W. Myers and Hugh L. Macneil, Los Angeles, for appellants.

W. A. Bullis, Los Angeles, for respondent.

SHINN, Presiding Justice.

Certain beneficiaries of the will of John W. Rankin appeal from a final decree of distribution of his estate, insofar as it declares that respondent, Mary E. Cox, is a beneficiary, contending that the court in probate misconstrued the will, which included three codicils. By holographic will dated August 12, 1941, Mr. Rankin made several specific bequests and divided his remaining estate into two equal parts. One part was left to his wife, outright, provided she survived him, otherwise to a trust. She survived him, and the provisions of the trust set out in paragraph 9 are not in question. By paragraph 8 the other part was placed in trust, the income to go first to the testator's aunt, Julia K. Goldwater; secondly, to his wife; and third, to his wife's sister Honor Davis. The trusts were to terminate on death of the last surviving beneficiary. Codicil No. III, which is holographic, is the one in controversy here. It was written four days after the original will and reads as set out below.[1] At the hearing of the petition for distribution a controversy arose as to the rights of Mary Cox, created by Codicil III. She contended that by that codicil she was added as one of the beneficiaries of the paragraph 8 trust, notwithstanding the fact that Mrs. Rankin was living at the time of the hearing. Rankin Hatfield, Louise Rankin Bloom, and Celia Bloom Rust, remaindermen under the will, contended that Mary Cox is not a beneficiary of the paragraph 8 trust for the reason that Mrs. Rankin was living at the time of the distribution of the estate in probate. The court agreed with the construction urged by Mary Cox and distributed one-half of the remainder of the estate to a trustee, under paragraph 8, to pay the income to the surviving wife (Julia Goldwater having deceased), during the life of the wife and on her death in equal shares to Honor Hoyer Davis and Mary E. Cox in equal shares, if both be living, during their joint lives, and to the survivor thereof during her lifetime.

Respondent does not question that she was to become beneficiary only in case Mrs. Rankin survived her husband and survived distribution of his estate. She says that "distribution of my estate" did not mean distribution in probate but distribution or division of the corpus on termination of the trust. We presume that the trial court agreed with this construction, although in its memorandum opinion reasons were not given for the conclusion that was reached.

By "distribution of my estate" the testator meant disposition of all his estate which was subject to distribution. This could only be a distribution in probate. Only a

1. "I, John W. Rankin make this my codicil to my holographic will dated August 12th, 1941, as follows:—
"If at my death my wife Enge G. Rankin is deceased, or if she dies prior to the distribution of my estate, then and in that event I add to the beneficiaries who are to receive net income of the trusts created by sections '(VIII)' and '(IX)' the former faithful secretary of mine, Mary E. Cox, born Mary E. Asbury, but under the following provisions:—
"(A) If my aunt, Julia K. Goldwater, is deceased, or after her death, said Mary E. Cox is to share the net income of the trust created by said section '(VIII)' (of said will) equally with my said wife's sister Honor Hoyer Davis, so long as the latter lives, but if said Honor Hoyer Davis is deceased, or after her death, said Mary E. Cox will take & receive all the said net income so long as she lives, from that trust, provided (of course) that my said aunt is deceased;
"(B) If both my said wife's sister and my said aunt are deceased, or after the death of the last survivor of said wife's sister and said aunt, said Mary E. Cox shall take and receive all of the net income from the trust created by section '(IX)' of said will;
"(C) The term of said trusts is hereby extended until, and shall not terminate until, the death of said Mary E. Cox, if she survives my said wife, the latter's said sister and my said aunt.
"I hereby republish my said will and the two holographic (wills or) codicils thereto both executed and dated yesterday, August 15th, 1941.
"Witness may hand this 16th day of August, 1941.
John W. Rankin."

part of the testator's estate would be divided upon termination of the trusts.

It is doubtful that there are in the law and practice of wills and probate administration terms that are more commonly used than "distribution," "partial distribution" and "distribution of the estate." Anyone familiar with practices in probate would understand that "distribution of my estate" means distribution in probate. The time or the event for a division of trust property is, by long settled practice, described as the "termination of the trust."

The courts have had few occasions to attribute a meaning to the word "distribution" as used in probate administration, which is probably due to the fact that the meaning is so well understood. The court said, in the Estate of Dunphy, 147 Cal. 95, 100, 81 P. 315, 317; "The word 'distributed' is not a technical word in conveyancing, and is not usually found in deeds. If it have any legal technical meaning, it has such meaning with reference to decrees of distribution in probate courts." In Estate of Heberle, 153 Cal. 275, 277, 95 P. 41, 42, it was said: "The seventeenth paragraph contains a direction for the 'distribution' of the Spring street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such purpose, while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. [Quoting from Estate of Dunphy.]"

Other cases in which "distribution" was held to mean distribution by probate decree are: In re Archdeacon's Estate, 134 N.J. Eq. 535, 37 A.2d 34; Jenkins v. Smith, D.C. Conn., 21 F.Supp. 433; Maguire v. Commissioner of Int. Revenue, 313 U.S. 1, 61 S.Ct. 789, 85 L.Ed. 1149; In re Mack's Estate, 111 Pa.Super. 20, 169 A. 468.

Mr. Rankin was familiar with the meanings of the words in question. In the body of the will he spoke of the property which would go under the will as "one-half of all the rest and remainder of my estate and property" and "all of the other half of said remainder," and throughout the will and the codicils he invariably referred to the trust property as "the principal and corpus" of the trust. He did not refer to the trust property as his "estate" or even as "trust estate."

[1, 2] If Mr. Rankin had intended that Mary E. Cox should be a beneficiary if Mrs. Rankin died at any time during the life of the trust he would have expressed his desire in simple language. It is not conceivable to us that if he intended her to have the rights which the decree awards her he would have made her a beneficiary on the conditions stated in the codicil, namely, the failure of his wife to survive him and to survive distribution of his estate. He spoke clearly, and in the absence of strong reasons, derivable from the will as a whole, that he had intentions at variance with those expressed, we cannot presume that he intended anything other than what he said. It will be noted that while paragraph 8 of the will gave a life interest in income to Mrs. Rankin, Codicil III did not. Even if Mary E. Cox would come in as a beneficiary, only after the death of Mrs. Rankin and Julia Goldwater, Mrs. Rankin would still enjoy her income during her lifetime. The fact that Mrs. Rankin's life estate was ignored in writing the codicil indicates that Mr. Rankin had in mind that his wife would not be living at the time of the creation of the trust. It is clear to us that since Mrs. Rankin survived distribution of the estate in probate, respondent Mary E. Cox is not a beneficiary under the will.

The judgment is reversed with directions that a new decree of distribution be entered in accordance with the views herein expressed.

PARKER WOOD and VALLÉE, JJ., concur.

118 Cal.App.2d 108

BARNES v. HILTON.

Civ. 19223.

District Court of Appeal, Second District, Division 1, California.

May 25, 1953.

Hearing Denied July 22, 1953.

Proceedings on judgment debtor's motion to vacate confession judgment. The Superior Court, Los Angeles County, Ellsworth Meyer, J., granted the relief sought, and the judgment creditor appealed. The District Court of Appeal, White, P. J., held that foreign judgment giving full faith and credit to confession judgment entered by California court would not be res judicata on issue as to validity of confession judgment when raised by judgment debtor's motion to vacate confession judgment for failure to comply with statutes governing such judgments.

Affirmed.

1. Judgment ⇐49

Judgment by confession based upon promissory notes was void on its face in absence of compliance with statute requiring statement to be signed and verified by debtor. Code Civ.Proc. §§ 1132, 1133.

2. Judgment ⇐67(3)

Judgment by confession, invalidity of which appeared on face of judgment roll, could be set aside at any time. Code Civ. Proc. § 473.

3. Judgment ⇐49

Statute, relating to judgments by confession and requiring that written statement be made, signed by debtor, and verified by his oath, is not satisfied by statement of attorney purporting to act under an unverified or unauthenticated power of attorney contained in promissory note. Code Civ.Proc. §§ 1132, 1133.

4. Judgment ⇐815

Foreign judgment giving full faith and credit to confession judgment entered by California court would not be res judicata on issue as to validity of confession judgment when raised by judgment debtor's motion to vacate confession judgment for failure to comply with statutes governing such judgments. Code Civ.Proc. §§ 1132, 1133.

Morton E. Feiler, and Guerin & Guerin, Los Angeles, for appellant.

Harold Judson, Studio City, and Emil Steck, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

On February 25, 1949, the Superior Court of Los Angeles County entered a judgment by confession based upon four promissory notes executed by defendant, E. M. Hilton, whereby the defendant gave a warrant of attorney authorizing any attorney of any court of record to enter an appearance and confess judgment. Pursuant to such authority, Morton E. Feiler, an attorney licensed to practice in California, confessed judgment, making a "verified statement of facts."

On February 20, 1952, E. M. Hilton, the judgment debtor, moved to vacate the aforesaid judgment, and his motion was granted on February 26, 1952, upon the ground that the judgment was void in that the defendant or judgment debtor had not signed and verified the statement required by section 1133 of the Code of Civil Procedure. In addition to the issue thus presented, the appellant has presented for consideration a decision of the Supreme Court of the State of Kansas, 172 Kan. 345, 239 P.2d 966, which, he contends, is res judicata, holding that the confession judgment was not void. It is the position of respondent that the judgment of the Kansas Supreme Court is not "res judicata" on the question.

Sections 1132 and 1133 of the Code of Civil Procedure of the State of California provide as follows:

> "1132. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.
>
> "1133. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

"1. It must authorize the entry of judgment for a specified sum;

"2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

"3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same."

Appellant contends that it was not necessary for the defendant E. M. Hilton to sign personally the confession of judgment; that the signing of the confession by the defendant's authorized attorney does not render the judgment void, and that the decision of the Supreme Court of Kansas renders the matter res judicata. None of these contentions may be upheld.

In General Motors Acceptance Corp. v. Codiga, 62 Cal.App. 117, 120, 216 P. 383, the confession of judgment was said to be "invalid" as being in violation of section 1133 of the Code of Civil Procedure. It was held in First National Bank v. Terry, 103 Cal.App. 501, 504, 506, 285 P. 336, that a judgment by confession entered in Illinois during a "recess" rather than a "vacation" of the court, in contravention of Illinois statutes on the subject, was "invalid". It further appeared in the case cited that the remedy for the collection of the debt had been barred by the statute of limitations of Illinois, and in such circumstances it was held that the attorney appeared without authority, and the judgment based upon his confession was void. In Reynolds v. Lincoln, 71 Cal. 183, 184, 9 P. 176, 12 P. 449, the signature of an attorney, rather than a party, was held "not sufficient."

[1, 2] The judgment in this cause, which the trial court set aside, was entered in clear contravention of the policy of this state as set forth in the code sections hereinabove adverted to. The judgment was void on its face—that is, the invalidity of the judgment appeared on the face of the judgment roll. See Baird v. Smith, 216 Cal. 408, 410, 14 P.2d 749; People v. Davis, 143 Cal. 673, 77 P. 651. In Baird v. Smith, supra, a default judgment was prematurely entered by the clerk of the court, and an order vacating such judgment two years after its entry was upheld. The language of the court in that case is applicable here, where the clerk entered a judgment in violation of the applicable sections of the Code of Civil Procedure: "Examination of the authorities satisfies us that a judgment entered by the clerk under subdivision 1 of section 585, supra [Code Civ.Proc., sec. 585], at a time when the defendant's answer is on file and upon a default prematurely taken, is void and may be set aside at any time. The clerk in entering judgments upon default acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only the agent by whom it is written out and placed among the records of the court. The statute is the measure of his authority. In exercising the power conferred, he must conform strictly to the provisions of the statute or his proceedings will be without binding force, and any judgment entered by him will be void. (Citing authorities.) * * *" [216 Cal. 408, 14 P.2d 750.]

The court in the case last cited referred to Freeman on Judgments, fifth edition, page 2666, § 1283, stating in substance, that a default judgment entered by the clerk without authority of statute is void. Further, as was held in the cited case, such a judgment is not merely voidable, and attackable only within the six months' period provided by section 473 of the Code of Civil Procedure, but is void, and may be set aside at any time.

[3] Replying to appellant's arguments, it is to be noted that the pertinent code sections require a statement by the defendant, verified by his oath, and do not permit a statement by an attorney purporting to act under an unverified or unauthenticated power of attorney contained in a promissory note. If appellant's argument were upheld, then the provisions of

the code sections here involved could readily be subverted by the simple device of including in any promissory note a warrant of attorney, whereby any attorney could make the statement in writing, verify it, and confess judgment. Clearly, such is not the policy contemplated by the legislature. In this connection, it is significant that confession of judgment notes are not in general use in this state and the clerks of the various superior courts adhere strictly to the rules set forth in sections 1132 and 1133, supra, of the Code of Civil Procedure.

[4] Appellant further contends that the question of whether the judgment under consideration is void has been conclusively determined in his favor by the Supreme Court of the State of Kansas, in a proceeding in that state between appellant and respondent. It is appellant's position that the validity of the California judgment confession has been determined in his favor by the Supreme Court of Kansas and that such determination renders the matter res judicata. This contention is without merit for the reason that the validity of the California judgment is to be determined by the law of California. The law of the forum governs the transaction, and under that law the judgment was void and not entitled to full faith and credit in the forum of another state. See 50 C.J.S., Judgments, § 889, p. 477; also Bower v. Casanave, D.C., 44 F.Supp. 501; Loudonville Milling Co. v. Davis, 248 Ala. 202, 27 So.2d 6; Monarch Refrigerating Co. v. Faulk, 1934, 228 Ala. 554, 155 So. 74; South Orange Trust Co. v. Barrett, Del. 1950, 6 Terry 533, 76 A.2d 310; Acme Feeds v. Berg, 1942, 231 Iowa 1271, 4 N. W.2d 430; Jones v. Turner, 1930, 249 Mich. 403, 228 N.W. 796; Second Nat'l Bank v. Thompson, 1947, 141 N.J.Eq. 188, 56 A.2d 492; Bernard Gloeckler Co. v. Baker Co., Tex.Civ.App.1932, 52 S.W.2d 912.

The order appealed from is affirmed.

DORAN, J., concurs.

TEVIS et al. v. CITY & COUNTY OF SAN FRANCISCO et al.*

Civ. 15413.

District Court of Appeal, First District, Division 1, California.

May 19, 1953.

Hearing Granted July 15, 1953.

Mandamus, to compel city and county and its officers to allow petitioners, former city employees, vacation pay, and for other relief, under amendment to city and county charter which by its terms became effective after petitioners were laid off by city, but which purported to grant retroactive vacation allowances to employees covered by it. The Superior Court, City and County of San Francisco, Theresa Meikle, J., determined that petitioners were entitled to vacation pay and granted mandate accordingly, and city and officers appealed. The District Court of Appeals, Peters, P. J., held that mandamus was appropriate and proper remedy and that in view of the obvious purpose of amendment and of language used therein, petitioners, who had earned their vacation allotment by services performed in 1949, were entitled to have such allowances.

Judgment affirmed.

1. Mandamus ⇐105

Rule that mandamus may not be used to recover money in specific sum from governmental agency where that is sole issue presented, does not preclude use of mandate where cooperation of city official must be had before payment can be secured.

2. Mandamus ⇐102(2)

Mandamus is an appropriate remedy to compel an auditing officer to issue warrant for compensation of employees or officers of city, county, or state, where amount thereof is so fixed by law, ordinance, or otherwise that act of auditing same and drawing warrant accordingly is merely ministerial in character.

3. Counties ⇐162

Municipal Corporations ⇐889

States ⇐130

Rule that creation of office is sufficient compliance with constitutional requirement that no money shall be drawn from treasury but in consequence of appropriation made by law, has been changed by statute

* Subsequent opinion 272 P.2d 757.

as applied to state but not as applied to cities or to cities and counties. Government Code, § 9610; Const. art. 4, § 22.

4. Mandamus ⇐107
Municipal Corporations ⇐891

City charter provision authorizing paid vacations for certain city employees amounted to an appropriation by the charter which cut across other charter provisions which contemplated advance budgetary planning, and, therefore, mandamus was an appropriate and proper remedy for enforcement by said employees of alleged rights to vacation pay, even though city had not appropriated funds for them. St. 1931, pp. 3020, 3023, 3030, §§ 70, 73, 86; St.1948, pp. 193, 195, §§ 69, 72; St.1950, 3d Ex.Sess., p. 102, § 151.5.

5. Municipal Corporations ⇐8

A charter provision can be made to take effect and bind courts at any time that the people, in exercise of their legislative power, provide, or, in other words, at a time other than its adoption.

6. Constitutional Law ⇐186

Although there is strong policy against construing statutes to be retroactive, there is no constitutional inhibition against retroactive legislation that does not impair contract or vested rights.

7. Constitutional Law ⇐121(2)

The legislature, constitutionally, can affect existing contractual rights of its political subdivisions acting in a governmental capacity.

8. Municipal Corporations ⇐220(5)

The resignation or lay off of a public employee, even though he is thus deprived of his status as an employee, does not per se deprive him of accrued vacation rights; and, therefore, there is nothing wrong per se in making an allowance to laid off employees for accrued vacation rights.

9. Counties ⇐72
Municipal Corporations ⇐215

In determining whether city and county charter provision, which retrospectively authorized vacation benefits for certain city and county employees, but which, by its terms, did not become effective until September 26, 1950, authorized vacations for employees who were laid off June 30, 1950, the general purpose of such provision would have to be considered. St.1950, 3d Ex.Sess., p. 102, § 151.5.

10. Municipal Corporations ⇐220(5)

In view of obvious purpose of San Francisco charter amendment which retrospectively authorized vacation allowances to certain city and county employees, and of language therein which provided that recipients of allowances must be employees when services were rendered but omitted to provide that recipients must be employees when allowances were granted, city employees who earned their allowance by rendering services in 1949 but who were laid off on June 30, 1950, were entitled to allowance even though charter amendment did not, by its terms, take effect until September 26, 1950. St.1950, 3d Ex.Sess., p. 102, § 151.5.

11. Counties ⇐153½
Municipal Corporations ⇐871

Provisions of constitution prohibiting legislature from making gifts, or from granting or authorizing county or municipal authority to grant extra compensation to public officer etc., after his service has been rendered, prevent legislature from directly or indirectly granting to counties or cities the legal rights to make a gift of public funds by recognizing the validity of past or moral considerations, but are not applicable to chartered cities or cities and counties which have plenary power over their own affairs subject only to charter restrictions. Const. art. 4, §§ 31, 32; art. 11, §§ 1 et seq., 6, 8, 8½.

12. Counties ⇐21½
Municipal Corporations ⇐57

San Francisco is a chartered city and county which derives its powers from the Constitution itself. Const. art. 11, § 1 et seq.

13. Municipal Corporations ⇐8

The charter of a city is comparable to the Constitution of the state and is governed by the same principals.

14. Municipal Corporations ⇐220(5)

Provision of Constitution prohibiting legislature from making any gift, or from granting or authorizing any county or municipal authority to grant extra compensation to any public officer etc., after officer's service has been rendered, did not render invalid a San Francisco charter amendment which retrospectively authorized vacation allowances for city employees who had already rendered service for which allowances were granted. St.1950, 3d Ex. Sess., p. 102, § 151.5; Const. art. 4, §§ 31, 32.

15. Municipal Corporations ⇐46

Even if provision in San Francisco charter to effect that no officer or employee shall be paid for greater time than that covered by his actual service, should be interpreted as prohibition against granting, retroactively, any vacation pay to city employees, it would simply constitute a limitation against Board of Supervisors, by ordinance or otherwise, making such an allowance, and would not prevent people from amending charter itself to allow such vacation pay. St.1931, p. 3065, § 150; St. 1950, 3d Ex.Sess., p. 102, § 151.5.

16. Statutes ⇐159

Statutory provision which is latest in the point of time controls.

Dion R. Holm, City Atty., A. Dal. Thomson, Public Utilities Counsel of the City & County of San Francisco, and Jack G. McBride, Deputy City Attorney, San Francisco, for appellants.

Delany, Fishgold & Minudri, San Francisco, for respondents.

PETERS, Presiding Justice.

Petitioners are civil service trackmen formerly employed by the city and county of San Francisco who were laid off June 30, 1950, because many streetcar tracks in the city were then being torn up and not replaced, with the result that many trackmen were not needed. After the lay off, petitioners have remained on the civil service list. They contend that they are entitled to a two-week vacation with pay earned during the calendar year of 1949. It is conceded by the city and its officers named in the petition that all petitioners have the qualifications entitling them to this vacation pay unless they are barred by the lay off. The city and its officers contend that the lay off on June 30, 1950, bars petitioners because section 151.5 of the charter, upon which petitioners must rely, did not become effective by legislative ratification until September 26, 1950, St.1950, 3d Ex.Sess., p. 102, and that under that section, properly interpreted, those laid off prior to the effective date of the section are not entitled to vacation allowances. The trial court determined that petitioners were entitled to the vacation pay, and granted its mandate accordingly. The city and its named officers appeal, contending that mandate is not the proper remedy, that section 151.5, properly interpreted, prohibits the relief prayed for, and that the judgment appealed from will result in the gift of public funds in violation of the state Constitution.

At the outset of this proceeding we are met with the contention that mandate is not a proper remedy because, so it is claimed, petitioners are seeking a simple money judgment against the city.

[1, 2] The petition here involved names the city and county, the members of the public utilities commission, the manager of the commission, the secretary of the civil service commission and the controller and treasurer of the city as defendants, and asks relief against them all. The prayer of the petition is for a writ commanding all of the defendants "to allow said petitioners and plaintiffs vacation pay of two calendar weeks," for an injunction restraining all of defendants from doing any of the acts threatened in the petition, for a money judgment for the amounts involved, and for costs and other relief. While it is the law that mandamus may not be used to recover money in a specific sum from a governmental agency where that is the sole issue presented, Northrup v. Haynes, 15 Cal.App.2d 665, 59 P.2d 1056; Coombs v. Smith, 17 Cal.App.2d 454, 62 P.2d 380, that rule does not preclude the use of mandate where the cooperation of city officials must be had before payment can be secured. See Scan-

nell v. Murphy, 82 Cal.App.2d 844, 187 P. 2d 790; Quigg v. Evans, 121 Cal. 546, 53 P. 1093. In Scott v. Boyle, 164 Cal. 321, at page 323, 128 P. 941, at page 942, the court stated the applicable rule as follows: "*Mandamus* is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employes or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character."

The same principle was announced in Dupuy v. Board of Education, 106 Cal.App. 533, 539, 289 P. 689, 692, in the following language: "It is urged, that conceding the correctness of the lower court's ruling mandate is not the proper remedy. It will be noted that the claim of plaintiff involves no terms of employment or dispute over services rendered. All that is involved is whether or not moneys, conceded to have been earned, are now due. All that remains is the issuance of the warrant and this is a ministerial duty enjoined by law. In such a case mandate will lie. [Citing authorities.]" See, also, Reed v. Board of Education, 139 Cal.App. 661, 34 P.2d 758.

But, say appellants, even if mandamus would normally be available, it was erroneous to grant such relief here because there was no allegation or proof that funds were available to make the ordered payments, and without such fact existing mandamus improperly interferes with the detailed and carefully timed fiscal procedures of the city as set forth in the charter. §§ 69, 70, 72, 73 and 86, St.1931, pp. 3020, 3023, 3030, St.1948, pp. 193, 195. It is urged that the issuance of a writ of mandate contravenes the advance budgetary planning contemplated by the charter. The vacations here involved were earned in 1949 and receivable by those entitled in 1950. It is claimed that no provision was made in the 1950 budget for this vacation pay.

[3] There are some cases that state the general rule that the petitioner must plead and prove the existence of a specific fund out of which payment can be made. Stevens v. Truman, 127 Cal. 155, 59 P. 397; State Commission in Lunacy v. Welch, 20 Cal.App. 624, 129 P. 974; see annotation 5 A.L.R. 572, at page 579. But there are so many exceptions to this rule that it has been almost emasculated. Thus in the Truman case, supra, the court declared that if there is a valid state law imposing a duty to appropriate upon the city and county, the general treasury of the city and county is liable even if the special fund set up by the supervisors proves to be inadequate. There are also cases holding that payment will be made out of the general funds of the governmental agency for an otherwise legally created office for which the legislative body has failed to appropriate money to pay the salary. The leading case is Meyer v. Riley, 2 Cal.2d 39, 38 P.2d 405, 406, which held that the occupant of a state office created by the Legislature could mandamus the state controller to pay him his salary even though the Legislature had failed to include any appropriation for such salary in the annual budget bill, and even though such salary was subject to being increased by the executive department. The court held that the creation of the office was sufficient compliance with the constitutional requirement that "no money shall be drawn from the treasury but in consequence of appropriation made by law". Article 4, § 22. The sufficiency of the general fund was assumed. See, also, U'ren v. State Board of Control, 31 Cal.App. 6, 159 P. 615; Millholen v. Riley, 211 Cal. 29, 293 P. 69. While the rule of these cases as applied to the state has been changed by statute, § 9610, Gov.Code, no such statutory change has taken place as to cities or cities and counties.

This principle has been applied to the very city and county here involved. Thus in Harrison v. Horton, 5 Cal.App. 415, 90 P. 716, it was held that a charter authorization (the vacations involved in the instant case are provided by charter provision) to the district attorney to hire an assistant did away with the necessity of an appropriation by the board of supervisors and a warrant by the auditor for the payment of the salary, and allowed the same to be collected by mandate, even though there

was no provision for such position in the annual budget.

[4] These cases establish the rule that the charter provision here involved amounts to an appropriation by the charter, cutting across the provisions for budgeting, etc., relied upon by appellants. Mandamus is therefore an appropriate and proper remedy in the instant case.

This brings us to the basic question involved herein, and that is whether these petitioners are entitled, under the charter provisions, to vacation pay. The wages of petitioners are fixed under section 151.3 of the charter, St.1947, p. 3266, that is, such wages are based upon collective bargaining agreements in private industry. Admittedly, the relevant collective bargaining agreements have no provision for vacations. This court in Adams v. City & County of San Francisco, 94 Cal.App.2d 586, 211 P.2d 368, 212 P.2d 272, held that employees of the city whose salaries were fixed in accordance with union collective bargaining agreements under section 151.3 of the charter, and where such collective bargaining agreements did not provide for vacations with pay, were not entitled to vacations with pay, in spite of the broad provisions of the charter, § 151, St.1943, p. 3128, granting vacation rights to other city employees. The rationale of the opinion was that, under section 151.3 of the charter, this limited group of employees was entitled to the same, but no more, compensation or take-home pay as their counterparts in private industry; that vacations with pay were an integral part of the wage structure so that where private industry allowed no vacations, the city employees covered by section 151.3 were not entitled to vacations.

While the Adams case was pending the people of San Francisco at the general election held on November 8, 1949, adopted § 151.4 of the charter, St.1949, 1st Ex.Sess. p. 46, which, by its express terms, did not become effective until January 1, 1951. So far as pertinent here, that section provided:

"Every person employed in the city and county service shall, after one year's service, be allowed a vacation with pay of two calendar weeks, annually, as long as he continues in his employment, provided that, after five years' service every person so employed shall be allowed, as long as he continues in his employment, a vacation with pay of fifteen days, annually, calculated as hereinafter provided. * * *"

"This section shall become effective on January 1, 1951."

The Adams case was decided in November, 1949, and became final in January of 1950, after section 151.4 had been adopted but before it became effective. The people acted promptly to rectify what they apparently felt was unfair discrimination in denying to certain employees vacation rights. At an election held June 8, 1950, section 151.5 was added to the charter, granting to these employees vacation rights in the future and retroactively to the year 1948. The new section reads as follows:

"(a) Every employee of the City and County of San Francisco whose rate of compensation is fixed pursuant to the provisions of section 151.3 of this charter shall be entitled to receive an annual vacation at the time, with the pay and of the duration specified in section 151.4, and no section of the charter nor any provision of any collective bargaining agreement nor any street railway or bus wage schedule shall be construed in any manner or for any purpose to increase, reduce or otherwise affect the time or duration of, or pay for, vacations provided by section 151.4, nor shall any employee be deemed to have any vacation rights other than or in excess of the vacation rights specified in section 151.4.

"(b) The vacation rights granted by section 151.4 or by this section, or contained in any collective bargaining agreements, or in any street railway or bus wage schedules, as any of said terms are referred to in section 151.3 of this charter, shall in no way increase, reduce or otherwise affect or be deemed to affect the wage or pay rate or schedule determinations made pursuant to the provisions of said section 151.3.

"(c) All vacation payments heretofore made to employees of the City and County of San Francisco in the manner and to the extent prescribed by sections 375 to 380, inclusive of Part I of the San Francisco Municipal Code, are hereby deemed to have

been earned and the payments therefor are hereby ratified and validated, and for all services rendered by employees during the calendar years 1948, 1949 and 1950 vacations shall be granted and paid pursuant to the terms of said sections of the Municipal Code.

"(d) This section shall become effective upon approval by the State Legislature."

This section became effective on September 26, 1950.

All of the petitioners here involved were laid off on June 30, 1950. Other employees who were not laid off, after September 26, 1950, were granted the rights conferred by section 151.5, but as to those laid off on June 30th, the city took the position, and contends here, that although the vacations here involved were totally earned in the calendar year 1949, only those employees in the classifications covered who were in the employ of the city on September 26, 1950, when section 151.5 became effective, are entitled to rights under the section.

It will be noted that section 151.5 refers to certain Municipal Code sections, the only ones which are pertinent here being sections 375 and 376. They provide:

"375: Every employee in the City and County service, except certified employees in the Board of Education, shall be allowed an annual vacation as provided herein as long as he remains in the City and County service."

"376 [in part]: Employees shall be allowed a vacation of two calendar weeks, and the compensation paid to employees during the vacation period shall be the amount the employee would earn during his vacation period if working at his current rate of pay and work schedule without the inclusion of overtime earnings * * *."

All of the arguments of appellants are predicated upon the basic concept that since section 151.5 did not become effective until September 26, 1950, that fact alone determines that those who were not employees on that date are not entitled to the vacation allowance. These arguments completely overlook the questions of interpretation involved, that is, what was the nature of the rights given employees on September 26, 1950, for past services, and does the section require that to be entitled to vacation pay the person involved must have been in the employ of the city on September 26, 1950? In other words, does the section provide that it is to have a retroactive operation?

[5] It is, of course, the law that a charter provision can be made to take effect and bind the courts at any time that the people, in the exercise of their legislative power, provide. In other words, a charter provision can be made to take effect at a time other than its adoption. Williams v. City of Vallejo, 36 Cal.App. 133, 171 P. 834; Callahan v. City & County of S. F., 68 Cal.App.2d 286, 156 P.2d 479. In the present case the people have spoken. Section 151.5, by its express terms, did not become effective until approved by the Legislature on September 26, 1950. We start with the premise that that was the effective date of the enactment.

[6, 7] In the second place, while there is a strong policy against construing statutes to be retroactive, Aetna Cas. & Surety Co. v. Industrial Acc. Comm., 30 Cal.2d 388, 182 P.2d 159, there is no constitutional inhibition against retroactive legislation that does not impair contract or vested rights. McCann v. Jordan, 218 Cal. 577, 24 P.2d 457. Moreover, the Legislature, constitutionally, can affect existing contractual rights of its political subdivisions acting in a governmental capacity. County of Alameda v. Janssen, 16 Cal.2d 276, 106 P.2d 11, 130 A.L.R. 1141; County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983.

[8] It should also be pointed out that it seems to be well settled that the resignation or lay off of an employee, even though he is thus deprived of his status as an employee, does not *per se* deprive him of accrued vacation rights. In Pohle v. Christian, 21 Cal.2d 83, 130 P.2d 417, there was involved a rule of the State Personnel Board allowing compensation for accrued but unused vacation time to a laid off employee. It was contended that this rule violated certain Political Code sections granting "employees" of the state a vacation—provisions very similar to the Municipal Code sections above quoted. It was

contended there, as it is contended here, that only those who were "employees" when the vacation was taken were entitled. The Supreme Court summarily dismissed this contention, using the following language, 21 Cal.2d at page 90, 130 P.2d at page 421: "The applicable sections of the Political Code may not reasonably be so interpreted. They do not expressly or otherwise provide than an employee having the right to a vacation loses his right to compensation for that time upon being separated from the service. The rule and the code provisions are in complete harmony, and the appellant is entitled to the vacation allowance claimed by him unless he waived it by refusing to take a vacation before he was laid off." See, also, Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11; Verry v. Eckel, 61 Cal.App.2d 595, 143 P.2d 394. Thus, there is nothing wrong *per se* in making an allowance to laid off employees for accrued vacation rights.

[9] The general purpose of this amendment to the charter must also be considered. Quite obviously the people of San Francisco desired that all city and county employees should be given a vacation with pay. They apparently felt that the decision in Adams v. City & County of San Francisco, 94 Cal.App.2d 586, 211 P.2d 368, 212 P.2d 272, had resulted in a small segment of workers being discriminated against, and that such was not their desire. That these were the reasons which induced the voters to adopt "Proposition A", § 151.5 of the charter submitted to them in June of 1950 is indicated by the argument to the voters, approved by the Board of Supervisors, in favor of "Proposition A" and mailed to electors of the city prior to the election. No argument in opposition to the proposed section was submitted. In that argument it is pointed out that the small group of employees who had been deprived of vacation rights seek to "clarify existing vacation rights granted all other City Employees and thereby have restored the same vacation privileges enjoyed by all other departments within the City Government." Then after a reference to § 151.4 of the charter which had been adopted the preceding November, the argument continues: "This group of workingmen have always enjoyed an annual vacation down through the years. A legal technicality via court action, deprived these workers of the vacation allowance which you, the people of San Francisco, have already given them.

"Therefore, by virtue of the above legal technicality, this small segment of workers are the 'forgotten men' of our City Employees.

"Briefly, Charter Amendment 'A' asks only for a clarification of prevailing vacation rights and the subsequent restoration of an annual vacation which is granted to most working people everywhere."

This argument clearly indicates that the voters were advised that the purpose of the amendment was to overrule Adams v. City & County of San Francisco, and to restore these people to the status they previously had.

Thus the question boils down to the problem as to whether this intent was clearly spelled out by the language used in the amendment. In the first place, the section clearly provides that it shall operate retroactively. Obviously, subsection (c) of section 151.5 has a retrospective operation, for it provides that such employees are entitled to vacations back to the year 1948. In that respect, the intent that the provision shall operate retrospectively is crystal clear.

In the second place, it is equally clear that the provision carefully refrained from conditioning its benefits to recipients who are employees of the city at the time the vacation is granted. Subdivision (a) of section 151.5 very carefully provides that "Every employee" of the city operating under section 151.3 "shall be entitled to receive an annual vacation", but subdivision (c), which refers to those entitled to the benefits of the section, carefully omits any requirement of employment at the time of the receipt of such benefits, simply providing that "for all services rendered by employees during the calendar years 1948, 1949 and 1950 vacations shall be granted and paid". Thus the section provides that recipients of the benefits granted must be employees when the services were rendered,

but carefully omits to provide that recipients must be employees when the benefits are granted.

[10] When the obvious purpose of the section is considered together with the language employed to express that intent it seems clear that since these petitioners were employees of the city in 1949, rendered services then, and earned their vacation allotment for such services in 1949, the fact that they were laid off before they had an opportunity to take their vacations does not affect their rights to accrued vacation allowances granted by section 151.5. To hold that petitioners are not entitled to vacation allowances for the year 1949, expressly granted to them by subdivision (c) of section 151.5, we would have to disregard the intent of the section as therein expressed. That we are not permitted to do. Williams v. City of Vallejo, 36 Cal.App. 133, 171 P. 834.

The last contention of appellants necessary to consider is the assertion that if section 151.5 be interpreted as herein indicated it would be unconstitutional in that it would amount to a gift of public funds by granting compensation for past services in violation of Art. IV, sections 31 and 32 of the Constitution. Those sections provide:

"Sec. 31 [in part]. The Legislature shall have no * * * power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever * * *."

"Sec. 32. The Legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay, or to authorize the payment of, any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

[11–14] There is a long line of cases holding that where these sections are applicable a past or moral consideration is insufficient, and that where only such consideration exists the sections are violated. See for a few typical cases, Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474; Id., 114 Cal. 404, 46 P. 279, 33 L.R.A. 752; McBean v. City of San Bernardino, 96 Cal. 183, 31 P. 49; Allen v. Hussey, 101 Cal.App.2d 457, 225 P.2d 674; Lamb v. Board of Peace Officers, etc., 29 Cal.App.2d 348, 84 P.2d 183; Sweesy v. Los Angeles, etc., Retirement Bd., 17 Cal.2d 356, 110 P.2d 37; McCarthy v. City of Oakland, 60 Cal. App.2d 546, 141 P.2d 4.

These sections do prevent the state legislature, directly or indirectly, from granting to counties or cities the legal right to make a gift of public funds by recognizing the validity of past or moral considerations. But San Francisco does not derive its powers from the legislature. Its powers are derived from the Constitution itself. It is a chartered city and county under Article XI of the Constitution. As was said in Adams v. Wolff, 84 Cal.App.2d 435, 441, 190 P.2d 665, 670: "The charter of a city is comparable to the Constitution of the state and governed by the same principles." Various sections of Article XI of the state Constitution grant "home rule" to cities and to cities and counties, and grant to such cities and cities and counties plenary power over their own affairs subject only to charter restrictions. §§ 6, 8, 8½. Stated another way, sections 31 and 32 of Article IV, constitute a restraint on the Legislature, but such sections are not applicable to chartered cities or cities and counties. One of the leading cases so holding is Los Angeles Gas & Electric Corp. v. Los Angeles, 188 Cal. 307, 205 P. 125, where it was held that a lease by the city of its power to private power companies did not come under the bar of the provisions of Art. IV of the Constitution. At page 317 of 188 Cal., at page 129 of 205 P. the court stated the applicable rule as follows: "This provision of the Constitution is in the article regulating the powers of the legislative department of the state government, and is a limita-

tion upon the power of the state Legislature. The powers of the city of Los Angeles are not derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. That is to say, the people of the state, through the Constitution, authorize the people of the city to regulate its affairs by a charter to be framed by a board of freeholders and voted upon by the people of the city, and approved by a resolution of the Legislature. Section 31 of article 4 has no application to a city charter. It is expressly provided by the Constitution, art. 11, § 6, that the city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. The sale and distribution of electrical energy manufactured by a city is a municipal affair, and one over which the Legislature of the state has no control."

The same thought was expressed by the majority of this court in Mullins v. Henderson, 75 Cal.App.2d 117, 132, 170 P.2d 118, 129, in the following language: "Nor is there any merit in appellant's contention that the mayor's attempt to order payment to employees in excess of the compensation to which they were [legally] entitled under the salary ordinance and the Civil Service Commission rules would constitute an attempt on the part of the mayor to make a gift of public funds, and would therefore be a violation of section 31 of Article IV of the Constitution. The case of Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am.St.Rep. 17, upon which appellant relies, was decided when the city and county of San Francisco was operating under a former charter which constituted a direct grant of power from the Legislature, whereas now it is operating under a freeholders' charter; and it has been definitely held that section 31 of Article IV has no application to a city operating under a freeholders' charter, and that where a city is so operated it is subject only to the restrictions and limitations provided for in its charter (Los Angeles Gas & Electric Corp. v. City of Los Angeles, 188 Cal. 307, 205 P. 125); that is to say, since the amendment in 1914 of section 6 of Article XI of the Constitution, which gives the right to chartered cities to control their municipal affairs, the charter of a city availing itself of that right is the supreme law of the city on its municipal affairs, and section 31 of Article IV of the Constitution does not apply to such a chartered city." See, also, Bank v. Bell, 62 Cal. App. 320, 217 P. 538; Smith v. City of Glendale, 1 Cal.App.2d 463, 36 P.2d 1083.

[15, 16] Appellants next urge that the charter itself, by the last sentence of section 150, St.1931, p. 3065, prohibits such gifts. That sentence reads: "No officer or employee shall be paid for a greater time than that covered by his actual service." If it be assumed that this sentence should be interpreted as a prohibition against granting, retroactively, vacation pay to employees (a point we do not decide), it would simply constitute a limitation against the Board of Supervisors, by ordinance or otherwise, from making such an allowance. But it would not prevent the people from amending their basic law—the charter. Here the allowance is made by the charter itself. Section 151.5 was adopted many years after section 150 was adopted. In such cases the latest provision in point of time controls. Adams v. City & County of San Francisco, 94 Cal.App.2d 586, at page 593, 211 P.2d 368, 212 P.2d 272.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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PEOPLE v. BUTLER.

Cr. 931.

District Court of Appeal, Fourth District, California.

May 20, 1953.

Defendant was convicted of arson and assault with a deadly weapon. The Superior Court of San Bernardino County, rendered judgment, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that since there was substantial conflict in evidence on issue for which erroneous instruction was given and district attorney gave special emphasis in argument to such erroneous instruction, reversal was required.

Reversed and remanded for new trial.

1. Criminal Law ⇐778(5)

In prosecution culminating in convictions for arson and assault with deadly weapon, instruction that, when evidence shows that defendant acted as if he were conscious, law presumes that he then was conscious, and that such presumption is controlling until overcome by preponderance of evidence, was erroneous as depriving defendant of full benefit of his testimony to effect that he was unconscious at time of alleged offenses and as placing burden on him to overcome presumption by preponderance of evidence.

2. Criminal Law ⇐1172(1)

Where there was substantial conflict in evidence on issue as to which erroneous instruction was given and district attorney gave special emphasis in argument to erroneous instruction given by trial court, reversal was required.

3. Assault and Battery ⇐96(8)

In prosecution culminating in conviction for assault with deadly weapon, where question whether defendant used rifle at all was conflicting, instruction defining deadly weapon as any object which "used in the manner in which it appears to have been used" is capable of producing great bodily injury was improper.

4. Criminal Law ⇐419(10)

In prosecution culminating in convictions for arson and assault with deadly weapon, error was committed in admitting testimony of arson investigator as to conversation, some days after fire occurred, in which investigator made accusatory statements and defendant unequivocally denied them.

5. Criminal Law ⇐519(5)

Fact that defendant has formerly pleaded guilty is admissible as constituting a confession, but usual rules apply with respect to admission of confession, and it is necessary that plea be shown to have been voluntary.

Jefferson & Jefferson, Martha Malone Jefferson, Bernard S. Jefferson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with arson and in another count with assault with intent to commit murder. A jury found him guilty of arson and, under the other count, guilty of assault with a deadly weapon. He has appealed from the judgment and from an order denying his motion for a new trial.

The defendant had been having some trouble with his wife over a restraining order which had been issued in a divorce proceeding, to which they were parties. He was living in a trailer park near Palm Springs and she was living in the home in Yucaipa. About noon on May 12, 1951, he told two people that he was going to buy a gun and kill his wife. He telephoned his wife three times that afternoon telling her, among other things, that he would burn the house down before he would let her have it. About 4:00 or 4:30 P. M. on that day he entered a store in San Bernardino and bought a .22 rifle, with a box of cartridges.

About 8:20 P. M. that evening Mrs. Butler locked her house and went to a neighbor's. When she returned about 9:50 P. M. she found the defendant sitting in the front room, apparently asleep. She ran back to the neighbor's home and someone there went to call the constable, who lived a few

blocks away. About that time the defendant was seen running away from the house. He got in his parked truck and drove away. He circled around a short distance and again parked his truck, with the lights off, where he could observe the Butler house. About 10:00 P. M. the constable started for the Butler home and passed the point where the defendant was parked. He stopped and when he started to talk to the defendant he saw a gun barrel sticking over the edge of the door and pointed toward him. The defendant threatened to kill him and fired several shots. After a struggle, the constable succeeded in getting possession of the gun and in handcuffing the defendant, with the help of some other people.

Some ten minutes after the constable took the defendant away, neighbors observed that the Butler house was on fire. The fire was burning in the front room and in two of the bedrooms, causing damage to the house as well as some of the furnishings. Mrs. Butler discovered that the glass in the rear door had been broken and the screen cut. A forest ranger in charge of a fire suppression station in that district testified as to the conditions he found in the house about 10:40 P. M. on that night. An investigator for the Board of Fire Underwriters testified as to what he observed three days later.

The sole defense was that of unconsciousness and amnesia. The defendant testified that he took a couple of drinks shortly after noon on that day; that he was unable to remember anything that happened thereafter until later in the evening when he found himself sitting in his truck; that he saw a gun being pointed at him through the window of the truck; and that an officer then hit him. A doctor of philosophy and a doctor of medicine testified that they had questioned the defendant shortly before the trial, and had concluded that he was not conscious of what he was doing during the period in question. The defendant was able to remember what occurred after his struggle with the constable, and testified in some detail as to what was then said and done. The superintendent and medical director of Patton State Hospital testified for the People, and in response to a hypothetical question expressed the opinion that a person who had done what the defendant had done during the intervening period was not unconscious.

[1, 2] No contention is made that the evidence is not sufficient to sustain the verdict but prejudicial error is assigned in connection with the instructions given and in respect to the admission of certain testimony. Error is first assigned in the giving of an instruction which included the following:

> "When the evidence shows that a defendant acted as if he was conscious, the law presumes that he then was conscious. This presumption is disputable, but is controlling on the question of consciousness until overcome by a preponderance of the evidence, which means such evidence as when weighed against the presumption and any evidence supporting the presumption has more convincing force, and from which it results that the greater probability of truth lies therein."

This exact language was held to be erroneous in People v. Hardy, 33 Cal.2d 52, 198 P.2d 865, 871. The court there said:

> "But there can be no justification in the law for placing on the defendant the burden of overcoming the presumption 'by a preponderance of the evidence.' It is a cardinal rule in criminal cases that the burden rests on the prosecution to prove the offense beyond a reasonable doubt * * * and it is error to deprive an accused of the benefit of the doctrine of reasonable doubt by giving an instruction that he has the burden of proving a defense by a preponderance of the evidence. (Citing cases.) The necessary effect of the instruction given in the present case was to place on defendant not merely the burden of producing evidence which would raise a reasonable doubt as to her consciousness, but the much greater burden of proving unconsciousness by a preponderance of the evidence."

The respondent argues that while this instruction was held to be erroneous in the Hardy case, it was not definitely held to be

reversible in itself since other errors there appeared. Other errors also appear in the instant case. In other cases an instruction requiring the defendant to prove his defense by a preponderance of the evidence has been held sufficiently prejudicial to constitute reversible error. People v. Costello, 21 Cal.2d 760, 135 P.2d 164; People v. Marshall, 59 Cal. 386; People v. Agnew, 16 Cal.2d 655, 107 P.2d 601. Moreover, this erroneous statement of the law was given special emphasis in the argument to the jury. Near the end of his closing argument the district attorney stated that the court would instruct the jury that the burden was on the defendant to show by a preponderance of the evidence that he was unconscious, and then said: "I wish you would listen to that instruction very carefully." There was a substantial conflict in the evidence here on this issue, and the effect of this instruction could not have been other than prejudicial. Regardless of the fact that there was strong evidence of the defendant's guilt, he was entitled to a fair trial under established rules of law.

[3] It is next contended that prejudicial error appears in an instruction given as to the meaning of a deadly weapon. In this instruction the following language was used: "A deadly weapon is an object, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing, and is likely to produce, death or great bodily injury." In People v. Simpson, 87 Cal.App.2d 359, 196 P.2d 933, 935, the same language was held to be erroneous since the words "'in which it appears to have been used'" assumed as a fact that a jack was used in some assaulting manner by the defendant, when there was a conflict in the evidence as to whether it had been so used. The weapon here in question was a rifle, but there was a conflict in the evidence as to whether this was used by the defendant or by the constable. The respondent argues that this instruction was not prejudicial since other instructions left it to the jury to decide whether or not the defendant did commit the assault with this weapon. It could not properly be concluded, as a matter of law, that it appeared from the evidence that this gun was used by the defendant in any particular manner and the court should not have implied that it did so appear. The instruction should not have been given in that form.

[4] It is next contended that prejudicial error was committed in admitting the testimony of the arson investigator for the Board of Fire Underwriters as to his conversation with the defendant at the hospital some days after the fire occurred. This conversation was in the presence of a deputy district attorney and a deputy sheriff. It consisted of a number of accusatory statements by the investigator, all of which were unequivocally denied by the defendant. The defendant was asked such questions as: "Then what did you go up there on Saturday night last and set fire to the place for?" "Do you mean to tell me that you do not remember shooting at a man?" and "You mean to tell me that you didn't set fire to that house," and "You don't remember going into the house of your wife and setting fire to it?" The respondent argues that the testimony as to this conversation comes within the exception noted in People v. Turner, 86 Cal.App.2d 791, 195 P.2d 809, to the effect that any false statements made by a defendant to arresting officers or others, with relation to material facts, may be thus shown. It is argued that in his denials to these questions the defendant denied that he was in Yucaipa on that day, and denied that he owned a gun. There was other evidence that the defendant had been in Yucaipa that day and that he bought a gun that afternoon, but he claimed to have been unconscious during that period, and the admission of this evidence cannot be justified under the rule relied on. A flat denial was made by the defendant as to each of the accusatory statements appearing in this testimony, and the evidence thus admitted not only was hearsay but its main effect was to disclose the firm opinion of the investigator that the defendant had set fire to this house and had fired the gun at the constable. This evidence was inadmissible, People v. Simmons, 28 Cal.2d 699, 172 P.2d 18; People v. Reingold, 87 Cal.App.2d 382, 197 P.2d 175; People v. Spencer, 78 Cal. App.2d 652, 178 P.2d 520, and it would

naturally have a prejudicial effect on the jury.

[5] It is next contended that the court committed prejudicial error in permitting the cross-examination of the defendant regarding his former plea of guilty. It is conceded that the fact that a defendant had formerly pleaded guilty is admissible as constituting a confession, but it is argued that the usual rules apply with respect to the admission of confessions, and that it was necessary that it be shown that the confession was voluntary in order to make it admissible. This is the usual rule in that regard. People v. Jones, 24 Cal.2d 601, 150 P.2d 801; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1; People v. Liss, 35 Cal.2d 570, 219 P.2d 789. There was no attempt here to show that this former plea had been voluntarily made, and the contrary would appear since the trial court had set aside the former plea in a special proceeding, on the ground that it had not been voluntarily made. The respondent argues that the door had been opened for this evidence since the defendant's counsel had brought out the fact, in another connection, that the defendant had spent seven months in jail. The reason why that time had been spent in jail was not material here, and the cross-examination with respect to the former plea should not have been permitted. Whether or not the matter was sufficiently prejudicial in itself to justify a reversal need not be decided.

The defendant raises eleven other points which require no extended discussion, most of them are either without merit or of so little materiality that they could not have affected the verdict. Three of them relate to and are sufficiently covered by the matters already discussed. None of them could be held prejudicial under the circumstances here appearing.

Evidence was improperly admitted indicating that the arson investigator was strongly of the opinion that the defendant had set this fire and had shot at the constable. The other evidence concerning the setting of the fire was entirely circumstantial, and concerning the shooting was conflicting. The former plea of guilty could not be taken as a confession here had it been properly presented, and there was no good reason for bringing it in at all. These matters were especially damaging when taken in connection with the instruction that the burden rested on the defendant to prove by a preponderance of the evidence that he was unconscious at the time the acts charged were committed. The jury would naturally be influenced by the improper evidence, and would naturally feel that the defendant, having previously pleaded guilty, had failed to sustain the burden which, according to the instruction, rested upon him. It must be held that these errors were sufficiently prejudicial to require a reversal.

The judgment and order are reversed and the cause remanded for a new trial.

GRIFFIN and MUSSELL, JJ., concur.

In re ARBULICH'S ESTATE.

ARBULICH v. ARBULICH.

S. F. 18194.

Supreme Court of California, In Bank.

May 26, 1953.

Rehearing Denied June 18, 1953.

Proceeding to determine heirship in the estate of a California decedent, which was claimed by brother of decedent who resided in and was a citizen of the United States and by another brother who resided in and was a national of Yugoslavia. The Superior Court, San Francisco County, T. I. Fitzpatrick, J., entered judgment to effect that the brother residing in and a citizen of United States was entitled to distribution of the entire estate, to the exclusion of the other brother, and the latter appealed. The Supreme Court, Schauer, J., held that evidence was sufficient to support finding that on March 21, 1947, when decedent died, reciprocal inheritance rights prescribed by Probate Code did not exist with respect to either real or personal property as between residents and citizens of United States and Yugoslavia.

Judgment affirmed.

Carter, J., dissented.

See also 248 P.2d 179.

1. Descent and Distribution ⇐71(7)

On appeal from Probate Court finding that reciprocal inheritance right prescribed by Probate Code did not exist between residents and citizens of United States and Yugoslavia as of March 21, 1947, question before Supreme Court was not whether that court should find that the greater weight seemed to favor appellant or respondent but was whether it could hold that as matter of law finding of Probate Court was without substantial evidentiary support. Probate Code, § 259.

2. Descent and Distribution ⇐71(7)

On appeal to Supreme Court from Probate Court finding that reciprocal inheritance right prescribed by Probate Code did not exist between residents and citizens of United States and Yugoslavia as of March 21, 1947, every reasonable inference would have to be drawn in favor of the respondent. Probate Code, § 259.

3. Aliens ⇐10, 14

On question whether evidence supported Probate Court's finding that reciprocal inheritance rights prescribed by Probate Code did not exist between residents and citizens of United States and Yugoslavia as of March 21, 1947, treaties, statutes, and other evidence of the foreign domestic law might be considered. Probate Code, § 259.

4. Trial ⇐136(4)

Where treaties or statute law alone are before the court, the construction thereof is a matter of law, but the question of how a foreign country has construed and applied such treaties or statutes is a question of fact.

5. Descent and Distribution ⇐71(7)

A finding by the trial court on the issue of reciprocal inheritance rights prescribed by the Probate Code is to be treated like a finding on any other issue of fact, and if there is evidence to support it such finding will not be disturbed on appeal. Probate Code, § 259.

6. Aliens ⇐10

In proceeding to determine heirship in an estate which was claimed by decedent's brothers one being a resident and citizen of the United States and the other being a resident and a national of Yugoslavia, evidence was sufficient to support finding that on March 21, 1947, when decedent died, reciprocal inheritance rights prescribed by the Probate Code did not exist with respect to real property as between residents and citizens of United States and Yugoslavia. Probate Code, § 259.

7. Aliens ⇐13

Treaty between United States and the predecessor to the existing Yugoslavian government, to effect that citizens of the United States in Serbia and Serbian subjects in the United States should enjoy the rights of the subjects of the most favoured nation, did not operate to establish the reciprocal inheritance rights contemplated by the Probate Code, and, moreover, was not applicable where one claimant of the estate of a California decedent was brother who resided in and was a citizen of the

United States and other was brother who resided and was a national of Yugoslavia. Treaty between United States and Serbia, art. 2, 22 Stat. 964; Probate Code, § 259.

8. Aliens ⇐10, 14

In proceeding to determine heirship in the estate of, California decedent which was claimed by decedent's brother who resided in and was a citizen of United States and by another brother who resided in and was a national of Yugoslavia, testimony by Yugoslavian Ambassador to the United States that reciprocal inheritance rights prescribed by Probate Code existed under 1881 treaty between United States and government which was predecessor to existing Yugoslavian government, served at most to create conflicting evidence as to ultimate fact and was not controlling on issue of reciprocity. Probate Code, § 259; Treaty between United States and Serbia, art. 2, 22 Stat. 964.

9. Descent and Distribution ⇐71(7)

In a proceeding to determine heirship in estate of a California decedent, which involved question of whether reciprocal inheritance rights prescribed by Probate Code existed as between residents and citizens of United States and of Yugoslavia as of date of testator's death, errors, if any, in admission of opinion evidence on behalf of each party with respect to such question, were not prejudicial. Const. art. 6, § 4½.

10. Aliens ⇐14

In proceeding to determine heirship in the estate of a California decedent, which was claimed by decedent's brother who resided in and was citizen of United States, and by another brother who resided in and was a national of Yugoslavia, evidence consisting of Yugoslavian decrees relating to foreign exchange transactions between Yugoslavia and other countries was sufficient to support finding that on March 21, 1947, when decedent died, reciprocal inheritance rights prescribed by Probate Code did not exist as to personal property as between residents and citizens of United States and Yugoslavia. Probate Code, § 259.

11. Descent and Distribution ⇐1

The right to take property by inheritance, and the right to receive that inheritance by payment in money, are part of the substantive incidents of the normal legal order of society, and the right to receive the benefits of the inheritance is a necessary and inherent corollary to the right to take by inheritance.

Haas & Schwabe, Portland, Or., Hubbard & Hubbard, San Francisco, Peter A. Schwabe, Portland, Or., and Emmet B. Hayes, San Francisco, for appellant.

Frank J. O'Brien, San Francisco, for respondent.

SCHAUER, Justice.

[1, 2] Following hearings on petitions to determine heirship in this estate the probate court found that on March 21, 1947, the date of death of the decedent (see Estate of Giordano (1948), 85 Cal.App.2d 588, 594, 193 P.2d 771), the reciprocal inheritance rights prescribed by section 259 of the Probate Code did not exist between residents and citizens of this nation and those of Yugoslavia as to either real or personal property. Judgment was thereupon entered to the effect that decedent's surviving brother Thomas (respondent herein), residing in and a citizen of the United States, is entitled to distribution of decedent's entire estate, to the exclusion of a surviving brother, John, who resides in and is a national of Yugoslavia. The two brothers are decedent's sole heirs at law. John appeals, contending that the evidence is not sufficient to support the finding of nonreciprocity. The question before us is not whether we, if we were viewing the evidence initially, should find that the greater weight seemed to favor appellant or the respondent but is, rather, whether we can hold that as a matter of law the finding of the probate court is without substantial evidentiary support. Every reasonable inference must be drawn in favor of the respondent. (Holmberg v. Marsden (1952), 39 Cal.2d 592, 596, 248 P.2d 417). So viewing the evidence we have concluded that

appellant's contention cannot be sustained and that the judgment should be affirmed.

Charles J. Arbulich, the decedent, was a naturalized citizen of the United States who died in San Francisco. By his will he left his entire estate, consisting of both real and personal property, to his father if the father survived the testator, otherwise to the testator's brother, appellant John Arbulich, Jr., of Yugoslavia. The father predeceased Charles. Both respondent Thomas and appellant John (by the Consul General of Yugoslavia, who purports to be John's attorney-in-fact) filed petitions to determine heirship, and this proceeding followed.

[3–5] The question on the merits, as already indicated, is whether the evidence supports the court's finding that the reciprocal rights required by the provisions of section 259 of the Probate Code did not exist on March 21, 1947.[1] Treaties, statutes, and other evidence of the foreign domestic law may be considered. (Estate of Knutzen (1948), 31 Cal.2d 573, 579, 191 P.2d 747; Estate of Bevilacqua (1948), 31 Cal.2d 580, 582, 191 P.2d 752. Where treaties or statute law alone are before the court the construction thereof is a matter of law, but the question of how the foreign country has construed and applied such treaties or statutes is a question of fact. A finding by the trial court on the issue of reciprocity is to be treated like a finding on any other issue of fact and if there is evidence to support it such finding will not be disturbed on appeal. (See Estate of Schluttig (1950), 36 Cal.2d 416, 423–424, 224 P.2d 695; Estate of Reihs (1951), 102 Cal.App.2d 260, 268, 227 P.2d 564; Estate of Miller (1951), 104 Cal.App.2d 1, 4, 230 P.2d 667.)

The following documentary evidence was included in that before the court in this proceeding:

1. A copy of the constitution of Yugoslavia, which apparently became effective on January 31, 1946. It is declared therein, among other things, that (Article 18), "Private property and private initiative in economy are guaranteed. The inheritance of private property is guaranteed. The right of inheritance is regulated by law. No person is permitted to use the right of private property to the detriment of the people's community. * * * Private property may be limited or expropriated if the common interest requires it, but only in accordance with the law. It will be determined by law in which cases and to what

1. Section 259 read as follows on that date: "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

Effective in September, 1947, section 259 was amended by striking therefrom the last three sentences as quoted hereinabove. At the same time section 259.1 (added to the Probate Code in 1941 and repealed in 1945) was added, as follows: "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259."

extent the owner shall be compensated. Under the same conditions individual branches of national economy or single enterprises may be nationalized by law if the common interest requires it. [Article 19] The land belongs to those who cultivate it. The law determines whether and how much land may be owned by an institution or a person who is not a cultivator. There can be no large land-holdings in private hands on any basis whatsoever. The maximum size of private land-holdings will be determined by law."

2. A Yugoslav decree dated July 16, 1946, pertaining to the acquisition of real property by foreigners. It provides, in part, that "Foreign citizens may acquire rights to ownership of real estate in * * * Yugoslavia either by legal business among the living or by legacy (in case of death) only by previous approval of the competent government agency. * * * [Such] limitations * * * shall not refer to acquisitions of real estate by legal inheritance * * * Permits * * * shall be issued by the Chairman of the Economic Council of [Yugoslavia] * * *" with an appeal "to the Government" allowed if a permit is refused. The Chairman of the Economic Council is "authorized to issue instructions and explanations in connection with the application of this decree." The decree provides no guide or standard to control the Chairman or "the Government" in determining when and whether permits shall issue.

3. A Yugoslav decree dated March 20, 1948, entitled "Control of Real Estate Transactions," which provides in Article 5 thereof that "Foreign citizens may not acquire right of property on real estate [in] * * * Yugoslavia, except on the basis of legal inheritance," and in Article 8 that "The provisions hereof are not valid for acquiring real estate by Yugoslav citizens on the basis of legal inheritance or on the basis of inheritance through testaments." Article 10 invalidated the decree of July 16, 1946 (item No. 2 hereinabove).

4. A copy of a letter [2] dated January 19, 1949, from A. G. Heltberg, American Consul in Belgrade, Yugoslavia, addressed to the Controller of the State of California, in which it is stated, among other things, that the provision of the Yugoslav decree of March 20, 1948, that "Foreign citizens may not acquire right of property or real estate [in] * * * Yugoslavia except on the basis of legal inheritance," has been "informally interpreted" by the claims office of the Yugoslav Ministry of Foreign Affairs "to mean that foreign citizens may inherit property if they, under Yugoslav law, are considered to be the natural heirs of the deceased. If property is willed to some other person than the natural heir that person may not succeed to the property in question."

[6] It is apparent that the evidence summarized hereinabove is sufficient to support a finding that on the date of decedent's death in 1947 reciprocal rights did not exist with respect to real property. In the decree of July 16, 1946 (which remained in effect until invalidated by the decree of March 20, 1948), it is declared that foreign citizens may acquire real property "by legacy (in case of death) only by previous approval of the competent government agency," and that such limitations shall not refer to acquisitions by "legal inheritance." As already noted herein, no standards are provided to guide either the government agency or a testator in determining in what situations, if any, such acquisition by legacy would be approved, and it is inferable that the granting, the withholding, or the conditions of granting, approval may vary from case to case according to the discretion of the governmental agency as exercised in an unbounded field and unguided by standards of equality of application. The situation thus appears to be comparable to that before the court in Estate of Schluttig (1950), supra, 36 Cal.2d 416, 425, 224 P. 2d 695 in which it was held that when "the taking of estates by testamentary disposition or succession is a matter of sufferance determinable in accordance with directions of the Nazi officials and their concepts of national sentiment, there is no 'reciprocal right' as that term is used in the Probate Code."

2. Admitted into evidence without objection from appellant.

Furthermore, it is to be noted that section 259 of the Probate Code, which is here involved, limits the right of the nonresident alien "to take real property in this State by succession or testamentary disposition," to those instances where there is "a reciprocal right upon the part of citizens of the United States to take real property upon the *same terms* and *conditions* as residents and citizens" (italics added) of the country of the alien's residence. That the terms and conditions on which foreigners may acquire real property in Yugoslavia by testament differ from those on which it may be so acquired by Yugoslav citizens is a reasonable inference to be drawn from the decree of July 16, 1946. Although the provisions of the decree of March 20, 1948, and of the interpretation thereof by Yugoslav authorities which is set forth in the consular letter of January 19, 1949, do not directly establish Yugoslav law as of the date of the testator's death herein (March, 1947), they do tend to confirm that under the decree of July 16, 1946, a differentiation was established between the right of foreigners who are natural heirs of the deceased to succeed to real estate "by legal inheritance" and any rights claimed by other foreigners to take real estate "by legacy (in case of death)."

[7] Appellant contends, nevertheless, that the provisions of Article II [3] of a treaty entered into in 1881 between the United States and the Kingdom of Serbia, 22 Stat. 964 (of which the present Republic of Yugoslavia is the successor government) and certified by the Secretary of State of the United States as remaining in full force and effect between this country and Yugoslavia, are applicable and controlling in appellant's favor on the issue of reciprocity. It may be noted that the first paragraph of Article II seemingly treats only of "citizens of the United States in Serbia [Yugoslavia] and Serbian [Yugoslav] subjects in the United States," rather than, as is the situation in the present case, of a United States citizen who dies in the United States and leaves property to a Yugoslav subject who is *in Yugoslavia,* and therefore is not here applicable. Even if we assume its applicability in that respect, however, the rights granted are only those given by each of the contracting nations "to the subjects of the most favoured nation," and do not purport to equal the rights given or guaranteed by each of the contracting nations to *its own* citizens. Consequently the treaty provisions do not establish the reciprocal rights required by the Probate Code.

[8] Testimony by the Ambassador of Yugoslavia to the United States that "Yugoslavia accords to citizens and residents of the United States their full and equitable rights of inheritance under * * * the Convention [treaty] of 1881, * * * [and that] whether the Convention itself is applicable or not * * * Americans do have their full, complete and unabridged rights of inheritance to inherit from their relatives or from their estate in Yugoslavia," serves at most to create a conflict in evidence as to the ultimate fact and is not controlling on the issue of reciprocity. Upon the record we are bound to hold that the evidence is not as a matter of law insufficient to support the finding of the trial court that at the time of decedent's death reciprocal rights within the meaning of the applicable statute did not exist as to real property.

3. Article II of the treaty reads as follows: "In all that concerns the right of acquiring, possessing, or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favoured nation.

"Within these limits, and under the same conditions as the subjects of the most favoured nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts, or charges whatever other or higher than those which are or shall be levied on natives or on the subjects of the most favoured state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives, or by the subjects of the most favoured state."

[9] As to whether reciprocity existed with respect to personal property, there is a substantial conflict of opinion evidence and both appellant and respondent urge that evidence of that nature, offered by the other, was improperly received. We need not pass upon such contentions, however, because it does not appear that the errors, if any, in regard to the admission of opinion evidence were prejudicial. In the light of the other evidence upon the subject, hereinafter mentioned, we do not think it likely that a different result would have been reached in the trial court if the disputed opinion evidence had not been received. (Cal.Const., art. VI, § 4½.)

Aside from the expressions of opinion, a copy of the Yugoslav Constitution, as hereinabove mentioned, and copies of Yugoslav decrees governing transactions with foreign countries and their nationals were received in evidence without objection, and such Constitution and decrees in themselves support the finding of the trial court that reciprocity did not exist with respect to personal property. Provisions of the Constitution have already been mentioned. The first of the decrees, which became effective September 7, 1945, provides: "630. By virtue of Article 2 of the Resolution of November 30, 1943 on the Supreme Legislative and Executive People's Representative Body of Yugoslavia as a provisional organ of the supreme people's authority in Yugoslavia and in connection with the Resolution of August 10, 1945 covering the change of name of the Antifascist Council of National Liberation of Yugoslavia into Provisional People's Assembly of the Democratic Federative Yugoslavia, and at the suggestion of the Minister of Finance, the Presidium of the Provisional People's Assembly of the Democratic Federative Yugoslavia decree.

"The Law

"Regulating Payment Transactions with Foreign Countries

"(Foreign Exchange Law)

"Basic Rules

"Article 1

"All financial transactions with foreign countries, as well as all transactions within the country in relation to foreign countries that may affect the development of the credit balance of our country and the international value of our domestic currency (foreign exchange transactions) are subject to the control of the Federal Minister of Finance (foreign exchange control).

"Article 2

"Primarily the following transactions are subject to control:

"(a) All transactions within the country and with foreign countries: in foreign exchange, claims and debts in foreign currency and other values in foreign currency;

"(b) All transactions with foreign countries: in domestic currency, credits and debits in domestic currency and other values in domestic currency;

"(c) All transactions with foreigners within the country, causing changes in property relations between our country and foreign countries; and * * *

"Article 3

"The term *transaction* from Articles 1 and 2 as used in this law means the transfer of values and metals and payments, it also means the establishment, cancellation and change of obligations and actual rights to values and metals, as well as changes of holders of rights and obligations.

"Article 4

"Permission must be had for transactions described in Articles 1 and 2 of this Law according to foreign exchange regulations.

"Article 5

"It is forbidden to conclude business in the country the amount of which in domestic currency is tied to gold or some foreign currency. * * *

"Article 6

"(1) The Federal Minister of Finance as the supreme foreign exchange authority, exercises his control over foreign exchange through: [various agencies] * * *

"(2) The Federal Minister of Finance regulates the limits of juris-

diction as between the foreign exchange authorities in regard to the exercising of foreign exchange control, be it by Regulations from Article 25 of this Law, or by separate decisions.

"Article 7

"(1) Transactions, subject to foreign exchange control according to this Law, may be conducted only by persons and establishments authorized to do so by the competent foreign exchange authorities, unless the conduct of such business is permitted by the foreign exchange rules themselves. * * *

"Article 8

"The National Bank, whenever authorized by the Federal Minister of Finance, may at any time request the holders in the country to offer for sale to the National Bank all their foreign exchange (regardless whether it be in the shape of claims in foreign currency, checks, drafts, etc.), foreign currency, foreign values and precious metals. If the National Bank decides to buy, it shall fix the terms, * * *

"Article 12

"(1) The term 'devisa' as used in the foreign exchange regulations means a claim abroad on whatever basis, in whatever currency, regardless of the manner of disposal * * *.

"Article 13

"(1) The term *foreigners* as used in this Law means all persons and corporations with permanent residence or seat abroad, regardless of citizenship of persons and ownership of enterprises.

"(2) The term *domestic persons* means all persons and corporations with permanent residence or seat within the country, regardless of citizenship of persons and ownership of enterprises. * * *

"Article 16

"(1) The penalties for foreign exchange infractions are: * * *

"2. Confiscation of objects or values constituting the foreign exchange infraction, in full or in part. * * *

"(2) The Federal Minister of Finance shall pronounce penalties. * * *

"Article 25

"The Federal Minister of Finance shall issue more detailed rules, regulations and decisions for the execution of this Law, upon consulting the National Bank. * * *"

The second decree, effective October 25, 1946, confirms the decree of September 7, 1945, and amends it in various respects which appear to be largely immaterial here. However, Article 24 of the second decree, provides that "The Minister of Finance of FPRY is herewith authorized to issue regulations, instructions, orders and decrees for the execution of this law," thus confirming the apparently unlimited power of the Minister of Finance over foreign exchange transactions.

[10, 11] Appellant urges that the "Foreign Exchange Law" has no materiality in relation to the question of reciprocity; that it is merely "regulatory of foreign exchange and has no reference whatever to rights of inheritance." But a reading of the entire substance of the documents mentioned makes it apparent that the trial court was justified in reaching the conclusion that under Yugoslav law a citizen of the United States, at the time of decedent's death, had no definitely ascertainable and enforceable right to *receive* Yugoslav property by testament, and that the receipt of any such property would depend in each case upon the largely, if not entirely, uncontrolled discretion of the Minister of Finance. This is far different from a standardized regulation which might merely delay the transmission of gold, money, or other stores of value from one nation to another. (See Estate of Schulttig (1950), supra, 36 Cal.2d 416, 425, 224 P.2d 695; cf. Estate of Miller (1951), supra, 104 Cal.App.2d 1, 12, 13, 230 P.2d 667.) Here it is pertinent to observe, as was declared in Estate of Blak (1944), 65 Cal.App.2d 232, 238, 150 P.2d 567; "The 'right' to take property by inheritance and the 'right to receive' that inheritance by payment in money, have long been recog-

nized as part of the substantive, legal and sanctioned incidents of the normal legal order of society. * * * The 'right' to receive the benefits of the inheritance is a necessary and inherent corollary to the 'right' to take by inheritance. One is not separable from the other. The one includes the other. If the right to take exists * * * the right to receive exists * * *."

Upon the record before us, which includes the Constitution and the Resolutions and Decrees of Yugoslavia as above mentioned, we cannot hold that as a matter of law the trial court was not justified in concluding that whether a citizen of the United States, as of the date of decedent's death, might in any particular case actually receive possession and marketable title to real estate in Yugoslavia devised to him or personal property, or its value, bequeathed to him, was a matter of grace or individual indulgence rather than of right based on uniform law.

By reason of our conclusion that no prejudicial error is shown and that the evidence supports the finding of the trial court that on the date of decedent's death reciprocity as contemplated and defined by our law did not exist in Yugoslavia with respect to either real or personal property, it becomes unnecessary to consider or decide respondent's further contentions.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion is out of harmony with my concept of the principles of law applicable to this case and I am in full accord with the views expressed in the able and learned opinion prepared by Mr. Justice Peters when this case was before the District Court of Appeal, 248 P.2d 179, and adopt said opinion as my dissent:

"Charles J. Arbulich, the decedent, was born in the country now known as Yugoslavia, came to the United States, became an American citizen, died in San Francisco on March 21, 1947, and left an estate consisting of real and personal property. By his will he disinherited his American citizen brother, the respondent Thomas S. Arbulich, and left his entire estate to his father, if he should survive the testator, and if not then to his brother, the appellant, John Arbulich, Jr., a Yugoslav citizen and resident. The father predeceased Charles. Both Thomas and John (John through the Consul General of Yugoslavia) filed petitions to determine heirship, it being contended by Thomas that John was ineligible to take under the will for the reason that Yugoslavia, so it is claimed, does not grant reciprocal rights of inheritance to American citizens inheriting from citizens of Yugoslavia within the meaning of section 259 of the Probate Code. John claimed such reciprocal rights existed. A petition by one claiming to be the widow of Charles was also filed, but the issues presented by that proceeding have been settled and are not here involved.

"After a trial which spread over many months because of numerous continuances granted to permit the parties to secure and to present evidence on the basic issue of reciprocity, the trial court determined that reciprocity did not exist, that John was therefore ineligible to take under the will, and that the entire estate should be distributed to Thomas as the sole remaining heir at law. John, through the consul general, appeals.

"Before discussing the evidence which, except for the testimony of the Yugoslav ambassador to the United States, is almost entirely documentary in character, some reference should be made to the general law governing such proceedings. It should be pointed out that section 259 of the Probate Code is not merely a procedural statute, but is part of the substantive law of succession. That being so, the statute as it read at the time of the death of the testator desiring to leave property to an alien governs. In re Estate of Giordano, 85 Cal.App.2d 588, 193 P.2d 771. Charles died March 21, 1947.

"Section 259 as it read in March of 1947 (Stats.1945, p. 2208, chap. 1160) and until its amendment in September of that year, then provided: 'The right of aliens not

residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.'

"Thus, as the section then read, there was a statutory rebuttable presumption that reciprocity existed, and the one contending there was a lack of reciprocity had the burden of proving that fact.

"The cases have also established the law to be that while the interpretation of foreign statutes and of treaties, when they alone are before the court, is a question of law, the question of how such statutes and treaties have been interpreted and applied by a foreign country is a question of fact. The appellate courts will not disturb a finding of reciprocity or of nonreciprocity that is supported by a presumption or is based on conflicting evidence. In re Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695—finding of nonreciprocity with Germany on April 3, 1945, affirmed; In re Estate of Miller, 104 Cal.App.2d 1, 230 P.2d 667, finding of reciprocity with Germany as of April 22, 1942, affirmed; In re Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567, a finding of reciprocity with the Netherlands (date of death not disclosed, but prior to 1942 and during German occupation of Holland) affirmed; In re Estate of Giordano, 85 Cal.App.2d 588, 193 P.2d 771, a finding of nonreciprocity with Italy as of January 17, 1945, affirmed; In re Estate of Reihs, 102 Cal.App.2d 260, 227 P.2d 564, a finding of reciprocity with Germany as of November 24, 1946, affirmed; In re Estate of Kennedy, 106 Cal.App.2d 621, 235 P.2d 837, a finding of reciprocity with Romania as of March 15, 1949, affirmed. In all of these cases it was held that where the finding of reciprocity or nonreciprocity was based on conflicting evidence or supported by a rebuttable presumption it would not be disturbed by an appellate court, even where, as to the same country, one trial court had found reciprocity to exist and another that it did not. Compare the Schluttig, Miller and Reihs cases, cited *supra*.

"The case of In re Estate of Kennedy, 106 Cal.App.2d 621, 235 P.2d 837, sets forth several other rules that are here applicable. It held that the facts that a limited nationalization or socialization of property and industry had taken place in Romania, or that that country was communistic in nature and dominated by Russia, did not compel a finding of nonreciprocity. It also held that once a statute enacted prior to the death of the testator involved is proved to exist, a presumption that such statute continued to exist arises under the provisions of section 1963, subdivision 32, of the Code of Civil Procedure, and that once such a statute is proved to exist, it will be presumed that the terms of such statute have been carried out under the provisions of section 1963, subdivisions 15 and 33, of the Code of Civil Procedure.

"The cases of In re Estate of Miller, 104 Cal.App.2d 1, 230 P.2d 667, and Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567, held that the fact that the property inherited in a foreign country could not be immediately transferred to the United States, due to the war or to foreign exchange regulations, was not relevant on the issue of reciprocity.

"Thus, in the instant case, appellant was entitled, in the trial court, to the rebuttable presumption that reciprocity existed. If he could prove the existence of a treaty or statute of Yugoslavia enacted prior to March 21, 1947, granting reciprocity, he was then entitled to the rebuttable presumptions that that law continued to exist, and that such law was and would be enforced according to its terms. Since the trial court has found against these presumptions and against reciprocity, the question is whether, keeping in mind the burden of proof and these presumptions, there is any substantial evidence or reasonable inferences therefrom to support the finding.

"Although the burden was on respondent to prove nonreciprocity, the appellant agreed to present his evidence that reciprocity existed before respondent offered his evidence.

"The appellant first introduced a treaty of 1881 between Serbia and the United States, and the certificate of then Secretary of State George C. Marshall dated May 21, 1948, duly authenticated, certifying that such treaty is still in force and effect between Yugoslavia and the United States. That certificate traces the history of the Kingdom of Serbia into the Kingdom of the Serbs, Croats and Slovenes, into the Kingdom of Yugoslavia, and finally, in November of 1945, into the Federal People's Republic of Yugoslavia, and certifies that by agreement between the two countries the Serbian treaty of 1881 was still in full force and effect. The final clause of the certificate states 'that the said treaty remains in full force and effect between the United States of America and Yugoslavia.'

"Article II of that treaty reads as follows:

" 'In all that concerns the right of acquiring, possessing, or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favoured nation.

" 'Within these limits, and under the same conditions as the subjects of the most favoured nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts, or charges whatever other or higher than those which are or shall be levied on natives or on the subjects of the most favoured state.

" 'They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives, or by the subjects of the most favoured state.'

"There was next introduced the certificate of Sava N. Kosanovic, Ambassador to the United States for Yugoslavia, duly authenticated by our State Department, and dated May 15, 1948, concerning the law of Yugoslavia with respect to the estates of decedents. The certificate contains the categorical assertion that reciprocity exists within the meaning of section 259 of the Code of Civil Procedure. The certificate states that the ambassador knows of his own knowledge that the Constitution and laws of Yugoslavia 'accord to citizens of the United States of America, including citizens of the State of California, though not residing in * * * Yugoslavia, the reciprocal rights of inheritance prescribed and referred to in Sections 259 * * * of the Probate Code of the State of California. The Constitution and laws of the Federal Peoples Republic of Yugoslavia permit and grant to citizens of the United States of America, including citizens of the State of California, though not resident in * * * Yugoslavia rights equal to those accorded to Yugoslav citizens residing in * * * Yugoslavia to take by will or succession any and all property located

within * * * Yugoslavia,' subject to the Nationalization Law of December 5, 1946, as amended April 28, 1948. The certificate then states that this Nationalization Law as amended provides for 'the nationalization of real property owned by foreigners, except immovable property of farmers tilling their own land, buildings serving in the main as the homes of the owners thereof,' but, under the provisions of that act "all the owners of nationalized property, are entitled to full compensation for such property.'

"The certificate then goes on to state that by agreement with the United States 'all treaties previously concluded with the former Kingdom of Serbia * * * are in full force and effect' between the United States and Yugoslavia. The certificate then quotes article II of the United States and Serbia treaty of 1881, above quoted, and then certifies that the government of Yugoslavia 'has at all times construed and does now construe and respect said treaty as providing for and guaranteeing complete reciprocal rights of inheritance between the United States of America and * * * Yugoslavia so that citizens of the United States of America, including citizens of the State of California, residing in the United States or wherever they may reside have the full and unabridged right to inherit and to receive and have paid to them all inheritances, by last will and testament or by succession, all money and property, real and personal, bequeathed, devised or due to them by the laws of the succession situated in the Federative Peoples Republic of Yugoslavia from the estates of deceased citizens' of Yugoslavia, subject only to the Nationalization Law as amended.

"A supplemental certificate of the ambassador, duly authenticated and dated October 14, 1948, was also introduced. The ambassador there certifies that the rights of foreigners to inherit property in Yugoslavia as set forth in the original certificate has been the law since 1918 and up to the present time, and that there has been no change in such laws and none is contemplated. It is certified that 'it has always been the fixed policy of my Government and its predecessors to fully protect, preserve and assure the rights of all foreigners and residents outside of Yugoslavia to enjoy, take and receive full rights of inheritance of property, real, personal or mixed, without discrimination, in the same manner and to the same extent as residents and nationals of Yugoslavia' subject only to the Nationalization Laws. It is further certified, when moneys are due and payable to Yugoslav residents from United States decedents as a result of inheritance, that the recipients in Yugoslavia receive such moneys in Yugoslavia at the official rate of exchange free of any imposts, levies or taxes, 'and they have free and unabridged use and enjoyment thereof' subject only to such limitations as are imposed on Yugoslav nationals for the protection of the state. This supplemental certificate also notes that on July 19, 1948, the United States and Yugoslavia negotiated a claims agreement by the terms of which the Yugoslav government engages to authorize Yugoslav nationals indebted to anyone in the United States 'to meet such indebtedness on maturity.' By the terms of that government Yugoslavia agreed to pay $17,000,000 to the United States for American property nationalized in Yugoslavia, to be distributed by the United States among the rightful claimants.

"In addition to these two certificates, Ambassador Kosanovic was called as a witness by appellant. He testified that he was not only the Yugoslav ambassador to the United States, but also a minister in the cabinet and a member of the Praesidium, the highest authority in his country. He presented a copy of the Constitution of Yugoslavia adopted in 1946 which, according to his testimony and supported by an examination of the document, makes no discrimination, so far as the right to enjoy and inherit property is concerned, between Yugoslav citizens and foreigners. The Constitution provides that the 'inheritance of private property is guaranteed. The right of inheritance is regulated by law.' In addition, the ambassador testified that there was no discrimination as against foreigners in connection with the right of inheritance, and that if inheritance taxes are paid in the United States on a bequest to a Yugoslav

citizen, that person will receive the inheritance without further tax. He several times reiterated his statement that there were no laws or rules or regulations in any way restricting the right of an American to receive and to enjoy his inheritance in Yugoslavia. On cross-examination he testified that his country had exchange controls, and that under Yugoslav law anyone in the country receiving foreign exchange could be compelled to sell it to the state bank at regular exchange rates. He testified that there were no big estates in Yugoslavia, that the land formerly owned by big landowners had been nationalized, and that the maximum ownership of one individual is twenty-five hectares,[1] but that former owners, including foreigners, were compensated. He also testified that money received by inheritance by Yugoslav citizens could be fully owned and enjoyed by such citizens.

"Appellant then, over the objection that it was incompetent, irrelevant and immaterial, introduced as an official document an official communication between the Yugoslav Ministry of Justice and the Yugoslav Ministry of Labor dealing with the reciprocity question. This document states that under Yugoslav law 'the courts extend protection to all individuals in the exercise of their [inheritance] rights, regardless of whether they be Yugoslav nationals or foreign nationals.' It also states that under the 1881 treaty, which Yugoslav recognizes, American citizens inheriting from Yugoslav nationals enjoy exactly the same rights and privileges over such property as do Yugoslav nationals. It is also asserted that the Ministry of Justice has always informed Yugoslav courts that reciprocity of inheritance exists between Yugoslavia and the United States. Attached is a copy of a decree of a Belgrade court distributing a portion of an estate in Yugoslavia to a United States citizen.

"Another official communication between the Yugoslav Ministry of Finance and the Ministry of Labor, over objection, was introduced in which it is stated that the Ministry of Finance has never issued any regulation limiting the right of inheritance of estates of Yugoslav citizens by American citizens. The document states that, due to the shortage of foreign exchange, it has not always been possible to transfer funds from Yugoslavia to the United States, but that it is the intention of the government to allow such transfers as soon as conditions permit.

"This was appellant's case. It is obvious that such evidence, independent of the presumption of reciprocity, would fully support a finding of such reciprocity. But the trial court found that reciprocity did not exist. The question is whether there is any substantial evidence to support that finding.

"Respondent first offered two letters, one from C. W. Cannon, United States Ambassador to Yugoslavia, dated August 14, 1947, and addressed to the then Attorney General of California, and the other from A. G. Heltberg, American consul at Belgrade, dated November 4, 1948, and addressed to Frank O'Brien, respondent's attorney. Neither of the letters to which these two letters were responses was offered. Both letters introduced purport to discuss certain laws and regulations of Yugoslavia and purport to give opinions as to how they are enforced. Appellant objected to the introduction of these letters on the grounds that they were incompetent, irrelevant, and immaterial, were hearsay and that no proper foundation had been laid for their introduction. The objections were good. The letters should not have been admitted. There was no showing that Cannon or Heltberg were experts on Yugoslav law. In fact, the Heltberg letter states that 'this office can not assume responsibility for statements made in respect to the laws of Yugoslavia.' The letters were merely informal documents, and certainly were not official documents. The important question of whether a sovereign state abides by its laws and treaties should not be made to depend upon informal offhand opinions of officials who may or may not be experts. Without a further showing, the letters should not have been admitted.

1. A hectare is 2.471 acres.

"It must not be assumed that these two letters support the finding of non-reciprocity. They do not. Both relate primarily to the foreign exchange controls limiting the transfer of funds from Yugoslavia to this country, a factor which, under the cases already cited, is not relevant on the issue of reciprocity. Cannon's letter was apparently in response to a letter from the attorney general telling Cannon that several Yugoslav residents and citizens had applied to recover funds on deposit in California banks, and inquiring if American citizens with money on deposit in Yugoslavia could withdraw such money, and requesting information about any currency regulations that might exist. Cannon replied that there were stringent regulations in force 'with regard to the export of foreign exchange and the transfer of property abroad.' Reference is made to pertinent provisions of the Foreign Exchange Law putting all foreign exchange transactions under government control, and requiring a permit for such transactions. The following paragraph of the letter is particularly relied upon by respondent:

"'According to the Embassy's information, the Yugoslav authorities have, so far, not only granted no foreign exchange permits to American claimants to the proceeds of property in Yugoslavia, but have, with minor exceptions, made it impossible for American citizens to establish their claims. In only one known instance has an American citizen actually been able to bring his claim to the point where his attorney could apply for a foreign exchange permit, and that application has been refused. This case involved a legacy.'

"The letter then refers to the confiscation and nationalization of many American properties. This letter was written before the claims settlement agreement, already referred to, was entered into between the two countries.

"The letter of Heltberg to O'Brien also deals primarily with the foreign exchange law, a copy of which was enclosed. The letter states that the 'law provides for a tight control of all foreign currencies held by Yugoslavia, and it is the opinion of the Embassy that American heirs ordinarily would not be able to transfer their inherited monies [sic] into American currency.' Attention is then called to the fact that the embassy has records of but one case of such a transfer since the end of the war, and to a communication from the Yugoslav government informing the embassy that 'it would grant transfers of funds derived from legally inherited properties within the limits of available foreign exchange stocks. However, because of lack of foreign exchange, the amounts for the time being would have to be deposited with the National Bank of the Federative People's Republic of Yugoslavia in Yugoslav currency as property of foreign successors.'

"The letter goes on to mention the fact that the Yugoslav decree of March 20, 1948 'permits acquisition of real estate in Yugoslavia by foreigners but only on the basis of legal inheritance or for official use. All other real estate owned by foreigners would be nationalized. The American heir, however, would have little control over his inherited properties. He would have to have the approval and consent of the competent state authorities before he could sell, transfer or dispose of the property. He would not be able to sell, transfer or dispose of the property to a non-Yugoslav citizen. The amount of income derived from the property and the use of the property would be determined by local housing authorities. Furthermore, to complicate matters, the Yugoslav Government does not recognize the right of their citizens to be nationalized as American citizens. The Embassy believes it possible that a person possessing Yugoslav nationality under Yugoslav law and American citizenship under American law could inherit Yugoslav real estate in the same manner as other purely Yugoslav citizens. When such a dual national is subsequently divested of his Yugoslav nationality, his previously inherited properties in Yugoslavia would presumably be seized without right of indemnity.'

"There was next introduced into evidence by respondent, without objection from appellant, a letter with six enclosures to lawyer O'Brien dated December 24, 1948, from Francis E. Flaherty, Acting Assistant

Chief, Division of Protective Services, Department of State, Washington, D. C. The letter calls attention to the decree of March 20, 1948, passed a year after the death of the decedent here involved, which contains the following sentence: 'Foreign citizens may not acquire right of property on real estate on the territory of the Federative People's Republic of Yugoslavia, except on the basis of legal inheritance.' The letter then states that it had been thought that the Nationalization Law, which provides: 'On the day this law becomes effective, all real estate owned by foreigners * * * will be nationalized,' nullified the right of aliens to inherit at all, but by a decree of June 23, 1948, the right of foreigners to gain ownership of real property 'on the basis of legal inheritance' was reaffirmed. The letter then sets forth the same restrictions on such ownership as were set forth in Heltberg's letter above quoted, and then states that the Nationalization Law and the June decree 'are presently interpreted by Yugoslav officials so as to permit alien heirs to inherit or succeed to property only when, under Yugoslav law, they are also natural heirs of the deceased.'

"The enclosures are translations of various laws and decrees and of a note from the Yugoslav Ministry of Foreign Affairs to the United States dated October 9, 1948. Several of the enclosed laws and decrees relate to the foreign exchange controls that have already been mentioned. One of the enclosures is a decree dated March 20, 1948, relating to the 'Control of Real Estate Transactions.' This decree was not in effect when decedent died. It provides that all transfers of real property are 'subject to prior approval by the competent state authorities,' and provides that such authorities shall deny such approval when the transfer is made for speculative purposes, or when such transfer will produce a larger income than needed for livelihood, or would exceed the maximum area allowed for agricultural ownership. This decree also prohibits a foreign citizen from owning land 'except on the basis of legal inheritance.' Attached to this decree is an 'Obligatory Interpretation' by the Praesidium, the highest authority in Yugoslavia, to the effect that a Yugoslav who acquires another citizenship forfeits his real estate to the state without compensation.

"The official note above referred to from the Ministry of Foreign Affairs of Yugoslavia to this country stated that the 'Yugoslav Courts strictly apply all Yugoslav provisions, laws and international agreements clearly regulating the rights of foreign citizens to acquire or inherit to [sic] real or personal property situated in Yugoslavia, within the limits of the existing provisions and without any discrimination i. e., under the same conditions as citizens of the most favoured nation.' Reference is then made to the decree of March 20, 1948, limiting foreign real estate holdings to those acquired as 'heirs at law,' and then it is argued that such provision is consistent with treaty obligations because all foreigners are treated alike. It is then stated that as to transfers abroad of legally inherited properties the Yugoslav government 'will grant such transfers within the limits of available foreign exchange stocks,' and when such stocks are not available the sum in question can be temporarily deposited in the national bank, in Yugoslav currency, as property of foreign successors.

"Without objection, appellant next introduced a Yugoslav decree dated July 16, 1946, relating to the acquisition of real property by foreigners. It provides that foreigners may acquire real property in Yugoslavia 'either by legal business among the living or by legacy (in case of death) only by previous approval of the competent government agency.' A lease to a foreigner for over five years likewise requires a permit, but neither of these limitations applies 'to acquisitions of real estate by legal inheritance.' Agencies are designated with permit issuing powers and the right of appeal granted from their decisions.

"Also without objection a copy of the Nationalization Law was introduced. In court counsel for respondent read into the record an amendment to that act adopted April 28, 1948, more than a year after the death of the decedent here involved. By the amendment, most real estate, as of the effective date of the amendment, owned by foreigners, was nationalized, except real

estate operated by peasant farmers or used by the owner as living quarters. The amendment also provided that Yugoslav citizens who became foreign citizens lose the right of ownership of real estate.

"Also without objection there was introduced another letter from Heltberg, American Consul in Yugoslavia, addressed to the California State Controller and dated January 19, 1949. Most of the material in this letter is cumulative of material already introduced. It refers to the decree of March 20, 1948, limiting the right of foreigners to acquire real estate except 'on the basis of legal inheritance,' and then points out that such clause has been informally interpreted by the Yugoslav officials 'to mean that foreign citizens may inherit property if they, under Yugoslav law, are considered to be the natural heirs of the deceased. It property is willed to some other person than the natural heir that person may not succeed to the property in question.' It is also pointed out that Americans succeeding to property in Yugoslavia would be faced with various restrictions and controls. The letter then discusses the penalties of dual citizenship, and then continues: 'Since 1945, the Embassy has no record of any case where American citizens have been heirs in Yugoslav estates. It is generally believed that the political affiliations of the American heir would not affect his right to inherit unless he was a dual national and his property liable to confiscation for crimes against Yugoslavia.'

"The only other exhibits introduced by respondent were two booklets of speeches by Yugoslav leaders which add nothing to the other evidence already mentioned.

"On this evidence the trial court found that reciprocity as to both real and personal property did not exist. The estate here involved consisted, at the time of death, of both real and personal property, the real property having been sold during the course of administration. There can be no doubt at all that the weight of the evidence indicates that reciprocity exists. Certainly that is true as to the personal property. However, we cannot say, as a matter of law, that reciprocity exists as to the real property. It is probably true that there are evidence or inferences therefrom that support the finding of nonreciprocity as to real property. The evidence of the laws, decrees and interpretations to the effect that foreigners can succeed to Yugoslav real estate only if they are heirs at law, that a Yugoslav who acquires American citizenship forfeits his rights in real property in Yugoslavia, etc., probably support the finding of nonreciprocity as to the real property. But even as to this issue the evidence is not satisfactory because most of these laws, decrees and interpretations were passed or made after the death of the decedent here involved. It is the law in effect at the time of such death in which we are here interested. It is by no means clear that such laws, decrees and interpretations are construed to be retroactive. That may be cleared up on a new trial.

"Even though it be assumed that there is some evidence, or inferences therefrom, that support the finding of nonreciprocity as to the real estate, there are other factors disclosed by the record that require a reversal and the granting of a new trial. The record discloses that the trial court considered and gave great weight to evidence not relevant to the issue of reciprocity, and that the finding of nonreciprocity was partially based on this nonrelevant evidence. That this is so is conclusively demonstrated by an examination of the transcript, of the memorandum opinion of the trial court, and of the findings.

"On numerous occasions during the trial the court expressed great distrust of the form of government existing in Yugoslavia, and expressed great interest in what would happen to the bequest here involved when delivered in Yugoslavia. Great interest was shown in the foreign exchange regulations that would constitute a restraint on an American citizen transferring Yugoslav funds inherited there to this country. For example, the trial court stated at R.T. page 221: 'We know that Yugoslavia today is dominated by a Communistic government. They are in power today. Now, this Court, the stand that I have taken is that I would have to have pretty

good evidence before I would distribute to anyone, or to any government back there that is dominated by the Communists. [What became of the presumption that reciprocity exists?] Having this case in mind, I met people who have been there, lived there, even when I was on a little vacation in Arizona, and I met a woman who lived there, and they took all of her property. They confiscated all of the business of her husband and herself.' At pages 135, 150, 160, 223 and 243 appear other comments by the trial judge indicating how strongly he was motivated by the fact that the government of Yugoslavia was socialistic or communistic.

"The theory upon which the trial court proceeded is also disclosed in the memorandum opinion. It is there stated: 'Furthermore, it has not been established to the satisfaction of the Court that the said John Arbulich, Jr. [the Yugoslav heir] would receive the benefit of any distribution to him of the balance of the estate, consisting of cash in excess of $30,000. It was established at the hearings by the testimony of the Yugoslav Ambassador Kosanovic that the present government of Yugoslavia is Communistic and that the property rights of individuals are completely ignored. Under the circumstances the Court cannot in good conscience order $30,000 or more distributed to the claimant in Yugoslavia or to any representative of that country without any assurance whatever that the distributee would ever receive any part of such funds.'

"Thus the trial judge not only indicated that he would not consider the presumptions already mentioned in favor of reciprocity, but also indicated that he had forgotten or would not consider the documentary and oral testimony to the effect that the Yugoslav heir would be permitted in Yugoslavia to enjoy the full benefits of the bequest.

"The weight given by the trial court to these factors is also disclosed in the formal findings. Finding X reads as follows: 'That at the time of death of said decedent the Government of Yugoslavia was Communistic and has been ever since, and that the property rights of individuals are ignored, and that, under the circumstances, the Court could not, in good conscience, order distribution to the claimant in Yugoslavia. That under the laws and regulations of Yugoslavia, John Arbulich, Jr., does not have any rights of ownership or control of his property, and if distribution were ordered to John Arbulich, Jr., it would, in fact, be distribution to the Communistic Government of Yugoslavia. Such distribution would be against public policy and contrary to provisions of Section 27 of the California Probate Code.'

"There is no evidence at all that the Yugoslav claimant would not be permitted to enjoy his legacy in Yugoslavia. The evidence is all the other way. The solemn declaration of the Ambassador from Yugoslavia that the Yugoslav claimant would receive the money free of any tax and that he would enjoy 'free and unabridged use and enjoyment thereof' could not thus lightly be disregarded. The ambassador is the highest diplomatic official of the country he represents, and his declarations about the law and practices in his country are entitled to great weight.

"The fact that the court disapproved of the form of the government of Yugoslavia was not relevant at all on the issue of reciprocity. Yugoslavia is a sovereign state and is recognized as such by the government of the United States. As long as some right of inheritance is recognized in that state, and the evidence here without conflict discloses that it is, the fact that such right differs from the right of inheritance in this country, or that as an individual a judge may disapprove of the form of government, are factors which are not relevant and should not be considered on the issue of reciprocity. This was clearly pointed out in the Estate of Kennedy, 106 Cal.App.2d 621, 235 P.2d 837, involving Romania, a country that is not only communistic, but within the sphere of influence of Russia, which Yugoslavia certainly is not. Some degree of socialization and nationalization has taken place in most European countries, a policy we as individuals may or may not approve, but as judges passing on the issue of reciprocity, the form of such governments is a false factor,

and a matter for each sovereign country to determine for itself.

"The fact that an American claimant of an estate in Yugoslavia would be subject to foreign exchange controls and could not immediately receive his legacy in this country is also an irrelevant factor. Practically every country in the world has some limitation on the export of wealth from the country. Such factor has nothing to do with the issue of reciprocity. It was so held in Re Estate of Miller, 104 Cal. App.2d 1, 230 P.2d 667, and In re Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567.

"Much is said in the briefs about the proper interpretation of the treaty of 1881 and about how such treaty should be interpreted in view of the case of Clark v. Allen, 331 U.S. 503 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953. The question is not how that treaty should be interpreted as a matter of law, but how the contracting parties have interpreted it. The ambassador testified that it had been interpreted to grant reciprocity to all American nationals. While there is no evidence directly contrary to this, there may be inferences that would support a finding to the contrary. Any gaps in the evidence on this point can be supplied on the new trial.

"Enough has been said to indicate that the finding of lack of reciprocity was based partially upon inadmissible evidence, upon factors irrelevant to the issues, and upon laws and regulations and decrees passed after the death of decedent. This being so, the judgment cannot stand. A new trial should be had at which only admissible evidence and relevant factors are considered.

"There is one other point that must be considered. Respondent contends, and the trial court found, that appellant was not properly represented in the proceeding. For that reason, it is urged, this judgment must be affirmed. It should be pointed out that, in spite of this finding, the trial court also disposed of the case on its merits. Such disposition is, of course, inconsistent with a finding that the appellant had made no proper appearance in the action.

"The contention that appellant was not properly represented is based upon the fact that the lawyer appearing on behalf of appellant was appointed by the Consul General of Yugoslavia to represent appellant. The lawyer had no power of attorney from appellant nor any other direct authority to represent him. Throughout the trial, counsel for respondent objected on this ground, and the trial judge, on many occasions, observed that he thought a personal power of attorney was indispensable. As already pointed out, an express finding was made on this issue.

"The petition of John Arbulich, Jr., alleges that it is filed by the Consul General of Yugoslavia as attorney in fact for John. It is further averred that under the power and authority vested in the Consul General by the United States and by the laws and treaties between the United States and Yugoslavia, he, as Consul General, has the power and authority to act as attorney in fact for his nationals who inherit American property. The recognition by the United States of the consul general with power 'to exercise and enjoy such functions, powers and privileges as are allowed to the Consuls General of the most favoured Nations in the United States' was duly proved. The question is, can the consul general appear in our courts as attorney in fact for his nationals in a probate proceeding? Can a consul appoint counsel to represent such nationals? The answer is clear that he may.

"The parties discuss the proper interpretation of an article in the Consular Convention between the United States and Serbia concluded in 1881, contemporaneous with the other Serbian treaty already mentioned in this opinion, and, like it, recognized by both the United States and Yugoslavia as being still binding. Article XI provides:

" 'In the case of the death of any citizen of the United States in Serbia, or of a Serbian subject in the United States without having any known heirs or testamentary executors by him appointed, the competent local authorities shall give information of the circumstances to the Consuls or Consular Agents of the nation to which the deceased belongs, in order that the necessary information may be immediately forwarded to the parties interested.

"'Consuls General, Consuls, Vice Consuls and Consular Agents shall have the right to appear personally, or by delegate, in all proceedings on behalf of the absent or minor heirs or creditors until they are duly represented.'

'The parties argue over the proper interpretation of this treaty. Appellant argues that the second paragraph should be read independently of the first so as to give the consul general the power alleged to exist. Respondent argues that the first paragraph limits the operation of the second paragraph to nationals dying abroad in the other country, and does not include the right to represent in the other country nationals residing at home. If the document alone be considered, either interpretation is reasonable. But the treaty provision must be considered together with applicable principles of international law. Without reference to any treaty provision, it is a well settled principle of international law that consular representatives are deemed to be international attorneys in fact for their nations. One of the earliest cases so holding, and a leading case on the subject, is The Bello Corrunes, 6 Wheat. 152, 19 U.S. 152, 5 L.Ed. 229. In that case the United States Supreme Court held that a vice consul of Spain was entitled to make a claim by way of libel on behalf of Spanish owners of a Spanish ship resident in Spain and whose identities were unknown to the consul. In that case the following frequently quoted statement appears, 6 Wheat. at page 168, 5 L.Ed. 229: 'On the first point made by the attorney-general, this court feels no difficulty in deciding, that a vice-consul, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libelled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point.'

"In the case of In re Tartaglio's Estate, 12 Misc. 245, 33 N.Y.Supp. 1121, it was held, both as a result of an interpretation of a treaty with Italy and by general international law, that the Italian consul general could properly apply and receipt for the distributive shares of personal property on behalf of the Italian heirs.

"In the case of Buxhoeveden v. Estonian State Bank, Sup., 41 N.Y.S.2d 752, there is a good collection of case and text authorities. There, both by treaty and on general principles, the Estonian Consul General was permitted to appear and set aside a default judgment, and to defend a suit against the Estonian State Bank, treated in the opinion as a private person.

"The case of In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87, is another good case on the subject, and collects and comments on many relevant authorities. There it was held by the New York Court of Appeals that either by treaty or by general principles of international law, a consular representative could even exercise on behalf of one of its nationals resident in the home country the personal right of a widow to elect not to take under a will. While three justices dissented in that case, they did so only on the ground that the power of the consul did not extend to the exercise of such a per-

sonal right—they did not disagree with the majority holding that a consul has the right to appear and to represent his nationals.

"In interpreting the treaty provision here involved, the following principles stated in In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 186, 157 A.L.R. 87, amply supported by authority, are applicable: 'In arriving at the meaning of the treaty we are bound to remember that it is the supreme law of the land * * *, that its words are to be taken liberally in the light of evident purposes * * * and that, since the pact is done in counterparts, one in each language little use can be made of local technical definitions of words. * * * When two constructions of a treaty are admissible, one restrictive of the rights that may be claimed under it and the other liberal, the latter is always to be preferred. * * * "This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law". The Bello Corrunes, 6 Wheat. 152, 171 [19 U.S. 152, 171] 5 L.Ed. 229.'

"With these well settled principles in mind we have no reasonable doubt but that the treaty here involved should be interpreted so as to confer a treaty right on the consuls of the contracting countries to appear on behalf of their nationals not otherwise represented and to represent them in the courts of the other country.

"This conclusion would be almost inevitable were it not for the case of In re Estate of Clausen, 202 Cal. 267, 259 P. 1094. There it was held that the Danish consul did not have the right to receive distribution of and receipt for the interests of Danish nationals under the then treaty with Denmark. The treaty there involved was one entered into in 1826 and related solely to problems of navigation and commerce existing between the two countries. It contained a clause that for the protection of navigation and commerce each country would agree to receive and admit consuls from the other who should enjoy all the privileges and powers of consuls conferred by either on the consuls of the most favoured nation. Nearly a hundred years after this treaty was entered into, United States entered into a much broader treaty with Germany which expressly conferred upon consuls of either country the power on behalf of nonresident nationals to receive and to receipt for distributive shares of estates to which such nonresident nationals were entitled. The Supreme Court of California rule, purely as a matter of interpretation of the treaty, and without reference to general principles of international law, that the treaty between Denmark and the United States related solely to problems of navigation and commerce, and that the powers conferred by that treaty on consuls related solely and exclusively to such problems. Thus the treaty with Germany did not operate under the most favored nation clause to confer any rights on Danish consuls except in connection with navigation and commerce. The court did not discuss the right of the Danish consul to appear and represent his national residing in Denmark in the probate proceeding under the general principles of international law above discussed. It simply decided that such consul, under the treaty, had no power to have distributed to himself and to receipt for the share of the estate to which the Danish national was entitled. See, also, Petersen v. Lyders, 139 Cal.App. 303, 33 P.2d 1030, and Lyders v. Petersen, 9 Cir., 88 F.2d 9.

"The present case differs from the Clausen case in several particulars. The present case does not involve the right of the Yugoslav consul general to have distributed to him and to receipt for the property bequeathed to appellant. The proceeding on appeal is not for distribution, but to determine heirship. Several times during the trial counsel appointed by the consul general stated that he was not contending that the estate should be distributed and receipted for by the consul general. He agreed that the court could order the estate distributed directly to appellant, and, in that event, offered to see that the estate was distributed to appellant and receipted for by him. This is important, not only because

it serves to distinguish the instant case from the Clausen case, but because it also meets the doubts expressed in the case of The Bello Corrunes, 6 Wheat. 152, 5 L.Ed. 229. In the quotation from that case above set forth the United States Supreme Court expressed doubt that, under general principles of international law, a consular representative could have the proceeds of the pending action distributed to himself, but had no doubts about the power of such representative to appear and to represent his absent national.

"In the second place, the Clausen case limited its decision to an interpretation of the treaty involved. It did not discuss the power of a consul, independent of treaty, to appear and to represent his nonresident nationals in lawsuits in the country to which such consul was accredited.

"In the third place, the instant case is distinguishable from the Clausen case because unlike the treaty involved in the Clausen case, the treaty here, properly interpreted, confers the very power involved. Moreover, under general principles of international law, consuls possess the power to appear for and to represent their nonresident nationals in the courts of the country to which such consul is accredited."

I would, therefore, reverse the judgment.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.



118 Cal.App.2d 291

PEOPLE v. FOLEY.

Cr. 5036.

District Court of Appeal, Second District, Division 1, California.

June 2, 1953.

As Modified June 4, 1953.

Defendant was convicted of a violation of the Vehicle Code. Judgment was pronounced on December 18, 1951, by which defendant was sentenced to serve one year in the county jail, but execution of sentence was suspended and defendant was granted conditional probation for a period of three years. On March 19, 1953, the order granting probation was revoked and the original sentence was ordered to be in full force and effect. On March 30, 1953, defendant signed written notice of appeal. The District Court of Appeal, White, P. J., held that if the appeal be regarded as having been taken from the original judgment, it came too late, and that the order of March 19, 1953, had no more legal effect than an order of commitment in any case where judgment had been pronounced and execution of sentence suspended, and was not appealable.

Appeal dismissed.

1. Criminal Law ⇐1023(11)

Judgment of conviction for violation of Vehicle Code, by which defendant was sentenced to serve one year in county jail, was appealable, even though execution thereof had been suspended after pronouncement of judgment. Vehicle Code, § 503.

2. Criminal Law ⇐1069(1)

Where judgment of conviction was pronounced on December 18, 1951, but execution of sentence was suspended and defendant was granted conditional probation for a period of three years, and order granting probation was revoked on March 19, 1953, defendant's appeal, notice of which was signed March 30, 1953, if regarded as having been taken from the original judgment, came too late. Rules on Appeal, rule 31.

3. Criminal Law ⇐1081

Rule providing that notice of appeal shall be liberally construed in favor of its sufficiency, does not have reference to time within which an appeal may be taken, but only as to the form of such notice. Rules on Appeal, rule 31.

4. Criminal Law ⇐1023(12)

Where judgment of conviction was pronounced on December 18, 1951, by which defendant was sentenced to serve one year in County Jail, but execution of sentence was suspended and defendant was granted conditional probation for period of three years, order entered on March 19, 1953, revoking the grant of probation and ordering the original sentence to be in full force and effect, had no more legal effect than an or-

der of commitment in any case where judgment had been pronounced and execution of sentence suspended, and was not appealable. Penal Code, § 1237, subd. 3.

Alexander L. Oster, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

On September 26, 1951, an information was filed by the District Attorney against defendant, charging grand theft in two counts, numbered I and III, violation of Vehicle Code, section 503 in two counts (II and IV), and one count of forgery in Count V.

Defendant was duly arraigned and entered a plea of not guilty to the offenses charged in the information. Subsequently, defendant with his counsel present, and by leave of court, withdrew his plea of not guilty as to Count II of the information (violation of section 503, Vehicle Code), and entered a plea of guilty thereto.

Defendant's request for leave to file an application for probation was granted and on *December 18, 1951, judgment* was pronounced as to said Count II of the information, by which defendant was sentenced to serve one year in the county jail. Execution of sentence was suspended and defendant was granted conditional probation for a period of three years. In July of 1952, the probation order was modified to require defendant to pay a fine in the sum of $40.

On March 19, 1953, the order theretofore entered granting probation was revoked and sentence imposed on December 18, 1951, as to Count II of the information, ordering sentence of one year in the county jail, to be in full force and effect.

On *March 30, 1953,* defendant signed a written notice of appeal "from the judgment in the above action and from the whole thereof".

The people have filed a motion to dismiss the appeal on the ground that the judgment from which said appeal was taken became final in December of 1951, and that the time allowed for an appeal, Rule 31, Rules on Appeal, has long since expired.

[1] Appellant had full opportunity to appeal from the judgment entered on December 18, 1951, even though execution thereof had been suspended after the judgment was pronounced. People v. Howerton, 40 Cal.2d 217, 253 P.2d 8; People v. Neal, 108 Cal.App.2d 491, 493, 239 P.2d 38.

Appellant urges that his notice of appeal should be considered as having been taken from the order made on March 19, 1953, revoking the prior order granting probation and ordering the "sentence imposed on December 18, 1951, as to Count 2 of the information, committing the defendant to the County Jail of the County of Los Angeles for the term of one year * * * in full force and effect". Appellant contends that this order was appealable under subsection 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from "any order made after judgment, affecting the substantial rights of the party."

[2, 3] There can be no question but that the appeal must be dismissed if it be regarded as having been taken from the judgment entered on December 18, 1951, Rule 31, Rules on Appeal. While the rule just cited provides that the notice of appeal "shall be liberally construed in favor of its sufficiency", such language does not have reference to the time within which an appeal may be taken, but only as to the form of such notice.

[4] We are of the view that the order of March 19, 1953, under the circumstances here shown, had no more legal effect than an order of commitment in any case where judgment had been pronounced and execution of sentence suspended. In re Ralph, 27 Cal.2d 866, 869, 168 P.2d 1.

The appeal is dismissed.

DORAN, J., and SCOTT, J. pro tem, concur.

CUCINELLA et al. v. WESTON BISCUIT CO., Inc. et al.*

Civ. 19391.

District Court of Appeal, Second District, Division 3, California.

May 27, 1953.

As Modified on Denial of Rehearing June 19, 1953.

Hearing Granted July 22, 1953.

Action against owner and driver of automobile for injuries sustained by pedestrian who was struck while attempting to cross street near intersection. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for owner and driver, and pedestrian appealed. The District Court of Appeal, Shinn, P. J., held that admitting testimony as to average speed usually traveled by motorists on such street was improper, but was not prejudicial.

Affirmed.

1. Negligence ⇐5

Custom or usage cannot make due care out of conduct that is, in fact, negligent under circumstances disclosed by evidence.

2. Appeal and Error ⇐1050(1)

Automobiles ⇐243(7)

In action against owner and driver of automobile for injuries sustained by pedestrian who was struck while attempting to cross street near intersection, admitting testimony as to estimated average speed usually traveled by motorists on such street was improper but was not prejudicial, where evidence indicated that driver's automobile was traveling faster than estimated average speed.

3. Automobiles ⇐160(1, 3), 216

Both motorist and pedestrian must exercise such care as circumstances of particular situation would demand of careful and prudent person; each must use his faculties and judgment in taking reasonable precaution to avoid an accident; each must be vigilant to observe presence or approach of the other; but neither is under a greater duty than the other to do what his situation and capabilities demand of him in protecting himself and others from injury.

4. Trial ⇐260(8)

In action against owner and driver of automobile for injuries sustained by pedestrian who was struck while attempting to cross street near intersection, error, if any, in refusing to give pedestrian's requested instruction that amount of caution required by law increases as does danger that reasonably should be apprehended was not prejudicial, where instructions given sufficiently stated rule.

* Subsequent opinion 265 P.2d 513.

William W. Waters and Henry F. Walker, Los Angeles, for appellants.

Hunter & Liljestrom, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff brought this action for damages resulting from injuries sustained when she was struck by defendants' automobile. In a jury trial verdict and judgment were for defendants and plaintiff appeals.

[1, 2] The accident occurred on San Fernando Road, a north-south highway, a short distance south of the intersection of that portion of Lacy Street which extends westerly from San Fernando Road. Plaintiff left the office of the Riverview Laundry at the southwest corner of the intersection and walked easterly to the middle of San Fernando Road where she stopped because of vehicular traffic traveling north. A northbound truck passed her, a car or truck traveling south passed behind her, and plaintiff, being frightened, and without looking to the north, hurried toward the west sidewalk, a distance of about 28 feet. Defendants' car, traveling south, six or eight feet from the westerly curb, struck plaintiff before she reached the westerly curb. There was some question whether the path that plaintiff traveled to or from the middle of San Fernando Road was in a crosswalk. On her appeal plaintiff assigns as error the admission of evidence, over her objection, as to the average speed usually traveled by automobiles on San Fernando Road at the location in question. A police officer who had worked in the area for several months traveling by motorcycle or automobile gave testimony with reference to the location of certain signs designating the area as a 25 mile zone. On cross examination by defense counsel he was asked: "And it is a fact, is it not, that the normal and

average rate of speed traveled by automobiles in that area is between 30 and 35 miles an hour?" Over plaintiff's objection the witness answered that the average speed usually traveled by motorists was around 30 miles per hour. This evidence of customary practice was offered as proof that a speed of 30 miles an hour or thereabouts was not a negligent speed. It was error to admit it. The reasonableness of defendants' speed as an element of claimed negligence was to be determined from the circumstances of the accident without regard to the average rate of speed usually traveled by cars in the vicinity. It was said in Milton v. Los Angeles Motor Coach Co., 53 Cal.App.2d 566, 570, 128 P.2d 178, 180: "The law is well settled that mere custom or usage cannot make due care out of conduct that is in fact negligence under circumstances disclosed by the evidence. Phoenix Assur. Co. v. Texas Holding Co., 1927, 81 Cal.App. 61, 74, 252 P. 1082; Rudd v. Byrnes, 1909, 156 Cal. 636, 642, 105 P. 957, 26 L.R.A., N.S., 134, 20 Ann.Cas. 124; Anstead v. Pacific Gas & Elec. Co., 1928, 203 Cal. 634, 638, 265 P. 487; Perry v. Angelus Hospital Association, 1916, 172 Cal. 311, 315, 156 P. 449; Robinet v. Hawks, 1927, 200 Cal. 265, 273, 252 P. 1045; Carroll v. Central Counties Gas Co., 1929, 96 Cal. App. 161, 165, 273 P. 875, 274 P. 594." See, also, Mehollin v. Ysuchiyama, 11 Cal. 2d 53, 77 P.2d 855; Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345; People v. Crossan, 87 Cal.App. 5, 261 P. 531; Wolfsen v. Wheeler, 130 Cal.App. 475, 19 P.2d 1004; Sanford v. Moreau, 249 App.Div. 915, 292 N.Y.S. 595; 61 C.J.S., Motor Vehicles, § 516, p. 271. Also, the fact that defendants' automobile was being driven faster or slower than the average speed usually traveled in the locality was a false quantity in determining the question of negligence of the driver. It would be a poor excuse for traveling at what could be found a negligent speed under the particular circumstances of the case for a driver to say: "I was traveling no faster than the average speed usually traveled by other drivers." "Average speed" would be ascertained by adding a great number of assumed speeds, the highest, lowest and all between, and dividing the total by the number of factors used. It would be necessary, also, to take into consideration all the different conditions which affect the flow of traffic from time to time. The question was whether, in view of the condition of the highway, the traffic, and the ability of the driver to observe the presence of plaintiff in the street, the speed at which he was driving measured up to the requirements of reasonableness and prudence. Nothing could be more meaningless and irrelevant to the facts in issue than the officer's estimate of the average, usual speed of cars. However, we are of the opinion that the error in the receipt in evidence of the opinion of the officer was not prejudicial to plaintiff. Don T. Smith, driver of the car, testified that he was traveling 30 or 35 miles an hour. Drivers of cars following him testified to the same effect, and an expert witness testified from measurements of the skidmarks of defendants' car (62 feet) that it was traveling 36 miles per hour. Thus the admission of defendant Smith, and the other evidence, strongly indicated that his car was traveling at a higher rate of speed than the estimated average. If the jury considered the testimony of the officer as evidence which tended to prove or disprove negligence of the defendants, the fact that their car was traveling above the usual speed of other cars would have been more favorable to plaintiff than to defendants.

[3] Error is assigned in the refusal to give plaintiff's requested instruction reading as follows: "While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same degree of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity

to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible, serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position."

What this instruction really says, and is intended to impress upon the jury, is that the motorist is using an instrumentality capable of causing serious injury; the pedestrian has "only his own physical body to manage," which "limits his capacity to cause injury"; therefore, the motorist must use greater care than the pedestrian to avoid an accident.

This supposed rule of comparative duties had its origin in statements of the court in Raymond v. Hill, 168 Cal. 473, 143 P. 743, a case in which a pedestrian walking in the street was injured when overtaken by an automobile. The court said, 168 Cal. at page 483, 143 P. at page 747: "While both parties are charged only with the exercise of the same degree of care, it is manifest that the amount of that care by law exacted of the driver of the motor vehicle is far greater than the amount exacted of the foot passengers. Of the driver of a vehicle under such circumstances, the law in terms requires that he shall not only give reasonable warning of his approach, but 'use every reasonable precaution to insure safety.'" The reference was to § 3(3) of an act regulating the operation of motor vehicles, Stats.1905, p. 816, which required the driver of a motor vehicle when approaching a person, horse or other draft animal on a highway, to "give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person or animal, and, in the case of horses or other draft animals, to prevent frightening the same." Other requirements were that upon a signal from the person in charge of a horse or other draft animal the motorist must stop, and if the horse is badly frightened, shut off his motor. Under that statute the maximum lawful speed was 20 miles per hour outside of cities or towns, 10 miles per hour in closely built up sections, and 15 miles per hour in other sections of the city. In speaking of the claim of motorists that foot passengers seemed to show an indifference to the law of self-preservation, the court said, 168 Cal. at page 483, 143 P. at page 747: "But nevertheless no person who has ever ridden in or driven an automobile can be unaware of one fact, and that is that pedestrians, and women particularly, are liable to sudden panic upon the unexpected approach of this terrifying machine." The remarks of the court with respect to the great care exacted of motorists when meeting or overtaking a pedestrian on the highway were related to the above quoted statutory requirement, for it was said, 168 Cal. at page 484, 143 P. at page 748: "The vital question for solution by the jury was whether the driver of the automobile used every reasonable precaution to insure the safety of plaintiff up to the moment she was struck." There was no statutory law at that time, nor to our knowledge has there ever been a requirement that a pedestrian must use every reasonable precaution to avoid being run down by an automobile. We therefore cannot disagree with the statement that under the 1905 statutes a motorist was required to use a greater amount of care in operating his vehicle than was demanded of a pedestrian as they approached each other; but the court was merely declaring and expressing approval of the statutory law, as applied to the facts of the case.

The 1905 statute did not impose any special duty upon motorists with respect to pedestrians except when they were being approached on the highway. The court did not state that under any other conditions the motorist must use greater care to avoid an accident than was required of a pedestrian. Nevertheless, the statements in Raymond v. Hill have been taken as authority for the general proposition that under all conditions a motorist has a greater duty of care than a pedestrian and a practice has developed of instructing juries to that effect. Weihe v. Rathjen Mercantile Co., 34 Cal.App. 302, 167 P. 287; Vedder v. Bireley, 92 Cal.App. 52, 58, 267 P.

724; Pinello v. Taylor, 128 Cal.App. 508, 514, 17 P.2d 1039; Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95; McNear v. Pacific Greyhound Lines, 63 Cal. App.2d 11, 146 P.2d 34.

When these cases were decided there was no law in force which imposed upon a motorist the strict requirement of care when approaching a pedestrian on a highway that was contained in the 1905 Act. That Act was repealed by the 1913 Motor Vehicle Act, Stats.1913, p. 639, and by § 20(h), p. 647, the duty of special care was limited to occasions when motorists would encounter horses being ridden or driven on the highway. The law at present is substantially the same. Veh.Code, § 532.

There has been a great deal of legislation pertaining to the operation of motor vehicles since the Raymond case. As between motorists and pedestrians the former have the right of way in certain conditions and in other conditions they must give way to pedestrians; but in modern times, or even in the days when the automobile was regarded as a "terrifying machine," no legislature has seen fit to declare that under all conditions a motorist must use greater care than a pedestrian to avoid an accident. It is significant also that commencing with 1913 each legislative revision of the law has either expressly or impliedly disapproved of the requirement of the 1905 statute which, as between a motorist and a pedestrian meeting on the highway, placed the former under a duty to use more than ordinary care.

The reasons for this are obvious: (1) The general principles of negligence have been deemed adequate; and (2) the law is, and should be, that a pedestrian has as great a duty of care to avoid being run down as a motorist has to avoid running him down. The result of negligence upon the part of either may be the mutilation or death of the pedestrian, and this is as well known to one as it is to the other. Of course, anyone who is manipulating a dangerous instrumentality must use greater care with it than is necessary with one that is harmless, but this comparison applies generally to possible injury to another as a result of its misuse. A motorist must use greater care to avoid running down a pedestrian than the latter need use to avoid damaging an automobile by being run over, but this is not the test as to their respective duties. In case of a collision between an automobile and a pedestrian the potentialities of the latter are material only as they concern his ability to avoid being hit. When contributory negligence is an issue the question is not whether the pedestrian used ordinary care to avoid damaging an automobile by getting himself run over, but whether he used ordinary care to keep out of the way of it. The instruction we are criticizing compares the duty of care required of a motorist in order to avoid injuring a pedestrian with that required of a pedestrian to avoid damaging the automobile and finds the former to be greater. It then fails to distinguish between the mere shadow of care that should be taken to avoid damaging the automobile and the very real care that should be exercised to avoid being run over, and says, in effect, that the pedestrian need be no more concerned for his own safety than he should be for the safety of the automobile. Both driver and pedestrian must exercise such care as the circumstances of the particular situation would demand of a careful and prudent person. Each must use his faculties and judgment in taking reasonable precaution to avoid an accident; each must be vigilant to observe the presence or the approach of the other; but neither is under a greater duty than the other to do what his situation and his capabilities demand of him in protecting himself and others from injury. The major concern of the motorist is that he must control his car so as to avoid maiming or killing the pedestrian. The major concern of the pedestrian is to avoid being run down. The instruction properly states the rule of extreme care that applies to one who is handling a machine that is capable of inflicting serious injury. It states the self evident fact that a pedestrian is less likely than the automobile to cause injury, and it says, in effect, that his duty of care is proportionate only to his ability to cause injury, thus ignoring his duty to take reasonable and

prudent measures to avoid injury to himself. It is altogether illogical and a misstatement of the law to say that a pedestrian has less of a duty to protect his own life and limb than a motorist has to preserve them for him.

[4] Plaintiff requested an instruction to the effect that the amount of caution required by law increases as does the danger that reasonably should be apprehended. The court refused the instruction. Plaintiff says that no equivalent instruction was given. Defendant merely replies that the rule was sufficiently stated in other instructions but does not take the trouble to point them out. In our own investigation we find that the court did instruct that "the amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation." Although this was stated in an instruction which related to plaintiff's attempted crossing the street, it was elsewhere stated that the duty of the defendant in the exercise of ordinary care was the same as that of plaintiff. Although the instruction might well have been given its refusal was not prejudicial error.

No cause has been shown for disturbance of the judgment.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



117 Cal.App.2d 800

ENFIELD v. HUFFMAN MOTOR CO. et al.

Civ. 15365.

District Court of Appeal, First District, Division 1, California.

May 19, 1953.

Action by purported automobile owner against garageman for automobile or its value and for unlawful detention of automobile. Garageman brought in prior owner as cross-defendant and filed counterclaim and cross-complaint for value of work, labor, and materials expended on automobile and for storage. The Superior Court, County of Alameda, entered judgment that all parties should take nothing, and purported owner appealed. The District Court of Appeal, Peters, P. J., held that, where trial court did not determine date lien arose, whether garageman's refusal to deliver on ground of purported owner's alleged nonownership was reasonable, or whether garageman's conduct resulted in waiver of necessity of purported owner's tender or garageman's lien, purported owner would be granted new trial.

Judgment reversed.

1. Automobiles ⇐374

Conduct designed to prevent delivery of automobile to one not owner is in protection of mechanic's lien if one exists, and in protection of owner's interest in automobile, and therefore is reasonable. Vehicle Code, § 425(a).

2. Bailment ⇐18(2)

Right to mechanic's lien, except where specifically controlled by statute, is governed by general common-law principles applicable to all liens. Civ.Code, §§ 1504, 1511, 1515, 2905, 2909, 2910.

3. Tender ⇐16(1)

Owner must make a demand for his property accompanied by tender, but where one claiming possessory lien absolutely refuses to deliver the property, tender may be excused. Civ.Code, §§ 1504, 1511, 1515, 2905, 2909, 2910.

4. Common Law ⇐9

The law does not require the doing of a useless act.

5. Bailment ⇐18(4)

Conduct which excuses owner's tender may also amount to waiver of mechanic's lien.

6. Bailment ⇐18(4)

Mere excessive demand, in absence of tender of proper amount by owner, will not amount to waiver of mechanic's lien.

7. Liens ⇐16

A lienholder who refuses, following proper demand, to deliver property without

setting up his lien thereon, or who bases his refusal upon ground inconsistent with lien, waives his right to claim lien.

8. Trover and Conversion ⇐4

An act which is done to preserve and protect property in order that it may remain subject to lien and which is equally beneficial to those having subordinate rights and not antagonistic thereto, does not constitute a wrongful conversion. Civ. Code, § 2910.

9. Appeal and Error ⇐1177(8)

In action by purported automobile owner against garageman for automobile or its value and for unlawful detention thereof, where trial court failed to determine date garageman's lien arose, whether garageman's refusal to deliver on ground of purported owner's alleged nonownership was reasonable, or whether garageman's conduct resulted in waiver of necessity of purported owner's tender or garageman's lien, new trial would be granted. Vehicle Code, § 425(a); Civ.Code, §§ 1504, 1511, 1515, 2905, 2909, 2910.

Raymond A. Ferrario, Everett E. Power, Oakland, for appellant.

John F. Hanson, Jr., Alameda, for respondent.

PETERS, Presiding Justice.

Plaintiff, O. E. Enfield, Jr., claiming to be the owner of an automobile in the possession of defendant, the Huffman Motor Company, brought this action for the recovery of the car or its value, and damages for its unlawful detention. The defendants brought in Bonnie Johnson as a party, and asserted a possessory lien in the company for $77.17 for work, labor and materials used or expended in the repair of the car, and further asserted that such repairs had been ordered by Enfield and Johnson. A counter-claim against Enfield for the value of the work, labor and materials, and for storage, was filed, as was also a cross-complaint against both Enfield and Johnson for the same items. The trial court determined that plaintiff should take nothing by his action, and that defendants should take nothing by their cross-complaint. Judgment was entered accordingly. Plaintiff appeals. Defendants have not appealed from the portion of the judgment adverse to them.

The record shows the following: In October of 1947, Bonnie Johnson owned the 1941 Dodge automobile here involved. She had the defendant company, the operator of a new car agency, a garage and repair service, install a new motor. Mrs. Johnson was not satisfied with the job and failed to pay a balance of some $60 to $70, which the defendant company claimed was still due. On January 1, 1948, Mrs. Johnson sold the car to her brother, the plaintiff, O. E. Enfield, Jr., for a total of $1,200, giving him a bill of sale therefor. When the car was sold to Enfield it had California license plates, but in May, 1948, Enfield had the car registered in his name in Colorado and secured and installed Colorado license plates.

Herbert Huffman, a partner in the defendant company, testified that in January of 1948 he went to Mrs. Johnson's home, where several families resided, to try to collect the claimed overdue bill. The door was answered by a man who claimed not to know Mrs. Johnson, stated that she had moved, and threatened to throw Huffman off the premises. Upon later meeting Enfield, Huffman stated that he was the man involved.

The Dodge automobile was again brought to defendant garage for repairs on July 14, 1948. There is a major dispute in the evidence as to who brought the car in and ordered the repairs. Enfield testified that he did, and that he was accompanied by a Margaret Tungstel, a friend, who corroborated him. Two of the attendants at the garage testified that Bonnie Johnson, accompanied by a man, presumably Enfield, drove the car into the garage. Bonnie Johnson not only denied that she had brought the car in, but denied that she had been in or near Alameda County on that date. This is a key issue in the case. The trial court resolved it in favor of plaintiff, because it found that

on the date[1] in question "O. E. Enfield, Jr., brought a certain 1941 Dodge Sedan automobile to the auto repair shop operated by the defendants and that at said time and place O. E. Enfield, Jr. ordered certain work and labor to be performed * *." It must be accepted, therefore, as a fact that Enfield, the legal owner of the car, brought it to the garage and ordered the work done. Enfield testified that he told the garage attendant that the motor died, the car leaked oil, and the starter dragged, and that he wanted these things repaired, and the oil changed. Defendants' testimony was to the effect that the repairs ordered were more extensive than this and were as disclosed on the work order introduced into evidence. The court has resolved this conflict in favor of defendants.

Margaret Tungstel testified that she accompanied Enfield to the garage on July 14, and that on July 15, 1948, at his request, she telephoned the garage and was told that the repairs were finished, that the car was ready for delivery, and that the charge was about $4.90. The service manager of defendant company remembered the telephone call, but testified that he told the caller that the car was not ready, that more extensive repairs were needed, and that the caller authorized these repairs to be made.

Later on the same day (July 15, 1948) Enfield arrived at the garage to pick up his car. He testified that he saw the Dodge in the garage, and that there was a bill under the windshield wiper; that the bill was for four dollars and ninety odd cents; that a mechanic told him that the car was ready; that he took the bill over to the cashier and was preparing to pay the bill when someone told him that Mr. Huffman wanted to see him; that he left the bill on the counter and went into Huffman's office; that Huffman told him that he would have to pay the $60 plus bill owed by his sister or he could not have the car. No demand of any kind was made for the current bill, nor did Huffman mention its amount.

The next day, on July 16, 1948, Enfield took a witness to the garage and again demanded his car, produced the bill of sale of the car and the Colorado registration showing that he was the owner, but again was refused the car unless he either produced Bonnie Johnson or her bill was paid. When Enfield attempted to remove some papers from his car he was ordered off the premises.

Huffman testified that he had been told that Bonnie Johnson had brought the car to the garage and that he had instructed the service department not to do any work on the car but to send her in to see him when she called; that the work card showed that Bonnie Johnson had ordered the repairs, although she had not signed the card; that he had been told by his employees that Bonnie Johnson had brought in the car; that when Enfield demanded the car he refused to deliver it to him on the ground that it was Bonnie Johnson's car; that although Enfield asserted ownership, he told him that Bonnie Johnson would have to pick up the car; that on the next day, when Enfield again demanded the car, he again refused to deliver to anyone but Bonnie Johnson, but Enfield denied any knowledge of her. Huffman admitted that no mention of the current bill was then made.

The record does not clearly disclose when the repairs were performed. Enfield and Miss Tungstel testified they had been told that they were completed on July 15, 1948. Huffman testified that on the 14th he had ordered that no work be done on the Dodge. The defendants simply testified, without fixing the date, that they were in fact completed as ordered at the reasonable cost of $77.17. It seems rather strange that Huffman would have ordered the repairs made after his dispute with Enfield on the 15th. Yet if Huffman is to be believed, that is exactly what he must have done. Huffman denied that there was or could have been a bill for $4.94, or any other sum, under the windshield wiper on July 15th for the reason that, under the

1. The complaint alleges that the date was July 16, 1948; the answer and the findings fix it as July 13, 1948; the evidence shows that it was July 14, 1948.

shop's billing procedure, the bill is never placed on the car. Enfield admitted that he made no tender to Huffman of either the $4.94 or of any other amount.

The only evidence that a bill for $77.17 was ever submitted to Enfield appears in a letter sent to one of plaintiff's then counsel dated August 19, 1948, enclosing a bill for that amount "for services to date," and stating that the car would be released "on payment of this bill if Mr. Enfield is able to make satisfactory proof that he is the owner of said vehicle." The only finding on this important question is that an allegation in the affirmative answer to the effect that on "the 15th day of July, 1949, [obviously intended as 1948] defendant presented to O. E. Enfield, Jr. and Bonnie C. Johnson, * * * a demand for work and labor performed and materials furnished in the sum of $77.17" was true. This finding is totally unsupported by the evidence. The earliest a demand was made, according to the record, was on August 19, 1948.

This date becomes important because defendants' defense to this action is that they acted reasonably in refusing the demands of Enfield for the car until they were satisfied that he and not Bonnie Johnson was the owner. Huffman testified that on the Monday or Tuesday of the next week following his original misunderstanding with Enfield (this would be July 19th or 20th), he had received a telegram from Bonnie Johnson from Fresno in response to one he had sent, telling him that she had sold the Dodge to plaintiff. This telegram was introduced by defendants and is dated July 14, 1948. Moreover, Huffman admitted that about this same time he had discovered, through inquiries of the police department of Alameda and the State Department of Motor Vehicles, that Enfield was in fact the owner of the car and registered as such in Colorado. Thus, not later than July 20th, and probably several days earlier if the date on the telegram is to be believed (it being defendants' evidence they are bound by it), Huffman knew the following facts: That the Dodge had Colorado license plates; that the car was registered to Enfield; that Enfield claimed to be the owner and produced the proper registration and a bill of sale from the former owner; that the city police and state motor vehicle department had informed him that Enfield was the owner; and that the former owner declared that the car belonged to Enfield. Yet a month later, on August 19th, when for the first time the defendants presented a bill for the claimed current repairs, defendants were refusing to release the car to Enfield, even if he paid the disputed bill, unless he could offer "satisfactory proof that he is the owner of said vehicle."

The record also shows that in October of 1948 the defendants were claiming that Enfield owed not only the $77.17 bill but $21 for storage. Counsel for Enfield offered to put up a $100 bond to cover all of the claimed indebtedness if Huffman would release the car, and then have the dispute settled in a court proceeding. Huffman refused.

Also in October of 1948 plaintiff filed a claim and delivery proceeding, together with a $2,500 bond, and gave the papers to a constable to secure the release of the car. The constable went to the garage and could not find the car, although he testified that he looked for it. Huffman testified that he told the constable that the Dodge was in storage without disclosing where it was. The constable, who certainly did not seem to have over-exerted himself in the performance of his duties, apparently did not make a direct demand on Huffman for the car.

On this evidence the court found that Enfield was the owner of the car; that the allegations of the complaint relating to a claimed unlawful taking and conversion of the car by defendants were untrue; that at all relevant periods defendants possessed the car and had a possessory lien for repairs on it; that Enfield brought the car to the garage and ordered the repairs; that plaintiff has never paid, offered, or tendered any sum whatever for these repairs; that on July 15, 1949 (obviously 1948) defendants presented to Enfield and to Bonnie Johnson a bill for $77.17 for the repairs; that such sum is a reasonable amount for such repairs and remains un-

paid. As already pointed out, the finding that a bill for $77.17 was presented to Enfield on July 15, 1948, is also unsupported, the evidence being that such bill was first presented on August 19, 1948.

[1] It seems to have been the theory of the trial court that Enfield ordered the repairs; that Huffman properly refused to deliver the car until satisfied who was the real owner; that plaintiff made no tender of the amount due, and that defendants made a demand, but nothing was paid; that defendants have a possessory lien and may keep the car until the amount due is paid. If these basic conclusions were supported by the record, and that was all that appeared, then the conclusion that defendants have a possessory lien under section 425(a) of the Vehicle Code would be quite clear. The difficulty is that the trial court made no findings at all on a basic legal and factual question presented by the record, that is, as to whether defendants, by their actions, did or did not waive the necessity of a tender and their right to a lien. The whole case revolves around whether Huffman's absolute refusal to deliver the car to anyone but Bonnie Johnson waived not only the necessity of a tender by plaintiff, but waived the lien. Defendant company argues that its inquiry about the ownership of the car was reasonable and that Huffman merely exercised ordinary prudence in requiring proof of ownership. But several difficulties are presented in trying to support these conclusions. When the car was first refused to Enfield, according to Huffman, the repairs had not yet been made because he had ordered that no work be done on the car, so that defendants then had no lien. But the real question is whether Huffman acted reasonably in refusing to deliver possession to Enfield not because of non-payment of Enfield's bill, but because Huffman believed Bonnie Johnson owned the car. There can be no reasonable doubt that conduct designed to prevent delivery of an automobile to one not the owner is in protection of a lien, if one exists, and in protection of the owner's interest in the car. Such conduct is therefore reasonable. If Bonnie Johnson had brought in the car for repairs the conduct of Huffman might well have been reasonable. But the court has found that Enfield brought in the car. While Huffman testified that his employees told him that Bonnie Johnson had brought in the car, the statements of these employees, on conflicting evidence, have been found to be untrue. Huffman, not Enfield, is chargeable with the mistakes of these employees. Therefore, we start with the basic premise that Huffman knew or should have known that Enfield brought in the car. Huffman did know that the car formerly belonged to Bonnie Johnson and that she still owed him over $60 for prior repairs. But on July 15th and 16th and later he refused to deliver to Enfield, not because of failure to pay the present bill, in fact, according to Huffman, there was no bill then owing from Enfield, but because he wanted Enfield to produce Bonnie Johnson. Huffman knew then that the car had a Colorado registration, that it was registered to Enfield and that Enfield had a bill of sale signed by Bonnie Johnson. On the 19th or 20th of July, 1948, or earlier, he had a telegram from Bonnie Johnson stating that Enfield was the owner, and by those dates had been told by the police and motor vehicle departments that Enfield was the owner. But as late as August 19th, when the bill for $77.17 was first presented to Enfield, Huffman was still refusing to deliver the car to Enfield unless he offered satisfactory proof of ownership. Such conduct was certainly inconsistent with a claim of lien, and would support findings that defendant by its conduct had waived the necessity of a tender, and had also waived its claim of a lien.

[2–4] The law applicable to the problems is reasonably clear. The right to a mechanic's lien, except where specifically controlled by statute, is governed by general common law principles applicable to all liens. Goodman v. Anglo-California Trust Co., 62 Cal.App. 702, 217 P. 1078. It is, of course, the general rule that the owner must make a demand for his property accompanied by a tender. Lindsay v. Kleiber Motor Truck Co., 110 Cal.App. 479, 294 P. 454. But it is equally clear that a tender may be excused by the con-

duct of the one claiming a possessory lien, such as where the claimant makes an absolute refusal to deliver the property. The law does not require a useless act such as a tender where it obviously would be unavailing. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398; see, generally Civil Code sections 1504, 1511, 1515, 2905, 2909, 2910.

[5] The next question is whether the conduct of the lien claimant may amount to not only a waiver of a tender, but a waiver of the lien itself. It is well settled that conduct excusing a tender may also amount to a waiver of the lien. A case closely in point is Hossom v. City of Long Beach, 83 Cal.App.2d 745, 189 P.2d 787, where it was held that land was freed from a city tax lien when a tender was excused by the statements of the city official involved that any offer to pay the tax would be refused. At page 750 of 83 Cal. App.2d, at page 791 of 189 P.2d, the court stated the applicable principles as follows: "A tender is not necessary where the declarations of the offeree are such as to indicate that the actual offer of money will be rejected; the law does not require a man to do a vain and fruitless thing; a strict and formal tender is not necessary where it appears that if it had been made it would have been refused. Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398. Where the tender of payment of the balance due on a chattel mortgage has been unjustifiably refused, such refusal places the mortgagee in default, stops the accrual of interest, discharges the lien and revests title in the mortgagor with full right of possession. Walker v. Houston, 215 Cal. 742, 745, 12 P.2d 952, 87 A.L.R. 937. A tender need not be kept good when it appears that it will not be accepted." See, also, Lichty v. Whitney, 80 Cal.App.2d 696, 182 P.2d 582.

[6–8] It is also quite clear that a mere excessive demand, in the absence of a tender of the proper amount, will not amount to a waiver. Goodman v. Anglo-California Trust Co., 62 Cal.App. 702, 217 P. 1078; Kirkman Corp. v. Owens, 62 Cal.App.2d 193, 144 P.2d 405. But, in the instant case the refusal by Huffman to deliver the car was not based upon any excessive claim, but upon the claim of Enfield's non-ownership—a ground separate and independent of any question of a tender. From an early date it has been the law that "a lienholder who refuses, upon proper demand, to deliver property, without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after action commenced." Williams v. Ashe, 111 Cal. 180, 184, 43 P. 595, 596; see, also, Lehmann v. Schmidt, 87 Cal. 15, 25 P. 161. The statement that a refusal based upon any other claim than a lien waives the lien is probably too broad. The proper rule is that if the refusal is based on a ground inconsistent with the lien, such lien is waived. The correct rule was stated as follows in Summerville v. Stockton Milling Co., 142 Cal. 529, 543, 76 P. 243, 248: "His possession was consistent with his own title, and was not inconsistent with his rights under the mortgage, nor with the rights of other creditors subordinate to the mortgage. He did not repudiate his lien, but acted for the purpose of protecting his rights thereunder. The conversion referred to in section 2910, Civ.Code, must consist of some act inconsistent with the continuance of the lien and equivalent to a denial or repudiation of it. An act done to preserve and protect the property in order that it may remain subject to the lien, and which is equally beneficial to those having subordinate rights, and not in antagonism thereto, is not a wrongful conversion within the meaning of this section." See, also, Sutton v. Stephan, 101 Cal. 545 at page 548, 36 P. 106.

[9] Now how do these principles apply to the instant case? Some of the findings, already mentioned, are unsupported. There is no finding as to the exact date the repairs were completed so as to fix the date the lien arose. If the findings imply that the lien arose on July 15th, such finding is contrary to the evidence of Huffman that he had ordered no work to be performed on the car. The court simply finds no tender by plaintiff and a demand (erroneously fixing its date) by defendants. The court does not find whether Huffman's refusal to deliver on the ground of non-ownership was or was not reasonable. If such

finding in favor of defendants is implied, certainly a finding that a refusal to deliver the car as late as August 19, 1948, unless Enfield offered "satisfactory" proof of ownership would be unsupported, in view of the defendants' own evidence, already set forth, as to what Huffman then knew about the ownership of the car. The court made no finding on the important issues of whether the conduct of defendants waived the necessity of a tender, or waived their lien. The record shows that these were the vital issues in the case. On the retrial further inquiry may be made into these matters.

For these several reasons the judgment appealed from must be and is reversed.

BRAY and FRED B. WOOD, JJ., concur.



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MOST WORSHIPFUL SONS OF LIGHT GRAND LODGE et al. v. SONS OF LIGHT LODGE NO. 9 et al.

No. 15483.

District Court of Appeal, First District, Division 1, California.

May 25, 1953.

Hearing Denied July 22, 1953.

Action for conversion of property allegedly belonging to subordinate lodges of a fraternal association, and for other relief, wherein defendants filed a cross-complaint. The Superior Court, City and County of San Francisco, rendered a judgment adverse to the cross-defendants and they appealed. The District Court of Appeal, Bray, J., held that where members of subordinate lodges of fraternal association joined such subordinate lodges because of alleged false representations, and nearly all of such members withdrew and affiliated with another grand lodge allegedly because of such alleged false representations, such withdrawing members could not transfer assets of such subordinate lodges to new lodges subordinate to another grand lodge against objection of any member of such subordinate lodges, nor could such new lodges use identical name and number of one of the old subordinate lodges and the name of another subordinate lodge, and no new lodge could use a name so similar to name of an old subordinate lodge as would be likely to confuse public.

Appeals dismissed and judgment and order appealed from reversed.

1. Beneficial Associations ⇐17

The assets of a fraternal association are property of all members, not of any member less than all of them, and such assets can only be transferred to another lodge by consent of all members, and one objector alone can stop such transfer.

2. Beneficial Associations ⇐4, 17

Where members of subordinate lodges of fraternal association joined such subordinate lodges allegedly because of alleged false representations, and nearly all of such members withdrew and affiliated with another grand lodge, allegedly because of such alleged false representations, such withdrawing members could not transfer assets of such subordinate lodges to new lodges subordinate to another grand lodge against objection of any member of such subordinate old lodges, nor could such new lodges use identical name and number of one of the old subordinate lodges and the name of another old subordinate lodge, and no new lodge could use a name so similar to name of an old subordinate lodge as would be likely to confuse public.

3. Beneficial Associations ⇐13(1)

Dues and assessments paid by members to an association become property of association and any severable or individual interest therein ceases upon such payment.

4. Beneficial Associations ⇐13(1)

Where members of subordinate lodges of fraternal association joined such subordinate lodges allegedly because of alleged false representations, and nearly all of such members withdrew and affiliated with another grand lodge, allegedly because they learned of such alleged false representations, new subordinate lodges thereby formed were not entitled to moneys which members making up new lodges paid into old lodges, and old lodges were not liable

to new lodges for sums paid to old grand lodge as required by rules of old grand lodge.

5. Assignments ⇐23, 24(3)
Parties ⇐10

Where members of subordinate lodges of fraternal association joined such subordinate lodges allegedly because of alleged false representations, and nearly all of such members withdrew and affiliated with another grand lodge, allegedly because they learned of such alleged false representations, claims members of old lodges had to return of dues and other moneys paid to old lodges, if any, or to damages because of such alleged false representations, could be assigned for suit purposes but could not be recovered in representative action.

6. Beneficial Associations ⇐16

Where members of subordinate lodges of fraternal association joined such subordinate lodges allegedly because of alleged false representations, and nearly all of such members withdrew and affiliated with another grand lodge, allegedly because they learned of such alleged false representations, new subordinate lodges thereby formed could not recover from old grand lodge the moneys paid it by old subordinate lodges, such cause of action, if any, being individual in each member of old subordinate lodges.

Marvin E. Lewis, San Francisco, for appellants.

Sol A. Abrams and Anthony E. O'Brien, San Francisco, for respondents.

BRAY, Justice.

Appeal by cross-defendants from a judgment against them for $11,517.73 and interest, and denying relief on their complaint to those cross-defendants who were plaintiffs, and from denial of a motion to set aside final judgment. They purport to appeal from the interlocutory judgment[1] and report of the referee. As these are reviewable on the appeal from the final judgment, the appeal as to the latter two matters will be dismissed.

Questions Presented.

1. Where majority members of an unincorporated fraternal association withdraw because of false representations which induced them to join, may such members take with them its assets?

2. May they take its name?

3. Does a new lodge formed by such members have any right to compel the old lodge to pay it a sum equal to the fees, dues, etc., formerly paid by such members to the old lodge?

4. Does such lodge have the right to recover such moneys from the grand lodge to which the old lodge belongs?

Background.

As this case seems to be confusion worse confounded, its background as revealed by the evidence will be presented first in order better to understand the pleadings, findings and true issues. In 1910 The Most Worshipful Hiram of Tyre Grand Lodge of Ancient Free and Accepted Masons (colored) of the State of California, a corporation,[2] was incorporated as a nonprofit fraternal organization. It continued to operate as such and at the time of trial had twenty subordinate lodges. At one time it sent its grand master to a national congress of grand masters (colored) and for a while was recognized by that congress as the only grand lodge in California recognized by it. In 1941 there was a split-up within the congress and several factions formed their own congress. In 1942 the first mentioned congress withdrew its recognition from Tyre, although a different congress continued to recognize it. In 1943 three colored Masonic subordinate lodges not affiliated with Tyre were organized. Of these cross-defendant Pough

1. An appeal by cross-defendants heretofore attempted from said interlocutory judgment was dismissed as premature. Most Worshipful Lodge v. Sons etc. Lodge, 91 Cal.App.2d 582, 205 P.2d 722.

2. This is the grand lodge (hereafter referred to as Tyre) which was the plaintiff in Most Worshipful Lodge v. Most Worshipful Sons etc. Lodge, 94 Cal.App. 2d 25, 210 P.2d 34, the case which was consolidated and tried with the case at bar.

in April organized Sons of Light No. 444, which in turn organized Orange Grove Lodge No. 138 and Rising Star Lodge No. 412. In May, Pough organized plaintiff, The Most Worshipful Sons of Light Grand Lodge, Ancient Free and Accepted Masons, Jurisdiction of California, a nonprofit corporation.[3] Later, Oriental Lodge No. 13, and Pride of Richmond Lodge No. 74 were organized under Light Grand Lodge. Pough became grand master of Light Grand Lodge and still is. In 1946 one Wilson was deputy grand master. In August while Pough was east attending a meeting of grand masters, Wilson called a meeting of Sons of Light No. 444, which then had a membership of about 260, at which "the largest portion," "practically all" the members decided to withdraw from Light Grand Lodge and join Tyre. This they did, using the same name but a different number, Sons of Light Lodge No. 9. Shortly thereafter a vote was taken in Oriental Lodge No. 13. Twenty-seven members voted to go over to Tyre and six who were not present did not vote. The 27 members then joined Tyre under the same name and number, Oriental Lodge No. 13. One hundred fifty out of 162 members of Pride of Richmond Lodge No. 74 went over to Tyre using the same name but changing the number and became Pride of Richmond Lodge No. 14. Eighty-six out of 89 members present of Orange Grove Lodge No. 138 voted to go over to Tyre. They kept the same name but changed the number and became Orange Grove Lodge No. 20. All of the groups which transferred their allegiance to Tyre, took with them all of the respective lodges' funds, bank accounts, robes, paraphernalia, records, assets and personal property, and including the real property of Pride of Richmond Lodge No. 74.[4] While under the jurisdiction of Light Grand Lodge, all members of the subordinate lodges were required to pay certain dues and fees to it. Apparently Grand Master Pough was entitled to retain considerable of these funds. This brings us to the—

Pleadings, findings and judgment.

The plaintiffs are Light Grand Lodge, each of the subordinate lodges from which members purported to take their respective lodges over to Tyre, and a remaining member of each of those lodges suing individually and in a representative capacity for the other remaining members of the respective lodges. The complaint alleged the ownership of the property taken from the respective lodges, the acts of defendants in removing the assets from plaintiff subordinate lodges and asked damages for their conversion and that defendants be restrained from using the names of said subordinate lodges and for damages. While some question could be raised as to the right of plaintiff subordinate lodges to bring this action in their own names (apparently only actions brought under section 3369 of the Civil Code can be brought by a fraternal unincorporated association in its own name; see Athens Lodge No. 70 v. Wilson, 117 Cal.App.2d 322, 255 P.2d 482), it is unnecessary to consider this question for the reason that plaintiff individuals are bringing the action in a representative capacity and the assets sued for as well as the lodge names are alleged to be the property of the respective lodges which the respective individuals represent. Differing with the situation of the cross-complaints which will hereafter be set forth, the rights sought to be enforced by plaintiffs are not the rights of individual members but of the respective subordinate lodges as units.

The defendants are the lodges formed by the members who withdrew from plaintiff subordinate lodges and two members of each lodge individually and as members of the respective lodges. Defendants filed an answer alleging that plaintiff subordinate lodges, the individual plaintiffs and cross-defendant Pough were agents of plaintiff Light Grand Lodge; that plaintiffs represented to the members of defendant lodges that Light Grand Lodge was the sole and exclusive colored Masonic Grand Lodge in California, which representations were untrue; that because of such representations defendants and members of defendant lodges joined and became members of Light

3. Hereafter referred to as Light Grand Lodge.

4. For brevity, all this will be referred to as "assets."

Grand Lodge and paid dues and other sums in large amounts to plaintiffs; that defendants, upon learning of the falsity of said representations, severed all connection with plaintiffs and affiliated with Tyre, retaining the assets of their respective lodges theretofore operated under affiliation with Light Grand Lodge; that said assets belong to defendants. In a cross-complaint defendants alleged that the individual cross-complainants were members of their respective cross-complainant subordinate lodge and were appearing for all the members of such lodge because the matters alleged affected all members of such lodges; that defendants and the members of the defendant lodges had been damaged in the sum of $100,000. Defendants then prayed that plaintiffs be compelled to account for all initiation fees, dues and other moneys paid by defendants to plaintiffs and in addition for $100,000 damages.

The court found that plaintiff Light Grand Lodge is not in fact a nonprofit corporation nor organized for the purpose of promoting Masonic principles among its members and subordinate lodges; that plaintiff subordinate lodges and members were its agents and that said subordinate lodges are not independent unincorporated voluntary associations;[5] that defendant lodges are colored Masonic lodges and that the defendant members of each lodge represent all the members of the respective lodge and that all members of each lodge are affected by all the matters found herein and that they are of common and general interest to all members; that although Tyre had been established in 1910 and was functioning as a colored Masonic Grand Lodge of which plaintiffs well knew, plaintiffs and cross-defendant Pough, for the purpose of depriving defendants of their money and property, fraudulently represented to the individual defendants and the members of defendant lodges that plaintiff Grand Lodge and subordinate lodges were the sole and exclusive bona fide colored Masonic lodges in California; that relying upon such representations the individual defendants and the members of the defendant lodges joined plaintiff Light Grand Lodge and subordinate lodges and paid to plaintiffs large sums of money as initiation fees, monthly dues, relief taxes, Grand Lodge taxes, Saint John's day taxes and other assessments to their damage; that about August 4, 1946, upon learning of the falsity of said representations the individual defendants and the members of defendant lodges severed all connection with plaintiffs and affiliated with defendant lodges and with Tyre; that upon such affiliation defendants retained the assets of their respective organizations theretofore operated under plaintiff Light Grand Lodge and that said defendants are now the owners of all of said assets and that none of plaintiffs contributed any money or other thing to make up such assets; that the names "Sons of Light," "Oriental," "Pride of Richmond" and "Orange Grove" are not the property of any of the parties and that plaintiffs have no exclusive or prior right to their use; that sufficient evidence was not produced to show the actual extent of damage to defendants by reason of said false representations and hence the court cannot determine its extent. An interlocutory judgment was then entered providing that plaintiffs recover nothing on their complaint; that plaintiffs be required to account for all moneys received as aforesaid, and that upon such accounting defendants shall be given judgment for the amount thereof together with interest. A referee was appointed and the accounting had. The referee's report showed that from October 25, 1943, to August 4, 1946, the total amount received by plaintiffs from defendants and the members of defendant lodges for initiation fees, dues, taxes and assessments was $11,517.73.[6] Thereupon final judgment was entered determining that

5. The evidence demonstrates that they are unincorporated voluntary associations. Probably this finding was intended to mean that they were not independent of the control of Light Grand Lodge.

6. While the referee characterized this amount as moneys paid by the members of defendant lodges to plaintiffs, actually it represents only the moneys paid by plaintiff subordinate lodges to plaintiff Light Grand Lodge and cross-defendant Pough prior to defendants' withdrawal.

plaintiffs take nothing under their complaint; that defendants have judgment against plaintiffs for said sum and $2999.63 interest. Plaintiffs then moved to set aside the final judgment on two grounds: that no opportunity was given them (1) to except to the findings of the referee, and (2) to argue that an appellate court decision was res judicata. They also moved for a new trial. Both motions were denied.

1. Do defendants have any right to the former assets of plaintiff lodges?

[1, 2] Assuming that the evidence supports the court's findings that defendants' members joined plaintiff subordinate lodges because of false representations and withdrew because they learned of their falsity, are defendants entitled to keep the assets of the lodges from which they withdrew and to take their names? The answer is, they are not. The assets of a fraternal association are the property of *all* the members, not of any number less than all of them. They can only be transferred to another lodge by consent of *all* the members. One objector alone can stop such transfer.

Assets belong to last member.

[3] It is well settled that "Dues and assessments paid by members to an association become the property of the association and any severable or individual interest therein ceases upon such payment. [Citations.]" DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139, 149, 187 P.2d 769, 776, 175 A.L.R. 382. "The member and the association are distinct. The union represents the common or group interests of its members as distinguished from their personal or private interest." 31 Cal.2d at page 149, 187 P.2d at page 776. The same is true of a lodge. In Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400, it was stated that a member has no severable proprietary right to any portion of the property accumulated by reason of the payment by himself and others of dues, and that his interest in such property is merely incidental to his membership and ceases upon his ceasing to be a member.

"When a schism has occurred in a religious or benevolent association, which has united with and assented to the control and supervision of a general organization, and acquired property since its union and assent to the government of the general organization, by the investment of dues collected from its members while harmony obtained, the title to the property remains in the name of the association, and that faction which has remained loyal and adhered to the laws, usages, and customs of the general organization constitutes the true association, and is alone entitled to the use and enjoyment of the association's property. This rule applies whether the subordinate association be a corporation or simply a voluntary association, and regardless whether the majority or minority of the entire membership constitute the faction adhering to and observing the laws, usages, and customs of the general organization, provided the minority includes the minimum number necessary to support the local organization." Union Benev. Soc. No. 8 v. Martin, 113 Ky. 25, 67 S.W. 38, 39.

In Henry v. Cox, 25 Ohio App. 487, 159 N.E. 101, all but 18 of 3500 members of a subordinate branch of the Ku Klux Klan voted to return its charter to the parent organization. By vote of all but five members all assets of the branch were attempted to be transferred to a new organization. The court held that while the members had the right voluntarily to withdraw individually or collectively, they could not take with them nor transfer any of the property of the subordinate branch. In Sabourin v. Lippe, 195 Mass. 470, 81 N.E. 282, a majority of the members of a local court of Foresters of America seceded, and formed a new court under the same name as the old. The new court was recognized by the grand court of the order as the old court. The court held that the original subordinate court continued in existence. "We understand it to be the law that any attempted secession by a subordinate body or order, unless through the unanimous action of all its members is illegal and uneffective as to loyal members and the secessionists lose all right in the property of the subordinate lodge. [Citations.]" Di Silvestro v. Sons of Italy Grand Lodge, 129 Misc. 521, 222 N.Y.S. 203, 215. Almost the identical situation to that in our case occurred in Phil-

lips v. Widow's Son Lodge No. 54, A. F. & A. M., 152 Va. 526, 147 S.E. 193, where by a vote of 34 to 3 the majority members of Widow's Son Lodge No. 54 withdrew from that lodge and organized Widow's Son Lodge No. 14, and severed their allegiance to the grand lodge. They took with them and transferred to the new lodge all of the funds of the old lodge. In holding that those funds could not be legally so taken the court said in 147 S.E. at page 194: "* * * their action in undertaking to transfer all of the funds of Lodge No. 54 to themselves and to Widow's Son Lodge No. 14 was without warrant of law and shocks the conscience."

In Stringfellow v. Loyal Tabernacle No. 48, Tex.Civ.App., 291 S.W. 1115, the dissentient group joined a new lodge and took with it the funds of the old lodge. The court held that having withdrawn from the old lodge they thereby lost their right to hold, manage or control those funds. In Re St. Vincent de Paul Benev. Ass'n of New Orleans, La.App., 175 So. 140, it was held that the property of an unincorporated association still belongs to the association, even though there is only one member left.

Defendants contend that these rules do not apply where the dissentient members were induced to join the old lodge by fraud. They contend that because of fraud in connection with the obtaining of members to the old lodge, the new lodge or defendant individuals on behalf of all other dissentients are entitled (1) to all the assets of the old lodge, (2) to all dues, fees, etc., paid to the old lodge and (3) damages against the old lodge. However, they cite no cases supporting the proposition that the fraud entitles them to take from the lodge its property. Defendants rely upon cases like Grand Grove U. A. O. D. of California v. Garibaldi Grove, 130 Cal. 116, 62 P. 486; Scott v. Donahue, 93 Cal.App. 126, 269 P. 455, and Supreme Lodge, etc. v. Los Angeles Lodge No. 386, 177 Cal. 132, 169 P. 1040, to the effect that an improper dissolution of the subordinate lodge by the grand lodge does not entitle the grand lodge to the subordinate lodge's assets, on the theory that the constitution and by-laws of the grand lodge provide the terms of the contract between it and the subordinate lodge and the grand lodge can only be entitled to the property of the subordinate lodge pursuant to the terms of that contract. Such a question is not involved here. Although Light Grand Lodge is joined as a plaintiff the question is not between ownership by that grand lodge and its subordinate lodges, but between ownership by those subordinate lodges, and lodges formed by the former members who withdrew therefrom. The Light Grand Lodge constitution and by-laws apparently provide that in the event that a lodge becomes defunct, suspended or withdrawn from the grand lodge, only the lodge's books of record and account and the ritual and seal become the property of the grand lodge. Here, however, it is not a case of the lodge becoming defunct, suspended or withdrawn, but one where some members withdraw and form a new lodge.

Interestingly enough, since it is cited by defendants, Supreme Lodge, etc. v. Los Angeles Lodge No. 386, supra, 177 Cal. 132, 169 P. 1040, recognizes the rule we are applying here. There 700 members of Los Angeles Lodge No. 386, a subordinate lodge of the Moose (apparently an unincorporated association), withdrew and incorporated under the same name and number. The Supreme Dictator of the Moose revoked the charter of the old lodge, transferred it to the new lodge, and ordered its assets transferred to the new lodge. The court held the action of the dictator in revoking the old lodge charter was not authorized by the rules of the order, and ordered the new lodge to return the assets to the old lodge. The new lodge contended that because it supported the acts of the dictator and the old lodge refused to do so, that thereby the old lodge became seceders and came within the rule "that, where a majority, however large, secede and renounce their allegiance to the supreme body, the minority, however small, who remain steadfast to the purposes of the order, are entitled to the lodge property. [Citations.]" 177 Cal. at page 138, 169 P. at page 1042. The court held that the new lodge group were the seceders, and applied the rule against them.

The doctrine of "clean hands" is not applicable here for the reason that the evidence fails to disclose any fraud of the plaintiff subordinate lodges. The old lodges are entitled to have their assets returned. Although the Light Grand Lodge is a plaintiff, it is not entitled to any of these assets as there has not been a dissolution of any of the subordinate lodges.

The trial court made a finding to the effect that none of the loyal members of plaintiff subordinate lodges contributed anything towards the assets which the dissentient members took away with them. There is no evidence to support this finding.

Defendants contend that because of the fraud found by the court they are entitled by way of "defensive relief" to keep defendant subordinate lodges' assets, citing Nevada Land & Inv. Corp. v. Sistrunk, 220 Cal. 174, 30 P.2d 389, and U. S. Mach. Co. v. International Metals Dev., Inc., 74 Cal. App.2d 5, 168 P.2d 37. "This remedy has been styled 'defensive relief,' whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability." 220 Cal. at page 177, 30 P.2d at page 390. That rule does not apply to the situation here, where plaintiff subordinate lodges are seeking to recover their own assets. Moreover, defendant subordinate lodges, as herein pointed out, are not the parties who were injured by the fraud, nor were plaintiff subordinate lodges the ones making the misrepresentations.

2. Names.

On just what theory defendants claim the right to use the identical name and number of one of plaintiff subordinate lodges and the name of the other plaintiff subordinate lodges does not appear. The lodge name is an asset of the particular lodge and like other assets belongs to the old and not the new lodge. Nor is any defendant lodge entitled to use any name so similar to that of any plaintiff lodge as to be likely to confuse the public. In Brown v. Hook, 79 Cal.App.2d 781, 180 P.2d 982, 983, we had a situation in many respects similar to that here. There we held that a seceding union could not use the name "San Francisco Lodge No. 68, I.A.M." because of its similarity to the union from which it withdrew, "Machinists' Union No. 68." Its use would be confusing and misleading. Obviously there would be great confusion in names between plaintiff Pride of Richmond Lodge No. 74 and defendant Pride of Richmond Lodge No. 14, between plaintiff Sons of Light Lodge No. 444, and defendant Sons of Light Lodge No. 9, etc. See Brown v. Hook, supra, for a discussion of many cases on this subject. Plaintiff subordinate lodges are entitled to an order restraining defendant lodges from using names similar to theirs.

3. Moneys paid by plaintiff subordinate lodges to Light Grand Lodge and defendant Pough.

[4] Upon what theory defendant subordinate lodges can recover dues paid to plaintiff subordinate lodges prior to the existence of said defendant lodges does not appear. It is obvious that these new lodges have no cause of action against the old lodges for moneys which the individuals now making up the new lodges paid into the old. Moreover, no theory is advanced why, in any event, plaintiff subordinate lodges who paid said sums to Light Grand Lodge as they were required to do by the rules of the grand lodge to which they had subscribed, should now be liable for those sums. Assuming that the individual named defendants joined plaintiff lodges because of the misrepresentations and assuming that thereby they would be entitled to a return of the dues and other moneys paid plaintiffs,[7] the judgment here will have to be reversed for the reason that neither in the evidence nor in the judgment appear the amounts which said individual defendants paid. The report of the referee and the judgment lump together all sums paid, not only by the dissentient members but by those who remained loyal.

[5] This is not a representative suit in the sense that the individual defendants are

7. See Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.2d 643, holding in effect that the measure of damages where a person has been induced to join a club by false representations is the difference in value of such membership between what it would have been were the representations true and its present value.

authorized to sue for the moneys due the other individuals who withdrew from plaintiff lodges. It is representative only in the sense that the individual defendants are appearing for the unincorporated associations, the lodges. The claims that the former lodge members have to a return of their moneys, if any they have, or to damages because of the misrepresentations of Pough and Light Grand Lodge, would be individual claims, requiring proof that each individual joined his respective lodge solely because of such representations and left solely because of such falsity, and the amount of moneys paid in by each such member. There might even be an offset in favor of the lodge for the benefit, if any, such member might have received while in the lodge. While such a claim could be assigned for suit purposes, it could not be recovered in a representative action. See Noroian v. Bennett, 179 Cal. 806, 179 P. 158; Brenner v. Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890, 114 A.L.R. 1015.

A rather interesting sidelight in this case is that the trial court awarded defendant subordinate lodges, which include members who never belonged to any of the plaintiff lodges, judgment against the present plaintiff lodges, which include members who came into defendant lodges after the dissentient members had left. Moreover, with the exception of two or three members, the false representations upon which defendants rely were not made by any of the present members of plaintiff lodges. To top it all, the court held that defendants were entitled to retain all the assets of plaintiff lodges and in addition to compel plaintiff subordinate lodges to repay to defendants the moneys which the plaintiff subordinate lodges had paid to Light Grand Lodge as dues, etc., for the now members of defendant lodges under the rules to which such members had subscribed.

In their answer to the cross-complaint plaintiffs admitted that the individual cross-complainants appeared for and on behalf of all the members of the respective subordinate lodge each individual alleged he represented, but denied all the other allegations of the cross-complaint. Thus, they denied that each and all members of the respective lodges were affected by the matters alleged or that they were of common and general interest to all the members. Therefore there was no admission that a claim for return of dues to an individual former member of a plaintiff lodge for alleged misrepresentation to such individual was a matter of interest to a new lodge which such person may have joined. Actually, this type of claim was one which, to enable a party other than the individual himself to sue on, would have to be assigned by that individual to such party. Membership in a new lodge would not constitute such assignment.

Jackson v. Deauville Holding Co., supra, 219 Cal. 498, 27 P.2d 643, cited by defendants, is not in point. There 51 individuals who had been induced to join a beach club *assigned their claims* for damages to an individual plaintiff. No such assignment was made in this case. Moreover, in the Jackson case, the court established as the measure of damages the difference between the actual value of the memberships and the value they would have had if the representations had been true. Myers v. Lowery, 46 Cal.App. 682, 189 P. 793, likewise was an action on *assigned* claims for *damages* for misrepresentation as to the nurses' training school operated by defendants.

The situation here is similar to that in Noroian v. Bennett, supra, 179 Cal. 806, 179 P. 158. There through misrepresentations a corporation obtained individual promissory notes from 20 farmers. After maturity the corporation assigned the notes to defendants who commenced separate actions thereon against 11 of the plaintiffs in that action. Thereupon all the 20 makers of the notes brought this action setting up the fraud, asking the court to take jurisdiction of the cause and restrain defendants from proceeding in the separate actions already brought and from beginning other actions on the notes. The court held that the complaint did not state a cause of action in favor of all of the plaintiffs but that at most it merely stated 20 separate and distinct causes of action, each in favor of a different plaintiff, and presented

no ground for joining them all in one action. It pointed out that the representations were made separately to each of the plaintiffs. Therefore, the proof of each representation must of necessity be distinct, independent and not determinative of any other. To constitute the fraud, each party must have relied on the promise made to him and must have been induced thereby to enter into the contract. Such reliance and inducement would be the subject of independent proof and contradiction as to each plaintiff. The trial of the joint action would require 20 different trials respecting 20 different conditions, to determine the facts upon which the rights of 20 different persons would depend, and neither trial would be a determination of the rights of any of the others. In our case, instead of 20 different actions there would be many times 20. No one member could testify as to what statements were made out of his presence, to induce other members to join, nor whether the other members joined because of such statements.

"Class or representative suits to obtain the rescission of transactions based on similar frauds practiced by one defendant upon various, and commonly numerous, persons, have so often been held not maintainable that one may well doubt whether under any circumstances such a suit will lie. One of the basic difficulties is not merely that the various transactions are legally distinct, but that each case is, or at least may prove to be, to some extent different. Even where the false representations were exactly the same, the various persons victimized may have acted upon different opinions and beliefs as to the facts; one may have relied upon one supposed fact, another upon a different one, and some may have largely acted upon their own judgment as to business possibilities, etc. Furthermore, each has an election of remedies, all may not desire the same relief, and some may not be entitled to any relief." 114 A.L.R. at page 1016. See Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 198 P.2d 514, for a compilation of cases upon the subject of representative or class suits. There, it was held that a representative suit could not be brought on behalf of individuals who were denied tickets to the Rose Bowl.

The judgment in this case runs against each plaintiff subordinate lodge for not only dues, initiation fees and other moneys which it paid to Light Grand Lodge and cross-defendant Pough but also for all moneys paid to the latter two by all the other plaintiff subordinate lodges. There can be no legal ground upon which, for example, plaintiff Orange Grove Lodge No. 138 is liable for dues and moneys paid by former members of plaintiff Oriental Lodge No. 13 to the latter lodge. Moreover, as hereinbefore stated, the referee made no attempt to segregate dues and other moneys paid by the dissentient members from those paid by the loyal members.

Fraud.

The fraud alleged in the complaint and found by the court was that between October 25, 1943, the date of the organization of plaintiff Sons of Light Grand Lodge, and August 4, 1946, cross-defendant Pough and plaintiffs fraudulently represented to defendants and the members of defendant lodges (actually defendant lodges were not then in existence) that plaintiff Grand Lodge was the only bona fide, sole and exclusive grand lodge and its subordinate lodges the only subordinate lodges, of Ancient Free and Accepted Masons, limited to members of the colored race in California. These statements were untrue in that there was at least one other colored Masonic Grand Lodge and subordinate lodges in California, the Tyre group, which had been in existence in California since 1910. See Most Worshipful Lodge v. Most Worshipful Sons etc. Lodge, supra, 94 Cal.App.2d 25, 210 P.2d 34, for holding that all colored Masonic lodges in California are clandestine and that regardless of age, none has the right to represent itself as the only bona fide lodge of Freemasonry in California. The evidence shows that the representation that the Light Grand Lodge was the only authorized and the oldest colored Masonic lodge

in California was made by cross-defendant Pough and others representing Light Grand Lodge. There is no evidence that these representations were made by the subordinate lodges themselves nor by any of the individual plaintiffs. In Most Worshipful Lodge v. Most Worshipful Sons etc. Lodge, supra, 94 Cal.App.2d 25, 210 P.2d 34, 38, we stated that there was substantial evidence to support the trial court's finding that Light Grand Lodge had "misrepresented to members and prospective members that it was the only colored Masonic group entitled to function in California and led them to believe it was the older organization" and that "There was testimony at the trial that persons had joined Light thinking it was the older organization", 94 Cal.App.2d at page 33, 210 P.2d at page 38, because of those representations. That case was between the two grand lodge corporations, and such statement was not a statement that the subordinate lodges had made such misrepresentations. The fact that Light Grand Lodge and its representatives made such misrepresentations, while it would support an injunction restraining them from continuing to make them, is not sufficient to authorize a recovery by any individual member without a showing that such misrepresentations were made to him, believed by him and that he joined a subordinate lodge because of them. While cross-defendant Pough, besides being Grand Master of Light Grand Lodge, was Master of Sons of Light Lodge No. 444, and perhaps because he proselyted members for all the subordinate lodges, could be held to be their agent and they to be bound by his representations (in spite of the fact that such subordinate lodges were also victims of those representations), still those facts would not obviate the necessity for the showing above mentioned. No effort was made in the trial court to determine when the individual dissentient members discovered the falsity of the representations and whether after discovering them they or any of them continued to remain members of their respective lodge for any considerable time before withdrawing.

From the evidence it appears that Light Grand Lodge may have been conducted for the benefit of Pough. Apparently most of the fees, dues and other moneys paid to it by the subordinate lodges went to Pough. Many sums were paid by those lodges directly to him. Several of the witnesses who testified for defendants gave as their reasons for withdrawing, not the representations about exclusive Masonic lodges, but because they were dissatisfied with the way their lodge was being run, or that too much money was going to the grand lodge and Pough or that Pough did not send the supplies he had promised.

Plaintiffs contend that our decision in the companion case, 94 Cal.App.2d 25, 210 P. 2d 34, contradicts the findings here. The judge who made the findings upon which the interlocutory judgment was based was under the belief as he expressly stated many times during the trial and as he found in the companion case, that Tyre and its subordinate lodges were the only colored Masonic lodges entitled to practice Freemasonry in California. However, in his findings here he did not so state but found only that Sons of Light were not the only colored Masonic lodges entitled to practice Freemasonry in California and thus the holding in the companion case that Tyre, too, is not the only Masonic group entitled to practice in California does not affect the findings here.

4. Judgment against Light Grand Lodge and Pough.

[6] Nor can defendant subordinate lodges recover from Light Grand Lodge in this action the moneys paid it by the subordinate lodges. While the evidence supports the finding that Light Grand Lodge and Pough made the misrepresentations charged, there is no legal theory upon which defendant subordinate lodges which were not even in existence have any cause of action against either. As hereinbefore pointed out, the causes of action arising from such fraud are individual in each member so defrauded. He alone can bring an action for such fraud.

The appeals from the interlocutory judgment and the report of the referee are dis-

missed, and the judgment and the order appealed from are reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



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PEOPLE v. RYAN.

Cr. 862.

District Court of Appeal, Fourth District, California.

May 26, 1953.

Petitions for writ of error coram nobis and for writ of habeas corpus. The Superior Court of Kings County, Clark Clement, J., entered order denying petitions, and defendant appealed. The District Court of Appeal, Griffin, J., held, inter alia, that where defendant had previously been twice convicted of felony when represented by attorneys, had been taken into custody on more than 20 separate occasions, and in most cases had been informed of right to counsel, and, in proceeding in question, defendant requested and was granted continuance to employ counsel prior to preliminary hearing but thereafter without aid of counsel, took stand and testified at preliminary hearing concerning offense, defendant had not been denied any constitutional right to counsel at preliminary hearing.

Attempted appeal from order denying writ of habeas corpus dismissed; order denying writ of error coram nobis affirmed.

1. Criminal Law ⇐232

Where defendant had previously been twice convicted of felony when represented by attorneys, had been taken into custody on more than 20 separate occasions, and in most cases had been informed of right to counsel, and, in proceeding in question, defendant requested and was granted continuance to employ counsel prior to preliminary hearing but thereafter, without aid of counsel, took stand and testified at preliminary hearing concerning offense, defendant had not been denied any constitutional right to counsel at preliminary hearing. Const. art. 1, § 13.

2. Criminal Law ⇐997

Question of denial of counsel at preliminary hearing may not be raised by coram nobis proceeding, particularly where one such proceeding has heretofore been determined adversely to defendant.

3. Criminal Law ⇐1158(1)

In coram nobis proceeding, where defendant testified that prior to preliminary hearing assistant district attorney had told defendant he would be forced to lay over in jail until spring term of court but that if defendant would plead guilty assistant district attorney would recommend minimum sentence, question whether assistant district attorney had made alleged statement was for trier of fact.

4. Criminal Law ⇐997

In coram nobis proceeding by defendant who alleged that assistant district attorney had told him that he would be forced to lay over in jail until spring term of court but that if he would plead guilty assistant district attorney would recommend minimum sentence, evidence sustained order of trial court denying petition.

5. Habeas Corpus ⇐113(3)

No appeal lies by defendant from order of the Superior Court denying a writ of habeas corpus. Pen.Code, § 1506.

William M. Martin, Hanford, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., A. Hugo Pearson, Dist. Atty., and Kenneth C. Nagel, Asst. Dist. Atty., Hanford, for respondent.

GRIFFIN, Justice.

It appears from the record that on September 11, 1950, defendant, in propria persona, filed a petition for a writ of error coram nobis which apparently raised some of the same questions here presented. At

defendant's request he was returned from state's prison at Folsom for the hearing. An attorney was appointed to represent him and also act as "a friend of the court". Thereafter the court denied the petition. No appeal was taken from that order.

Thereafter, on September 8, 1952, defendant filed another such petition (also denominated petition for writ of coram nobis) alleging generally that he is now unlawfully imprisoned in the state's prison at San Quentin because he was not, at the time of his preliminary hearing, properly informed of and given the right to the aid and advice of counsel.

On November 13, 1952, through his attorney herein, who was appointed by the court, he filed a petition for a writ of habeas corpus predicated upon the same grounds. Petitioner was again returned to the Superior Court and by stipulation a hearing was had upon both petitions at the same time. Evidence was offered on behalf of the people and on defendant's behalf, resulting in orders denying both petitions. This appeal is from those orders.

In his opening brief, defendant contends that the court erred in failing to appoint counsel to represent him at the preliminary examination since (he claims) he did not waive any right to be represented by counsel, and only acquiesced in the preliminary hearing because of material misrepresentations made to him by the assistant district attorney.

It appears from the evidence that on January 29, 1949, defendant was charged with the issuance of a check without sufficient funds, in violation of Section 476a of the Penal Code. He was duly arraigned in the City Court in Hanford. A copy of the proceedings in that court were considered at the hearing. It shows that the magistrate informed defendant of his right to counsel; that defendant requested a continuance of one week for the purpose of employing an attorney, which continuance the court granted; that the defendant stated he thought he had finances "I can get ahold of"; that the court then told him it would be his responsibility to employ an attorney and that defendant acquiesced; that in the meantime defendant apparently notified the assistant district attorney that he desired to take the witness stand and testify at the preliminary hearing and enter a plea of guilty in the Superior Court; that arrangements were made and defendant appeared before the magistrate and the assistant district attorney there informed the court that that was defendant's request and defendant fully acquiesced in the statement made by the assistant district attorney. The court informed him he had been granted a continuance to December 9, 1949, at 2 p. m., for the purpose of employing counsel, and he answered in the affirmative. He then asked the defendant if the statement of the district attorney was true and if that was his wish and defendant answered "Yes". He then informed him that anything he might say could be used against him at any future trial and with that understanding he could be sworn and testify. He was sworn and testified pertaining to the passing of the check, and said that at no time had he an account in that bank or credit with it whereby it would be paid upon presentation. He was then asked if the statement he made was voluntary and of his own free will and he answered in the affirmative.

An information was filed in the Superior Court. Defendant was duly arraigned and he informed the court that he personally and definitely "waived" the services of an attorney and desired to enter a plea of guilty to the charge.

He now contends that it was the duty of the magistrate to appoint an attorney to represent him at the hearing notwithstanding the fact that at the actual hearing he did not demand such right; that his former request for counsel still stood and that since he did not specifically waive such right he was denied his constitutional right under Amendment VI, U. S. Constitution and Article I, Section 13, California Constitution. It is now his position that he was not then represented by counsel; that since his incarceration he has discovered from an examination of the law, that he committed no offense because the check he issued was not dated and that he told the bartender who made it out and cashed it for him that he should hold it until a given time when it would be good. This statement was refuted

by the bartender at the previous hearing. In support of his argument he cites such cases as People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829, People v. Shapiro, 85 Cal. App.2d 253, 194 P.2d 731, People v. Butterfield, 37 Cal.App.2d 140, 99 P.2d 310, and People v. Chesser, 29 Cal.2d 815, 178 P.2d 761.

The Avilez case is factually different. There the family of defendant had engaged counsel for him and the court proceeded to hear the preliminary examination by appointing a public defender in his stead. There the district attorney and the court knew that private counsel had been obtained and failed to inform the defendant of that fact.

Although the facts in the Shapiro case may indicate a more expressed waiver of defendant's right to an attorney at the preliminary hearing, the facts in the instant case clearly indicate that although there was no formal waiver of defendant's right to counsel entered in the minutes, his intention to waive it is manifest from his desire to proceed with the examination, knowing of his full rights in the matter, and particularly of his right to counsel at all stages of the proceedings. The fact that he personally waived that right in the Superior Court indicates, to some extent, what he really intended in respect to his desires in the magistrate's court. Since the defendant never informed the court he was unable to obtain counsel, the trial court was justified in believing that the defendant was financially able to employ his own counsel; and that he was not, as claimed by him, "a layman in matter of law and knew nothing about due process or law or such constitutional safeguards as the right to have the benefit of the aid and assistance of counsel even to an indigent person at every stage of the proceedings". The record indicates that in 1927 he was convicted of a felony and served 15 years in a Texas prison, at which time he was represented by an attorney; that in 1938 he was again convicted of a felony when represented by an attorney; that since his first conviction he has been taken into custody on more than 20 separate occasions for felony or misdemeanor violations, some involving similar charges to that here made; that in most cases he was informed of his right to counsel; and that in one case where he had no lawyer he just "went over and copped out and went on up".

[1, 2] From the circumstances related and a reading of the petition for this writ, prepared by defendant in propria persona, it is quite apparent that the court's conclusion that he did have or should have had a fairly good understanding of his constitutional rights in this regard is supported by the evidence. None of defendant's constitutional rights appear to have been violated in this respect. People v. Crowley, 13 Cal. App. 322, 109 P. 493; People v. Campos, 10 Cal.App.2d 310, 52 P.2d 251; People v. Harding, 116 Cal.App.2d 65, 252 P.2d 1007. In addition, it has been held that this question may not be raised by a coram nobis proceeding, particularly where one such proceeding has heretofore been determined adversely to defendant. People v. James, 99 Cal.App.2d 476, 222 P.2d 117; People v. Bagasol, 22 Cal.App.2d 327, 70 P.2d 970; Vernon v. Rappaport, 25 Cal.App.2d 281, 283, 77 P.2d 257.

[3, 4] Next, defendant accuses the assistant district attorney of making certain representations to him before the preliminary examination inducing him to take the stand and testify without the aid of counsel, and to enter a plea of guilty. He charges that although the district attorney made him no promises, he did tell defendant in November that since he was unable to obtain counsel he would be forced to "lay over in jail" through the spring term of court; that if he would plead guilty he would recommend to the adult authority the minimum sentence and that the district attorney failed to do so.

The assistant district attorney testified that defendant called him to the jail, and in the absence of the parole officer informed him that the parole officer wanted the district attorney to drop the charges and that they would be handled as a parole violation; that defendant had before that time told the parole officer the district attorney wanted to

drop the charges and handle it as a parole violation; that he then told the defendant he was trying to "play both ends against the middle" and that he did not intend to dismiss the charges under such arrangements; that he intended to prosecute him; that he made no promises to defendant nor any statements as to any recommendation for a minimum sentence, and that defendant indicated to him he wished to go over and testify as shown in his statement to the magistrate; that he did not recall in the conversation saying anything about "laying over until springtime" and that there was no question brought up about that subject.

It is defendant's contention in this regard that defendant's uncontradicted testimony shows that the assistant district attorney did represent that defendant would have to remain in jail until the spring unless he took the stand and testified against himself at the preliminary hearing, since his testimony is opposed only by the statements of the assistant district attorney that he did "not recall" such a statement being made. The testimony of the defendant is sufficiently denied so as to create a conflict in this respect. The trial court had the right to consider this evidence and the weight to be given to defendant's testimony under the circumstances related. The conclusion of the trial court is sufficiently supported by the evidence. People v. Savin, 37 Cal.App. 2d 105, 98 P.2d 773.

[5] Likewise, no sufficient ground is established for ordering petitioner's release on habeas corpus. No appeal lies by a defendant from an order of the Superior Court denying a writ of habeas corpus. The right of appeal from such an order is limited by sec. 1506 of the Penal Code. The attempted appeal therefrom must be dismissed. People v. Schunke, 102 Cal.App.2d 875, 228 P.2d 620.

Attempted appeal from order denying writ of habeas corpus dismissed. Order denying writ of error coram nobis affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

118 Cal.App.2d 99

GARETTO et al. v. ALMADEN VINEYARDS et al.

Civ. 15362.

District Court of Appeal, First District, Division 2, California.

May 25, 1953.

Action for price of wine. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., rendered judgment for buyers, and seller appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that delay in notifying seller that buyers refused to accept wine was not unreasonable.

Affirmed.

1. Sales ⇐126(1), 178(3)

Right to refuse to accept goods and right to rescind after acceptance of goods must both be exercised within reasonable time. Civ.Code, §§ 1768, 1789(3).

2. Sales ⇐178(3)

In cases involving question of lapse of time in relation to right to refuse to accept goods, cases involving rescission or attempted rescission of sales may be authority by analogy to extent that they deal with effect of lapse of time. Civ.Code, §§ 1768, 1789(3).

3. Sales ⇐178(3)

Where delay in notifying seller that buyer refuses to accept goods is caused by negotiation with seller in attempt to reach amicable settlement, delay is excused. Civ.Code, § 1768.

4. Sales ⇐182(4)

Unless delay in notifying seller that buyer refuses to accept goods is so palpably unreasonable as to constitute an acceptance as a matter of law, effect of delay presents question for trier of fact.

5. Equity ⇐71(2)

There is no hard or fixed rule as to lapse of time or circumstances that will justify application of doctrine of laches.

6. Appeal and Error ⇐1010(1)

Conclusion of trial court will not be set aside on review if it finds reasonable support in the evidence.

7. Sales ⇐181(13)

In action for price of wine, evidence sustained finding that delay of about two weeks in notifying seller that buyers refused to accept wine because it did not conform to sample was not unreasonable even though buyers received entire shipment into their tanks after testing samples.

Francis Passalacqua, Healdsburg, Albert Picard, San Francisco, (Raymond N. Baker, Hayward, of counsel), for appellant.

Wallace, Garrison, Norton & Ray, San Francisco, (Kent A. Sawyer, San Francisco, of counsel), attorneys for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment in his favor for $3,081.34, the amount deposited by defendants in court. The action was for the price of wine allegedly sold to defendants at an agreed contract price of $21,550. The defendants pleaded and the trial court found that the wine was warranted to conform to sample, that the wine actually delivered did not conform to the sample but was a different and inferior quality of wine and that it was not accepted by the defendants. The wine was sold by defendants for plaintiff's account after plaintiff had refused defendants' repeated demands to take the wine back and the amount of the judgment represents the difference with interest thereon between the amount received by defendants from this sale of the wine and the sum of their handling costs and an amount already paid by them to plaintiff.

The finding that the wine delivered did not conform to sample is not attacked on appeal and is amply supported by the evidence. The sole argument made on appeal is that "defendants lost their right to rescind the sale by their unreasonable delay and retention of the wine."

For the sake of clarity we note at this point that the case under the pleadings and findings of the court is not properly speaking one of rescission but of refusal to accept delivery because the goods tendered were not those agreed to be sold. The true question is not therefore whether defendants lost or waived the right to rescind by unreasonable delay but whether they must be held to have accepted the wine under that portion of section 1768, Civil Code, sec. 48, Uniform Sales Act, which provides: "The buyer is deemed to have accepted the goods * * * when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

The distinction is pointed out in 3 Williston on Sales, Rev.Ed., sec. 483, p. 36: "The question whether a buyer has elected to affirm a sale and retain the goods that he has bought, in spite of the seller's fraud, and the question whether a buyer has elected to forego a right of rescission for breach of warranty involve problems similar but not precisely identical with those presented by the question whether a buyer has accepted goods tendered to him."

[1, 2] This similarity of the question where it is claimed, as here, that the delay in notifying the seller of rejection after the receipt of the goods has been unreasonable to the case of delay in giving notice of rescission is shown by the provision of section 1789(3), Civil Code, sec. 69(3) Uniform Sales Act: "Where the goods have been delivered to the buyer, he cannot rescind the sale * * * if he fails to notify the seller within a reasonable time of the election to rescind * * *." From the comparison of the language of sec. 1768, Civ.Code, "after the lapse of a reasonable time", with that of sec. 1789(3), Civ.Code, "within a reasonable time", it is clear that the right to refuse to accept the goods and the right to rescind after acceptance of the goods must both be exercised within a reasonable time. Hence, to the extent that they deal with the effect of the lapse of time, cases involving the rescission or attempted rescission of sales may be authority by analogy, but only by analogy, in cases involving the lapse of time as it affects the question whether the goods have been accepted by the buyer.

In our case the evidence shows that the contract was made through an intermediary, Bundschu. The contracting agent for defendants was Benoist who handled the

matter of purchases and sales for defendants. Gaulet was the "manager of the property, but matters of purchases and sales he's always taken those things up with me (Benoist)." The wine in question was delivered by an independent trucker in three loads, February 13, 14 and 15, 1947. After the first delivery on February 13 Gaulet tested the wine and found that it did not conform to sample. He tried to communicate with Bundschu but could not reach him because he was in the hospital. He did not know plaintiff although he did know that he lived in Napa County. After failing to reach Bundschu Gaulet telephoned to Benoist who was in New York. Benoist instructed Gaulet to receive the rest of the wine into defendants' tanks and keep the tanks full until Benoist returned from New York. Upon Benoist's return he had a conference with Bundschu and plaintiff. The date of this conference was two or three weeks after the delivery of the wine. Plaintiff fixed it at "about two weeks * * about 14 days after delivery was made." At that time Benoist told plaintiff that the wine did not conform to sample and plaintiff asked to be allowed to submit samples of other wine. This was done and the samples submitted were rejected by defendants. Thereafter defendants formally notified plaintiff that they were rejecting the wine delivered to them and repeatedly tendered it back to him and requested him to remove it. Finally they notified plaintiff that if he did not remove the wine they would sell it for the best price obtainable and deliver the proceeds less their deposit and handling costs to plaintiff.

[3] Plaintiff treats the first notice of rejection as having occurred on May 6, 1947. It is well settled, however, in rescission cases that delay caused by negotiations with the other party in an attempt to reach an amicable settlement is excused, Williams v. Marshall, 37 Cal.2d 445, 455–456, 235 P.2d 372; Graham v. Los Angeles First N. T. & S. Bk., 3 Cal.2d 37, 44–45, 43 P.2d 543; Gist v. Security Trust & Savings Bank, 218 Cal. 581, 586, 24 P.2d 153; Reiniger v. Hassell, 216 Cal. 209, 210–211, 13 P.2d 737; Hunt v. L. M. Field, Inc., 202 Cal. 701, 704, 262 P. 730, and we are satisfied that the same rule is properly applicable in the case of a delay in notifying the seller that the buyer refuses to accept the goods under sec. 1768, Civ.Code.

The critical date here is the date of the first conference, two weeks after the delivery of the wine. At that conference plaintiff was told that the wine delivered did not conform to sample and plaintiff asked the privilege of submitting samples of other wine to be substituted in place of that previously delivered. The samples proved unsatisfactory and defendants thereupon definitely rejected the wine delivered. The delay after the first conference was caused by this effort to arrive at an agreeable adjustment and falls within the rule of the above cited cases.

[4] The general rule is that unless the delay is so palpably unreasonable as to constitute an acceptance as a matter of law the effect of the delay presents a question for the trier of fact. Warner-Godfrey Co. v. Sheinman, 273 Pa. 105, 116 A. 671; Laganas Shoe Mfg. Co. v. Sharood, 173 Minn. 535, 217 N.W. 941; Hayes v. Kluge, 86 N.J.L. 657, 92 A. 358; Rubber Corporation of America v. Tanney-Costello, 86 Ohio App. 438, 93 N.E.2d 38; Massari v. Accurate Bushing Co., 8 N.J. 299, 85 A.2d 260. We cannot say that the conduct of Benoist in authorizing the receipt of the wine into defendants' casks and holding its acceptance in abeyance until his return from New York in something like two weeks was so palpably unreasonable as to constitute an acceptance of the wine as a matter of law. In our opinion this presented a question of fact for the trial judge which he has resolved against the plaintiff.

Plaintiff relies heavily on Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 P. 122. In that case the buyer actually operated the pump purchased for almost two months with knowledge that it did not conform to the contract specifications before giving notice of rejection. The trial court found that the pump had been accepted and gave judgment for the plaintiff which was affirmed. In our case the wine was merely stored, not used in any way, and defendants' objection to the wine was communicated to plaintiff within about two

weeks and negotiations inaugurated for an adjustment agreeable to both parties. The trial court found that this conduct did not constitute an acceptance. The Jackson case is not authority that in the case before us there was an acceptance as a matter of law, nor is such authority found in any other case cited by plaintiff.

[5–7] The case of Mayer v. Northwood Textile Mills, 105 Cal.App.2d 406, 233 P.2d 657, has features not unlike the case before us. The court in that case does not clearly distinguish between delay in notifying of non-acceptance and delay in notifying of rescission. It does lay down the settled rule applicable to both situations: "There is no hard or fixed rule as to the lapse of time or circumstances that will justify the application of the doctrine of laches. (Citation.) The conclusion of the trial court will not be set aside by a reviewing court if it finds reasonable support in the evidence." 105 Cal.App.2d pages 409–410, 233 P.2d at page 659.

The trial court has drawn the inference of non-acceptance in this case and the evidence is such as to reasonably support that finding.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



118 Cal.App.2d 114

PIKE v. ARCHIBALD et al.

Civ. 4632.

District Court of Appeal, Fourth District, California.

May 25, 1953.

Action by father against physicians for wrongful death of son. The Superior Court, Kern County, R. B. Lambert, J., sustained general demurrer to complaint and father appealed. The District Court of Appeal, Mussell, J., held that where demurrer to father's prior complaint for death of son against county and doctors, who allegedly acted as agents and employees of county hospital, was sustained because of failure to allege that claim was presented to or filed with doctors, father could not by-pass controversy concerning failure to file claims by dismissing first action and filing another action in same court against doctors individually.

Judgment affirmed.

1. Physicians and Surgeons ⇐18(4)

Complaint alleging inter alia that physicians and surgeons who treated plaintiff's son failed and refused to take prompt necessary usual and emergency medical steps which would have saved life of child and that his death was proximately caused by their carelessness, inattentiveness and negligence and that as a result of the carelessness, inattentiveness and negligence of the physicians and surgeons plaintiff was damaged in sum of $50,000 stated a cause of action against general demurrer.

2. Evidence ⇐43(3)

While general rule is that court will not take judicial notice of other actions, even those pending or concluded in same court, and that authority of court to take judicial notice of its own records is limited to proceedings in same case, the rule has many exceptions and, in interests of justice, court may take judicial notice of proceedings in other cases in same court.

3. Evidence ⇐43(2)

Court would take judicial notice of prior proceedings placed before court by memorandum of points and authorities submitted with demurrer to complaint which stated cause of action for malpractice against physicians and surgeons.

4. Pleading ⇐252(1)

Facts once alleged in a pleading cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation.

5. Pleading ⇐223

Where demurrer to father's original complaint for death of son against county and others, including doctors, who acted as agents and employees of county hospital, was sustained because of failure to allege

that claim was presented to or filed with doctors, father could not by-pass controversy concerning failure to file claim by dismissing first action and filing another action in same court against doctors individually. Government Code, § 1981.

6. Pleading ⇐36(2)

Where father in death action against county and others, including doctors, alleged that son was injured as result of negligence of doctors at county hospital and that doctors acted as agents and employees of hospital, father was bound by such allegations in death action against doctors individually.

7. Counties ⇐146

A county is not liable for negligent injury of county hospital patient.

V. P. DiGiorgio, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

MUSSELL, Justice.

A general demurrer to plaintiff's complaint, in an action for wrongful death, was sustained without leave to amend and plaintiff appeals from the judgment which followed.

The principal question involved is whether the complaint filed May 8, 1952, states a cause of action. It is alleged therein, in substance, that the defendants were physicians and surgeons practicing in Bakersfield, holding themselves out to plaintiff and the public generally as being skilled in said profession and competent to perform such services as are usually and generally performed by physicians and surgeons; that plaintiff presented his minor son to defendants for medical treatment and the defendants undertook to render medical attention to said child, who had swallowed an unknown quantity of oil of wintergreen or other foreign substance; that the child was taken home after the first treatment and soon thereafter appeared to be in great pain; that the boy was then returned to defendants, at their request, for further treatment; that the following morning plaintiff was notified that his child had taken "a turn for the worse", and on arrival from his home, plaintiff was advised of the prior death of the child. It is then alleged on information and belief that the defendants failed and refused to take the prompt, necessary, usual and emergency medical steps which would have saved the life of his child and that his death was proximately caused by their said carelessness, inattentiveness and negligence; that as a result of the carelessness, inattentiveness and negligence of the defendants, plaintiff was damaged in the sum of $50,000.

[1] This complaint states a cause of action for negligence against the general demurrer, Davie v. Board of Regents of University of Cal., 66 Cal.App. 689, 692, 227 P. 247, and it was error to sustain the demurrer without leave to amend unless it can be held that plaintiff is bound by the allegations of his complaint in a prior action filed in the same superior court. This prior action, filed in November, 1951, was against the county of Kern and others and defendant Herbert Lee Archibald was served as John Doe One. Plaintiff alleged therein that the John Doe defendants were agents and employees of the county of Kern and acting within the scope of their employment as doctors, nurses and attendants at the Kern county general hospital; that plaintiff presented his minor son to the emergency receiving room of the said hospital, specifically requesting the nurses and doctors therein to render medical attention to the said child; that the child had accidentally swallowed an unknown quantity of oil of wintergreen or other foreign substance; that in response to plaintiff's request, said doctors undertook to and did render medical attention to said child and that the child died while in said hospital. It was further alleged upon information and belief that the said hospital and said doctors failed and refused to take prompt and necessary medical steps which would have saved the life of the child; that his death was proximately caused by the carelessness and negligence of said doctors and nurses and as a result of the carelessness, inattentiveness and negligence of said hospital and said doctors, both as in-

dividuals and acting as agents and employees of the county, plaintiff was damaged in the sum of $50,000; that a claim was filed against the county and by it rejected. There are no allegations in said complaint that a claim was presented to or filed with the defendant doctors. A general demurrer by the county was sustained to this complaint without leave to amend and a judgment was entered that plaintiff take nothing by his complaint against the county of Kern. This judgment was filed in said court on December 24, 1951. On March 17, 1952, Herbert Lee Archibald, one of the defendants therein, filed a general demurrer and plaintiff thereupon, on March 28, 1952, dismissed the action.

[2, 3] The trial court evidently took judicial notice of the allegations of this complaint and granted defendants' motion to include it in the transcript on appeal. In this connection, it may be noted that while the general rule is that the court will not take judicial notice of other actions, not even those pending or concluded in the same court, and that the authority of a court to take judicial notice of its own records is limited to proceedings in the same case, Wolfsen v. Hathaway, 32 Cal.2d 632, 638, 198 P.2d 1, it has been held that the rule has many exceptions and that in the interests of justice, the court may take judicial notice of proceedings in other cases in the same court. Christiana v. Rose, 100 Cal.App.2d 46, 52, 222 P.2d 891; In re Estate of McSweeney, 107 Cal.App.2d 140, 144, 236 P.2d 846. In the instant case the prior proceedings were placed before the court by the memorandum of points and authorities submitted with the demurrer. Popcorn Equipment Co. v. Page, 92 Cal. App.2d 448, 453, 207 P.2d 647.

Appellant's sole contention on this appeal is that Section 1981 of the Government Code applies only when the plaintiff claims he was injured by a public employee in the course of his employment. Citing Stewart v. McCollister, 37 Cal.2d 203, 206, 231 P.2d 48. This contention is correct as stated. However, it is not applicable here where the claim was made in the first action that plaintiff's son was injured by a public employee at the county hospital in Kern county. It clearly appears from the complaints in both actions that plaintiff, by his second suit, sought to avoid the requirements of Section 1981 of the Government Code, which provides that whenever it is claimed that any person has been injured as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment, a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk of the legislative body. Plaintiff is required by this section to present and file such claim with the officer or employee as well as with the legislative body and this is true although the action is brought against the employee individually. Huffaker v. Decker, 77 Cal. App.2d 383, 175 P.2d 254.

A situation quite similar to that in the instant case was presented to the court in Slavin v. City of Glendale, 97 Cal.App.2d 407, 217 P.2d 984, 986. In that case plaintiff first sued the city of Glendale for assault and battery committed by a police officer. A demurrer filed by the city was sustained without leave to amend. The plaintiff then amended his complaint by adding a separate and distinct cause of action against the officers individually. Thereafter a third amended complaint was filed similar to the preceding pleading except that the city was no longer named as a defendant. No claim was filed and the court sustained a demurrer as to defendant police officers without leave to amend. The court there said:

> "Finally, appellant contends that the Second Cause of Action, which was added after sustaining of a demurrer to the original complaint, states a cause of action against the defendants as individuals; therefore, appellant should have been permitted to go to trial on that issue. It will be recalled that the original complaint stated but one cause of action,—against the defendant city and its police officers acting in an official capacity. The new cause of action against the individual defendants alleged the same acts of assault and battery but omitted the allegations that such persons were acting as police officers. By so doing it was obviously

sought to by-pass the controversy concerning plaintiff's failure to file a claim. * * *

"The basic fact which must be recognized is that plaintiff's cause of action, however stated, was one for assault and battery committed by police officers of the City of Glendale. Plaintiff did not and could not allege that the required claim had been filed as required by the law, either within the 90 day period or at any other time. In an attempt to state a cause of action plaintiff drafted three different complaints which were substantially similar, to which demurrers were successively sustained. As stated in respondent's brief, 'appellant should not be allowed to breathe life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective.'"

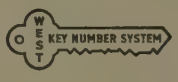
[4] In Lee v. Hensley, 103 Cal.App.2d 697, 709, 230 P.2d 159, 166, this court held as follows:

"The rule is that a defect in a verified complaint, by reason of an allegation which renders it vulnerable, cannot be cured simply by omitting the allegation without explanation in a later pleading. Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 128 P.2d 522, 141 A.L.R. 1358. See, also, Williamson v. Joyce, 137 Cal. 151, 69 P. 980; Neet v. Holmes, 25 Cal. 2d 447, 154 P.2d 854. Facts once alleged cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation. Accordingly, the court was fully justified in examining and considering the original complaint. Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825."

[5–7] While the rules announced in these cases were applied when amendments were filed to the complaints in the same actions, we conclude that where, as here, plaintiff sought to "by-pass" the controversy concerning his failure to file a claim by dismissing the first action and filing another in the same court, the rules announced are applicable. Plaintiff having claimed and alleged under oath, in the first action, that the child was injured as a result of the negligence of the defendant doctors at the Kern county hospital and that the said doctors were employees of the hospital, acting as agents and employees of the county of Kern, is bound by such allegations. The law is well settled that a county is not liable for the negligent injury of a hospital patient, Madison v. City and County of S. F., 106 Cal.App.2d 232, 245, 234 P.2d 995, 236 P.2d 141, and while plaintiff, in his first action, alleged that he suffered damages as a result of the carelessness and negligence of the hospital and said doctors, both as individuals and acting as agents and employees of the county, no specific facts are alleged therein showing individual and personal liability of the defendant doctors apart from acts done by said doctors while at the hospital and as employees thereof.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



118 Cal.App.2d 126

KOHLE v. SINNETT.

Civ. 8182.

District Court of Appeal, Third District, California.

May 26, 1953.

Hearing Denied July 22, 1953.

Action by automobile occupant against motorist for injuries received in accident which occurred while occupant and motorist were returning from meeting with prospective purchaser of occupant's land. The purchaser had requested motorist to estimate logging costs on the land and bring occupant along so that boundary lines could be pointed out. The Superior Court, Trinity County, C. A. Paulsen, J., entered judgment on verdict for motorist, and occupant appealed. The District Court of Appeal, Van Dyke, P.

J., held that question whether occupant was guest or passenger was for jury.

Judgment affirmed.

1. Automobiles ⇐245(24)

In action by automobile occupant against motorist for injuries received in accident which occurred while occupant and motorist were returning from meeting with prospective purchaser of occupant's land, where purchaser had requested motorist to estimate logging costs on the land and bring occupant along so that boundary lines could be pointed out, question whether occupant was guest or passenger was for jury.

2. Automobiles ⇐181(2)

An "automobile guest" is one who is invited, expressly or impliedly, to enjoy hospitality of driver of automobile, who accepts such hospitality, and who takes ride on his own business without making any return to or conferring any benefit upon driver as compensation therefor.

See publication Words and Phrases, for other judicial constructions and definitions of "Automobile Guest".

3. Appeal and Error ⇐1047(3)
Evidence ⇐207(4)

In action by automobile occupant against motorist for injuries received in accident, testimony of justice of peace concerning motorist's plea of guilty, which motorist entered to speeding charge to obtain settlement thereof, although motorist did not absolutely admit his guilt, was admissible as statement against interest, but striking out such testimony was not error which would entitle occupant to reversal of judgment. Vehicle Code, § 510.

Gibbs & Gideon, San Francisco, for appellant.

Glenn D. Newton, Redding, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-appellant Kohle brought action against defendant-respondent Sinnett to recover damages for personal injuries which appellant sustained when respondent's automobile in which plaintiff was riding, and which was being driven by respondent, left the road and plunged over an embankment. Appellant alleged that his status in the automobile at that time was that of a passenger. Respondent, answering, took the position that appellant was his guest. A jury brought in a verdict for respondent and from the judgment entered thereon this appeal is taken.

The accident happened August 23, 1950. Appellant, a resident of Redding, California, and others with him, owned certain timber lands near the town of Ruth in Trinity County. He had first met respondent in the preceding June. Respondent's occupation was that of a logging contractor and he was engaged in that business near Mount Shasta in Siskiyou County. Early in August one Wilson became interested in purchasing appellant's timber land and asked him to recommend a good logger, as Wilson wanted to find out, before he bought the land, what it would cost to log it. Appellant suggested respondent Sinnett. Wilson talked to respondent over the telephone and made tentative arrangements to meet him later. Accordingly, about a week thereafter, Wilson called respondent and asked him to meet with him at Ruth, look over appellant's timber land, and give him a logging estimate. Wilson also asked respondent to pick up appellant as respondent drove through Redding and bring him to Ruth so he could point out the boundary lines of the property. Respondent agreed to do so and accordingly called appellant on the phone, told him about the request of Wilson and the proposed meeting at Ruth on the next day, and asked him to go. Appellant agreed and on the next morning the two men journeyed to Ruth in respondent's pickup truck. They met Wilson and drove to the land they had come to see. As they drove along appellant pointed out his boundaries and the men made various stops to look over the ground. After the inspection trip respondent gave to Wilson his estimate of logging costs which was so high that Wilson at once refused to buy appellant's property. The accident happened within a mile of Weaverville while the two men were returning to Redding. There is evidence that conflicts with the foregoing statement of facts, but under the

well-recognized rule we must disregard such conflicts.

[1, 2] Appellant contends that as a matter of law he was a passenger in respondent's car when he received his injuries and therefore says it was error for the trial court to instruct the jury on the subject of guest-passenger relationships and the differing standards of care applicable in each. The contention is without merit. It was a question of fact for the jury to determine as to whether appellant was guest or passenger and the court with propriety submitted that issue to the jury under appropriate instructions, the correctness of which is not questioned on this appeal. It is true that each of these two men was interested in going from Redding to Ruth and dealing with Wilson there, but their interests were several and there was no necessary connection between them which rendered the presence of appellant such a matter of concern to respondent as to make appellant his passenger as a matter of law. The jury could infer that while respondent did in a sense ask appellant to accompany him on the trip, he did so at the request of Wilson, which request he merely passed on to appellant, offering appellant at the same time the accommodation of respondent's car to make the trip to meet Wilson. This is not, we may assume, the only inference that may be drawn from the facts, but it is a permissible inference and that is enough. As the trial court instructed the jury: "A guest is one who is invited, either expressly or impliedly to enjoy the hospitality of the driver of a vehicle; who accepts such hospitality; and who takes a ride * * * on his own business, without making any return to, or conferring any benefit upon the driver of the vehicle as compensation for the ride." It was Wilson who was dealing with appellant in the purchase of appellant's timber. It was Wilson who asked that respondent bring appellant to Ruth. Respondent agreed with Wilson to do this and so informed appellant, and when appellant accepted the ride from Redding to Ruth in respondent's car the jury from the facts we have related could find that he did so on his own business and not with any purpose of conferring any benefit upon respondent as compensation for the ride or otherwise. It may be very true, as argued by appellant, that appellant did in fact confer a benefit upon respondent by pointing out the lines of his property, but if so the jury could have inferred that it was purely incidental to appellant's dealings with Wilson and not done for any purpose of benefiting respondent. It requires no citation of authority other than the language of the guest law itself to sustain the proposition that the court was compelled to submit to the jury under appropriate instructions the question of whether appellant was guest or passenger in respondent's car. Appellant does not and could not upon this record contend that, if appellant was a guest, the verdict of the jury lacked support.

[3] Appellant contends that the trial court committed prejudicial error in striking out certain testimony given by the Justice of the Peace of Weaverville Township concerning an alleged plea of guilty entered by respondent in response to a citation for a violation of Section 510 of the Vehicle Code. The following occurred: On cross-examination respondent was asked if he had pleaded guilty to a charge of excessive speed in the Justice's Court. He replied in the negative. Thereafter appellant's counsel called the Justice of the Peace as a witness. He testified that on October 11, 1950, the respondent came before him to answer to a charge of excessive speed in violation of Section 510 of the Vehicle Code. We now quote from the transcript: "Q. What was that plea? A. Well, in the exact words, I don't believe I remember. I have had a good many pleas since then but it was in the effect of 'guilty'. The man paid his fine. * * * It was some time after the citation had come into the court before Mr. Sinnett, I believe was his name, was able to come down here. He was in Weed, I believe, and he wrote me and asked for an extension of time, which I granted. And finally when he did come down on October 11th—his trial was set for October 18th and he was here a few days ahead of time and he

came in and said he wanted to settle up, whatever it was. I showed him the citation and at that time asked him if he was guilty, and he said he didn't know for sure whether he was or not. He said the speed limit up there was on any normal highway, and after I explained to him that it could be ten miles an hour in certain zones, even though it was a fifty-five mile speed limit, well, he said, probably he was guilty then, I think, as near as I can remember." On motion the court struck out the evidence, observing that it was not an unqualified plea of guilty and instructed the jury to "disregard all evidence on this question and dismiss it from your minds." The entries in the docket showing the case against respondent and the disposition thereof were not offered in evidence. However, the testimony of the justice of the peace as to his conversation with respondent was admissible as statements against interest. Such statements made to anyone would have been admissible and they were no less so because made to the justice of the peace. But when we consider what was said by respondent in his discussion with the justice and the attendant circumstances we think it cannot be said that the error would justify reversal under the constitutional mandate. We have judicial knowledge that it is a long way from Weed to Weaverville; respondent appeared in response to the citation after having received the convenience of a postponement at his request; a trial would involve a second appearance plus attorney's fees, plus witnesses, and the attendant expense; respondent stated to the justice that "he wanted to settle up, whatever it was"; he stated he didn't believe he was guilty, but on further discussion admitted that he probably was; the justice said he couldn't remember exactly what the plea was, but it was in the effect of guilty and the man paid his fine. These things considered, the transaction amounted in practical effect to a common law plea of nolle contendere and we do not believe that a jury of practical people would have given any particular weight to the statements made during the conversation with the justice as testified to by him. Certainly we ought not to reverse the judgment upon this assignment of error.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.



118 Cal.App.2d 50

STONER v. LAIDLEY et al.

STONER v. STONER et al.

Civ. 4609.

District Court of Appeal, Fourth District, California.

May 21, 1953.

Action by son against mother to quiet title to four parcels of real property which mother contended were held in trust. The Superior Court of Kern County, Robert B. Lambert, J., entered judgment from which mother appealed. The District Court of Appeal, Barnard, P. J., held that evidence supported findings that mother had full knowledge of all of transactions involving conveyance to son and to son with other children, and that she acted upon independent advice, both legal and lay.

Judgment affirmed.

1. Trusts ⇐110

In action by son against mother to quiet title to four parcels of real property, wherein mother sought to have declaration that son held properties in trust for her, evidence sustained finding that although a confidential relationship existed between the parties, the son had used no undue influence, and not advised mother, but that mother had relied and acted upon the advice of other members of her family, including her son-in-law who was a lawyer, when making conveyances to son and other children.

2. Trusts ⇐110

In action by son against mother to quiet title to four tracts of realty which

mother contended son held in trust for her, evidence warranted finding that property was not impressed with a trust in favor of mother.

3. Trusts ⇐44(3)

In order to prove a trust by parol under conveyance absolute in its terms, the evidence must be clear, satisfactory and convincing.

4. Trusts ⇐110

In action by son against mother to quiet title to four parcels of real property which mother contended were held in trust, wherein it appeared that son had acquired one tract by gift deed for purported purpose of equalizing gifts of mother to children, and another tract upon assumption of indebtedness of mother, and two other tracts by deeds from mother to three children and purchase by son of shares of other children, evidence warranted finding that the conveyances were supported by ample consideration within meaning of rule raising presumption of fraud and undue influence where property is transferred without consideration and confidential relationship exists.

5. Deeds ⇐208(1)

In action by son against mother to quiet title to four tracts of realty which mother contended was held in trust, wherein it appeared that mother had deeded two of the tracts to three children with instruction not to deliver deeds until after her death, but that different instructions had thereafter been given, evidence warranted finding that such two deeds had thereafter been delivered in accordance with mother's instructions.

6. Limitation of Actions ⇐197(2)
Trusts ⇐365(5)

In action by son against mother to quiet title to four tracts of realty which mother contended were held in trust, evidence warranted findings adverse to mother's contention that continuous trust existed which precluded statute of limitation from running until repudiation thereof, and warranted conclusion that mother's claims were barred by limitations and laches.

7. Trusts ⇐365(5)

Where mother made no claim to an interest in property which had been conveyed to son until many years after the transactions occurred, and until after three important witnesses were dead, mother was precluded by laches from asserting that son held title in trust, especially when facts and circumstances strongly indicated that she knew son was claiming title to the properties.

Hancock, Elkington & Rothert and Harlow P. Rothert, San Francisco, for appellant.

Johnston, Baker & Palmer, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to four parcels of real property in Bakersfield. The defendant Ella Stark Stoner is the mother of the plaintiff, and will be referred to as the defendant. L. K. Stoner is his brother, the defendant Viola S. Laidley is his sister, and the defendant Mary Ella Lenahan is his niece, the daughter of Mrs. Laidley. Mrs. Laidley's husband was a lawyer.

The four parcels, which are referred to as the "cottage property," the "home property", the "store property" and the "other property" were formerly owned by the defendant. She conveyed the "cottage property" to the plaintiff by a deed dated October 28, 1921, which was recorded on March 8, 1933. She conveyed the "home property" to the plaintiff by a deed dated July 27, 1932, and recorded August 22, 1932. She executed a deed dated September 16, 1924, conveying the "store property" to the plaintiff and to his brother and sister, L. K. Stoner and Mrs. Laidley. This deed was not recorded until March 8, 1933. The defendant conveyed the "other property" to her three children by deed dated July 3, 1933, and recorded July 6, 1933. Subsequently, Mrs. Laidley and L. K. Stoner sold and conveyed their interests in this property to the plaintiff. Mrs. Laidley conveyed her interest in the "store property" to the plaintiff in 1937, and L. K.

Stoner conveyed his interest to the plaintiff in 1940. A trust deed on the "store property" was foreclosed in 1937, and the plaintiff purchased it at the trustees' sale and received deeds conveying that title to him.

This action was brought on December 6, 1949, and was tried in May, 1951, at which time the defendant was 88 years old. The brother and sister and Mrs. Lenahan, who had been appointed as guardian of the defendant, filed disclaimers. An order restoring the defendant to capacity was entered on March 10, 1950, and thereafter she filed an answer and a cross-complaint in which she asked to have it declared that the plaintiff holds these properties in trust for her, sought an accounting of rents and profits, and asked to have title to the properties quieted in her. The court's findings, after a lengthy trial, were in favor of the plaintiff and he was given a judgment quieting title to the properties in him, from which the defendant has appealed.

With respect to the "cottage property", the court found that in October, 1921, the defendant executed and delivered to the plaintiff a gift deed conveying that property to him; that this deed was delivered by the plaintiff to L. K. Stoner for safe keeping; that early in the year 1933, this deed could not be located and the defendant had her son-in-law, W. W. Laidley, prepare another deed which was delivered to the plaintiff; that the original deed was later found and recorded; and that since October 28, 1921, the plaintiff has been and is the owner of that property.

With respect to the "home property," the court found that on July 27, 1932, the defendant sold and conveyed it to the plaintiff for a valuable consideration; that the consideration was that the plaintiff assumed a lien indebtedness on the property of $10,000, with interest, owed to the Bank of America, assumed an additional $1,900 on unsecured notes owed by the defendant to said bank, and agreed to allow L. K. Stoner to occupy the property without rent for a certain period of time; that plaintiff paid off these debts and allowed the brother to occupy the property for said period; that the defendant did not execute this deed until after she had consulted her attorney W. W. Laidley, who advised her on all legal and business matters in connection with her property; that Mr. Laidley prepared this deed and it was acknowledged before a notary in his office; that the defendant personally delivered this deed to the plaintiff; and that since August 22, 1932, the plaintiff has been and now is the owner of this property.

With respect to the "store property", the court found that on September 16, 1924, the defendant executed a gift deed naming Mrs. Laidley, L. K. Stoner and the plaintiff as grantees; that this deed was delivered to L. K. Stoner with instructions that it was to be held by him and recorded upon the death of the defendant; that in February, 1933, Mr. Laidley, the business and legal adviser of the defendant, advised her that she should have L. K. Stoner deliver the deed to the plaintiff for recording; that, thereafter, the defendant wrote a letter to L. K. Stoner requesting him to deliver the deed to the plaintiff, and also requested the plaintiff to obtain the deed from his brother and record it as she desired to give the property to her children immediately; that the deed was then delivered to the plaintiff as requested by the defendant, and was recorded; that, in February, 1937, Mrs. Laidley sold and conveyed her one-third interest in this property to the plaintiff for $4,000; that this fact was known to the defendant a short time thereafter; that, in 1940, the plaintiff purchased from L. K. Stoner his one-third interest in this property for the sum of $5,632.29; that shortly thereafter the defendant was advised of said sale and transfer; that at the time the deed conveying the property to the three children was recorded the property was encumbered by a trust deed for over $20,000 for money which the defendant had borrowed, and there was an attachment against the property on a claim of John-Deere Plow Company against the defendant in excess of $16,000; that this claim was later adjusted and settled; that by reason of this attachment and other defects in the title this property could not be refinanced but was sold under said deed of trust, and the plain-

tiff purchased the property at the trustees' sale; that prior to and after the said trustees' sale the defendant was fully advised by the plaintiff and L. K. Stoner regarding all of the transactions, and other matters in connection with the sale under this trust deed; that since the delivery of the deed to this property to the plaintiff in March, 1933, and its recordation as requested by the defendant, the defendant has not been the owner of this property or any part thereof; and that since the conveyance to the plaintiff by his brother and sister of their interests in this property the plaintiff has been the owner of all of said property.

With respect to the "other property" the court found that on July 3, 1933, the defendant executed and delivered a deed conveying this property to her three children, the plaintiff, Mrs. Laidley and L. K. Stoner; that the defendant executed this deed after she received advice from W. W. Laidley, who was acting as her business and legal adviser upon all matters, and from other parties other than the plaintiff; that Mrs. Laidley and L. K. Stoner later conveyed their interests in this property to the plaintiff, and that the plaintiff paid each of them $200 for their respective interests; and that since February 21, 1939, the plaintiff has been and now is the sole owner of this property.

It was further found that at the time it was conveyed the "cottage property" was worth not to exceed $7,500, the "home property" not to exceed $13,000, the "store property" not to exceed $37,000, and the "other property" not to exceed $600; that at all times here involved there had been a confidential relationship between the defendant and her three children; that she was not advised by and did not rely upon the advice of the plaintiff in any matter pertaining to her business and her property; that during the period in question she was advised by and relied upon the advice of W. W. Laidley in all legal matters, and was advised by and relied upon the advice of Mrs. Laidley and Mr. Laidley and other persons upon all matters relating to her business and property; that the plaintiff did not, during the years 1930 to 1932, or at any other time, advise the defendant that because of the existing depression and the encumbrances the real property belonging to her was in a precarious condition and might be lost through foreclosure, or tell her that if she gave him the complete control and legal title to the property he would hold the title for her, would prevent any foreclosure and would manage it for her benefit; that it is not true that in 1937 the plaintiff, without defendant's knowledge or consent and with intent to personally profit thereby, allowed the "store property" to be foreclosed by the holder of the trust deed; that it is not true that the plaintiff, in December, 1949, repudiated an agreement to hold title to said real property and to manage it for the benefit of the defendant; and that it is true that the plaintiff never agreed to hold title to any of the real property mentioned in the findings for the defendant or to manage it for her benefit.

It was further found that the defendant's several causes of action, as set forth in the cross-complaint, are each barred by certain statutes of limitation; that each of said causes of action are further barred by laches in that the defendant, between the years 1933 and 1949 has never claimed any interest in these properties, and that since 1937 she has had full knowledge that the plaintiff had purchased the interests of his brother and sister in the "store property"; that she knew that the plaintiff was required to borrow money in order to purchase the store property when it was sold under the trust deed; that she knew that it was necessary for said property to be sold under the trust deed due to liens and other clouds on the title to the property, which were caused by the defendant and parties other than the plaintiff; that she had full and complete knowledge of each and every one of these transactions and did not object to the same, or at any time claim that she was the owner of said property or had any interest therein; that during this period she stated to the plaintiff and others that the plaintiff was the owner of these properties; that during the years 1932 and 1933 and thereafter she knew that the plaintiff was paying off all debts on the "home

property" and had fully performed the other considerations which he had agreed to perform in that regard; and that she also had knowledge that the plaintiff was expending large sums of his own money to repair and improve the properties, and during this entire period she did not object thereto nor claim that she had any interest in the property until December 1, 1949.

The defendant relies on the rule that where a confidential relation existed between the parties, and property is transferred without consideration, a presumption of fraud and undue influence arises which shifts the burden of proof to the grantee to show fairness and good faith in the transaction, that the grantor had a full understanding of the situation, and that the grantor acted upon independent advice in making the transfer. Sparks v. Mendoza, 83 Cal.App.2d 511, 189 P.2d 43; Hatch v. Penzner, 44 Cal.App.2d 874, 113 P.2d 295; Estate of McConkey, 33 Cal.App. 2d 554, 92 P.2d 456; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910. It is argued that the court found that a confidential relation existed here; that there was no consideration for these transfers; and that there is neither findings nor evidence to show that these transfers were fair to the defendant, that she had a full understanding of them, or that she had received independent advice.

[1–3] While the court found that a confidential relationship existed, it also found in effect that the plaintiff had used no undue influence. It found that the defendant was not advised by the plaintiff, and that she relied and acted upon the advice of other members of her family, including her son-in-law who was a lawyer. These findings are supported by the evidence. The plaintiff was in Mexico from 1921 to 1930, and was away from the family on his own business most of the time from 1930 to 1933. L. K. Stoner had for years been operating a store in the "store property", as manager for the defendant. The store was closed about 1932 because of financial difficulties. The plaintiff was called in because an imminent danger of losing the properties existed. It may well be that the defendant preferred to save the property for the children rather than to have it taken by the creditors. It does not certainly appear, however, that she intended to save the properties for herself, or that she made any agreement with the plaintiff for that purpose. In Taylor v. Bunnell, 211 Cal. 601, 296 P. 288, 291, it was held that after the showing of a confidential relationship the burden was still on the plaintiff to prove that the deed was not what it purported on its face to be, and to show that the facts surrounding the transaction were sufficient to establish a constructive trust. The court there said: "The rule is also well established that to prove a trust by parol under a conveyance absolute in its terms the evidence must be clear, satisfactory and convincing."

[4] An ample consideration existed here within the meaning of the rule relied on by the defendant. About 1920, the defendant had told each of her children that she would give them some property. She gave Mrs. Laidley a house and lot, and Mrs. Laidley later sold it and used the money. She gave L. K. Stoner a house and lot and he later conveyed it to his wife as part of a property settlement. She repeatedly said she was going to give the "cottage property" to the plaintiff. In 1921, she executed a gift deed to that property to him, handed it to L. K. Stoner and asked him to deliver it to the plaintiff when he returned from Mexico. The plaintiff returned from Mexico for a visit in 1922 and saw his mother in Berkeley. She told him she had given him a deed to the "cottage property" by delivering it to his brother. When the plaintiff came to Bakersfield, L. K. Stoner took the deed from the safe and gave it to him. The plaintiff then handed the deed back and asked his brother to take care of it for him. The defendant admitted at the trial that she had given the plaintiff the "cottage property" because she wanted to treat him the same as she had treated the other children.

In June, 1932, the plaintiff had a talk with the defendant in Bakersfield in which she told him of the debts to the bank, $10,000 on a trust deed on the home property and $1,900 on notes, and that the bank was

pressing for payment. She told him she would give him this property if he would pay off these debts, but he was unwilling to do so because he thought the property was not worth that amount. He finally agreed to do so when he found that the trust deed on the "home property" had been made out to include the "cottage property", which had been given to him. The defendant, who lived with the Laidleys in Berkeley, said she would have her attorney prepare a deed when she returned to Berkeley. In July, 1932, she delivered to the plaintiff a deed to this property executed before a notary public in Alameda County. The plaintiff paid off the $11,900 debts to the bank, with some interest, and also spent considerable money, in carrying out his agreement with his mother, to enable L. K. Stoner to operate a business on the "home property" for a certain period. This was in legal effect a sale, as found by the court, and the plaintiff thus paid what appears to have been the full value of the property.

While the "store property" was deeded to the three children in 1924, with instructions that the deed was not to be recorded until after the defendant's death, she gave different instructions in 1933. At that time, the holder of the trust deed for $20,000 was threatening to foreclose and the John-Deere Plow Company was threatening to attach on a claim for $16,000. This attachment was actually levied shortly after the deed to the three children was recorded. The plaintiff was called for a conference with his mother by his brother-in-law, Laidley, and was told of the situation. Laidley advised the defendant to give a second mortgage to the plow company. She then stated that she wanted nothing more to do with the property and that "I have made out a deed to you children for the property. It is yours and you can do what you want with it." She then asked the plaintiff to go to Bakersfield and get the deed from his brother and record it as soon as possible. Laidley said this was the thing to do. The defendant also wrote to L. K. Stoner and asked him to deliver the deed to the plaintiff. The plaintiff went to Bakersfield, obtained the deed and recorded it. Four years later the trust deed on the "store property" was foreclosed and the plaintiff bought it in at the trustees' sale, having borrowed the money for this purpose. He then paid his sister $4,000 for her one-third interest, and later paid his brother $5,600 for his interest. There is evidence that he paid between $22,500 and $25,000 in connection with the trustees' sale, and that altogether he paid practically what the property was then worth. In view of all of the evidence it cannot be said that an adequate consideration was not paid.

It does not appear that the plaintiff paid anything to the defendant for the "other property" which was deeded to the three children in 1933, although he later paid his brother and sister for their interests therein. It would appear that this property was conveyed to the three children as a part of the transaction involving the "store property," as the 1933 deed to the "other property" also included the "store property," another deed to which had recently been recorded. Some ten years later the defendant asked L. K. Stoner what he had done with his interest in the "other property", and he told her that he had sold it to the plaintiff.

[5] We have read the entire record which discloses that the court's findings, to the effect that the defendant had full knowledge of all of these transactions and that she acted upon independent advice, legal and otherwise, are sufficiently supported. There is some conflict with respect to the delivery of the two deeds in 1933. The defendant testified that her two sons came to her while she was in Bakersfield; that the plaintiff said he had brought the papers she would have to sign for him to take care of things for her; that she signed them without reading them as she trusted him entirely; that he kept the papers; that she did not know who prepared the papers; that there was no discussion about the "store property" or the "cottage property"; that he was taking the business over to take care of it and save it for her; that she did not mistrust him and asked no questions; that she remembered no conversation about the plaintiff paying the debts; that she did not tell the plaintiff to record the deed to the "store property"; and that she did not know that the plaintiff had bought that property at the foreclosure sale until he told her in 1949. There is a great deal of con-

flicting evidence given by the plaintiff and by L. K. Stoner, and also in many written instruments concerning which the defendant could remember nothing. Nothing more than a conflict appears, at best, and the evidence as a whole strongly supports the findings made.

[6, 7] The defendant further contends that the finding that her claims are barred by various statutes of limitation is unsupported by the evidence. It is argued that a continuous trust here existed, that the statutes did not begin to run until a repudiation of the trust was brought home to the beneficiary, and that this was not done and the defendant had no knowledge that the plaintiff claimed to own the property until some time in December, 1948. This contention rests upon a conflict in the evidence, other portions of which are sufficient to sustain the finding in this regard. The only other point raised is that the finding that the action was barred by laches is without support in the evidence. It is unnecessary to discuss this issue other than to say that the defendant allowed these matters to rest without objections for many years after the transactions occurred, and until after three important witnesses were dead, when the facts and circumstances strongly indicate that she knew that the plaintiff was claiming title to the properties.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 139

HOOVER v. KERN COUNTY et al.

Civ. 4634.

District Court of Appeal, Fourth District, California.

May 26, 1953.

Action by motorist against county and owners of subdivision for injuries sustained when plaintiff's automobile struck depression in street in the subdivision in county territory. The Superior Court, Kern County, R. B. Lambert, J., on county's demurrer, entered judgment in favor of county, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that the responsibility and liability of the county for maintenance of the street in a proper condition did not attach until completion of the street work and its acceptance by the board.

Affirmed.

1. Municipal Corporations ⇐755(2)

The question of who has control over street at time of accident caused by defective condition thereof is usually an important element in determining liability for injuries thus sustained.

2. Municipal Corporations ⇐755(2)

One of the main purposes of the Subdivision Map Act is to require subdivider to do original work of placing streets in proper condition before maintenance thereof is taken over by city or county, and to relieve public to this extent of burden that would otherwise exist. Business and Professions Code, § 11611.

3. Dedication ⇐35(3)

Although Subdivision Map Act requires governing board of municipality to approve map submitted by subdivider within ten days and to accept or reject any offer of dedication at such time, a further and later acceptance by board of work of placing streets in proper condition before maintenance thereof is taken over by city or county is necessary, in view of fact that it must later be determined whether work has been done in accordance with standards established as condition precedent to acceptance of any street. Business and Professions Code, § 11611.

4. Automobiles ⇐255
Dedication ⇐35(3)

Under Subdivision Map Act, acceptance by governing board of municipality of subdivision map within ten days after its filing is a conditional acceptance which remains conditional until work of placing streets in proper condition has been completed by subdivider and accepted by governing body as being in accordance with standards established by governing body,

and, therefore, county was not liable for injuries sustained by motorist because of defective condition of street during period between conditional acceptance and final acceptance of street. Business and Professions Code, § 11611.

5. Dedication ⇐35(3)

The dedication of streets is complete when it is accepted by governing board of municipality as required by Subdivision Map Act, but the doing of work of placing streets in proper condition by subdivider is a condition precedent to acceptance of streets by municipality for purposes of maintenance. Business and Professions Code, § 11611.

6. Dedication ⇐35(3)

The responsibility and liability of governing board of municipality for maintenance of streets in proper condition does not attach until completion of street work by subdivider and its acceptance by governing board. Business and Professions Code, § 11611.

7. Automobiles ⇐255
Dedication ⇐34

The governing board of county had no authority to accept streets in subdivision at time of approving subdivision map, and, therefore, nonliability of county for injuries sustained by motorist because of defective condition of street was not affected by such acceptance. Business and Professions Code, § 11611.

West, Vizzard, Howden & Baker, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for personal injuries sustained by the plaintiff when her automobile struck a depression in a street in a new subdivision in county territory. She sued the county and the owners of the subdivision. The county's demurrer to an amended complaint was sustained without leave to amend. Judgment in favor of the county followed, from which the plaintiff has appealed.

The amended complaint alleges that the defendants Curran were the owners of certain real property in the defendant county which was not within the boundaries of any municipality; that on December 27, 1949, they caused to be submitted to the board of supervisors a subdivision map embracing said property, which was prepared in the manner prescribed by law; that on December 27, 1949, the board of supervisors approved this map and ordered it recorded, and further ordered that the streets shown upon said map and therein offered for dedication "be and the same are accepted for public use"; that this map was recorded on December 29, 1949; that concurrently with the adoption of this order the board of supervisors entered into a contract with the defendant Roland Curran by which he agreed to improve the streets in this tract; that Curran furnished bonds conditioned upon the faithful performance of the contract; that Curran, in performing said contract, negligently left a large depression at a certain street intersection which frequently became concealed by standing water; that this dangerous and defective condition existed on November 19, 1951, and prior thereto; that from and after September 10, 1951, the board of supervisors had knowledge of this defective condition and failed to remedy it or to take action reasonably necessary to protect the public; that on November 19, 1951, the plaintiff, while operating her automobile, struck this depression while it was concealed by standing water, as a result of which she suffered certain injuries; and that on January 14, 1952, the board of supervisors adopted an order accepting the street work in question. The contract referred to in the complaint provided that the street work should be done in accordance with certain specifications, provided for an inspection to see that it met the requirements, and provided that "before making application for acceptance of the work" the contractor should furnish satisfactory evidence as to certain material used.

The controlling question here is as to the meaning and effect of section 11611 of the Business and Professions Code, which is a part of the "Subdivision Map Act". The

preceding section provides when the final map of a subdivision may be filed for approval. The first paragraph of section 11611 provides that the governing body shall then approve the map within ten days if it conforms to the requirements. The second paragraph reads:

> "The governing body shall at that time also accept or reject any or all offers of dedication and shall, as a condition precedent to the acceptance of any streets or easements, require that the subdivider, at his option, either improve or agree to improve the streets or easements in accordance with standards established by such governing body by local ordinance."

The next section provides for a bond in connection with the work agreed to be done, and section 11614 provides that upon the execution of such a contract by the subdivider and the posting of the bond, the map shall be accepted for recording.

The appellant contends that the dedication of these streets for public use became complete on December 29, 1949, when the offer of dedication was accepted by the board and when the map was recorded; that the completed dedication placed the duty of maintaining the streets on the county at that time; and that the county could not evade liability for injuries caused by disrepair of the streets by delegating the responsibility for fixing the streets to a contractor. Reliance is placed on such cases as Bosqui v. City of San Bernadino, 2 Cal. 2d 747, 43 P.2d 547; Shea v. City of San Bernadino, 7 Cal.2d 688, 62 P.2d 365; and Mulder v. City of Los Angeles, 110 Cal. App. 663, 294 P. 485, in which it was held that the cities had control over the streets in question.

[1–4] The question of who has control over a street at the time involved is usually an important element in determining liability. Gibbons v. City of San Bernadino, 108 Cal.App.2d 33, 238 P.2d 115. One of the main purposes of the Subdivision Map Act seems to be to require the subdivider to do the original work of placing the streets in a proper condition before the maintenance thereof is taken over by a city or county, and to relieve the public to this extent of the burden that would otherwise exist. Section 11611 requires the board to approve the map within ten days, if the preliminary steps have been properly taken, and requires the board to accept or reject any offer of dedication at the same time. But it also provides that, as a condition precedent to the acceptance of any streets, the board shall require the subdivider to either improve or agree to improve the streets in accordance with established standards. Not only is this acceptance of the streets made conditional by statute, but it necessarily follows that a further and later acceptance of the work is necessary since it must later be determined whether or not the work has been done in accordance with the standards established. The contract here recognized this and provided for an inspection of the work and for the furnishing of satisfactory evidence before an application for acceptance of the work was made. The work here was not accepted by the board until some two months after this accident happened. In the meantime, the subdivider was in control of the streets. The acceptance which the board is required by section 11611 to make in advance, being a conditional one, it would be unreasonable to interpret that section as intended to mean that the condition was met and the acceptance complete when the subdivider agreed to do the work. Under that section, reasonably interpreted, we think the acceptance of the street remains conditional until the work itself has been completed and accepted as being in accordance with the standards established by the governing body.

[5, 6] The statute makes a distinction between a "dedication" and an "acceptance" of streets and while the dedication may be said to be complete when it is accepted by the board, as required in the first paragraph of the statute, the doing of the work is a condition precedent to the acceptance of the streets. It naturally follows that the responsibility and liability of the governing board for the maintenance of the streets in a proper condition does not attach until the completion of the street work and its acceptance by the board.

[7] The legal situation is not altered because of the fact that the order adopted by the board of supervisors on December 27, 1949, approving this map and ordering it to be recorded, also contained a further order that the streets shown upon this map and therein offered for dedication "are hereby accepted for public use." The board had no authority to accept the streets at that time other than conditionally, as provided in section 11611, and the provisions of the statute control. County of San Diego v. California Water & Telephone Co., 30 Cal.2d 817, 186 P.2d 124, 175 A.L.R. 747.

A cause of action was not stated and could not be stated as against the defendant county, and its demurrer was properly sustained without leave to amend.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 133

PEOPLE v. CONTINENTAL CAS. CO.

Civ. 8248.

District Court of Appeal,
Third District California.
May 26, 1953.

Action against a surety upon certain bonds executed by defendant in compliance with statute requiring bonds of contractors on public works to bind surety to pay sums falling due under the Unemployment Insurance Act if the contractor does not pay them. The Superior Court, Sacramento County, rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that action was not barred by limitations.

Judgment reversed.

1. Statutes ⇐233

To bind government a statute must expressly declare that it does so or must so declare by necessary implication.

2. Statutes ⇐233

Legislative enactments are presumed to speak to citizen and not to sovereign.

3. Limitation of Actions ⇐11(1)

Statutory provision that suit against surety on contractor's bond may be brought any time after claimant has ceased to perform labor or furnish material until expiration of six months after period in which verified claims may be filed as provided by statute, is not applicable to State, and such limitation did not bar State from maintaining action upon bonds executed by surety in compliance with statute requiring bonds of contractors on public works to bind surety to pay sums falling due under Unemployment Insurance Act if contractor does not pay them. Government Code, §§ 4200 et seq., 4206; Gen.Laws, Act 8780d.

4. Appeal and Error ⇐170(1)

Where action sought recovery of principal amounts due under statute, including penalty, interest and attorney's fees, and trial court ruled only on defendant's plea of statute of limitations, and appeal was presented upon agreed statement that controversy existed as to liability for penalty and interest, and record did not show upon what grounds liability for penalty and interest was controverted, District Court of Appeal would rule only on question of limitations and would not rule that as matter of law defendant was liable for penalty, interest and attorney's fees. Government Code, §§ 4200 et seq., 4206; Gen. Laws, art. 8780d.

Edmund G. Brown, Atty. Gen., Irving H. Perluss and Vincent P. Lafferty, Deputy Atty. Gen., for appellant.

Anderson, McPharlin & Conners, Los Angeles, Rowland & Craven, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-appellant, the State of California, brought action against defendant-respondent upon certain bonds executed by respondent in compliance with Section 4200 and following of the Government Code. Among other things, this section provides

that bonds of contractors on public works shall contain a provision binding the surety to pay sums falling due under the provisions of the Unemployment Insurance Act, Gen.Laws, Act 8780d, if the contractor does not pay them. The complaint alleged that such sums had fallen due and were unpaid. The trial court held that the State's action was barred by the provisions of Section 4206 of the Government Code and from the judgment rendered against it this appeal has been taken.

It is not disputed that if said Section 4206 applies to the State so as to require that its action be brought within the time therein limited then the action was barred when begun and the judgment of the trial court must be affirmed. It is likewise undisputed that if the section does not apply to the State then the action was begun in time and the judgment appealed from must be reversed.

[1,2] In construing legislation generally with respect to whether or not the sovereign is bound thereby, it is well settled that to bind the government the statute must expressly declare that it does so or must so declare by necessary implication. Legislative enactments are presumed to speak to the citizen, not to the sovereign. In Philbrick v. State Personnel Board, 53 Cal.App.2d 222, 223, 127 P.2d 634, 637, it is stated that: "In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication." And in 16 California Jurisprudence, "Limitation of Actions", § 25, page 414, it is said: "It is settled that the state is not bound by the statutes of limitations, unless made subject to their provisions or restrictions by express words or by necessary implication."

[3] Section 4206 provides as follows: "Suit against the surety or sureties on the contractor's bond may be brought by any claimant, or his assign, at any time after the claimant has ceased to perform labor or furnish material, or both, and until the expiration of six months after the period in which verified claims may be filed as provided in Section 1184e of the Code of Civil Procedure." (Now sec. 1192.1 C.C.P.). This section does not create a cause of action or give the right to sue. That is done by the preceding Section 4202, which requires the bond and stipulates its provisions when a bond is executed pursuant thereto. Those for whose declared benefit the bond was in part required have a right of action if their demands against the contractor be not met. Section 4206 is a statute of limitations and nothing more. It fixes the time in which actions may be brought by referring to the time within which "claims may be filed as provided in Section 1184e of the Code of Civil Procedure." It says that claimants may not sue until after they have ceased to perform labor and furnish materials or both and that they cannot sue unless their action is brought within six months after verified claims may be recorded against the contractor as provided in Section 1184e of the Code of Civil Procedure. The only claimants to whom these provisions expressly refer are those who furnish labor and material. The State does not. The State is not expressly included in the statute. Nor is it included by necessary implication. Both the statutory pattern and the measure of limitation fit those who furnished labor and material. Neither fits the situation of the State and the State can only be brought within the scope of the limitation by laboring the language thereof. The statute may operate fully without including the State. We hold the appellant not governed by the section and that its action was timely.

[4] Appellant brought its action to recover the principal amounts due under the Unemployment Insurance Act and the amount sued for included penalty and interest. Reasonable attorney's fees were likewise sought. The trial court passed only on the plea of the statute of limitations. Now appellant asks this Court to rule that as a matter of law respondent is liable in this action for the penalty, interest and attorney's fees. The appeal is presented upon an agreed statement and we, therefore, do not have the pleadings before us, but concerning them the statement

asserts: "Liability for all amounts, except those for penalty and interest, having been admitted by answer, subject to the defense of limitations, an additional controversy existed as to liability for such amounts." It does not appear from the record here upon what grounds liability for penalty and interest was controverted. Under the circumstances, we think it would be improper for this Court upon this record to go further, than has been done, that is, rule upon the question of limitation of action—the sole issue determined by the decision in the trial court.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.



118 Cal.App.2d 270

WALTHER et al. v. STEFANI et al.

Civ. 8253.

District Court of Appeal,
Third District, California.

June 1, 1953.

Action by the executors of a decedent's estate against the executor of another decedent's will and others for a decree that a note, payable to defendant executor's testator and his wife, and a trust deed, naming two other defendants as trustees, were held in trust for plaintiffs. From a judgment of the Superior Court, San Joaquin County, M. G. Woodward, J., for plaintiffs, defendants appealed. On appellant executor's motion to remove appellant trustees from any control over the litigation and grant movant full authority to effect a compromise thereof, the District Court of Appeal, by the court, held that the trustees being parties to the action and included in the judgment and appellants' joint brief, the court could not properly order the trustees' removal from any control of the litigation.

Motion denied.

Appeal and Error ⇐321

The District Court of Appeal cannot properly order that defendant trustees, joining with other defendants in appeal from judgment for plaintiff in action for decree that note and trust deed securing it were held in trust for plaintiffs be removed from any control of litigation on codefendant's motion.

Franklin A. Dill and M. Mitchell Bourquin, San Francisco, Frank L. Murphy, Sacramento, for appellants.

Oscar C. Parkinson, Stockton, for respondents.

PER CURIAM.

The executor of the last will and testament of Virgilio Stefani, deceased, one of the appellants, has filed in this court a motion for an order removing appellants Frank L. Murphy and C. Robinson from any control over the litigation in the above matter and for an order granting appellant Fred A. Stefani as an individual and as an executor of the last will and testament of Virgilio Stefani, deceased, full authority to effect a compromise of this litigation if possible.

The record on appeal shows that respondent filed an action against appellants praying that a certain promissory note payable to Virgilio Stefani and his wife and the deed of trust securing same, in which deed of trust appellants Murphy and Robinson were named as trustees, be decreed to be held in trust for respondent. From the judgment in favor of plaintiff and respondent all of the defendants appealed.

Appellant executor has cited no authority that would justify the granting of such a motion as is here made, and we know of none. Appellants Murphy and Robinson were parties in the action and were included in the judgment. They were also included in the joint brief filed by all appellants. It is not suggested that they did not have the right to appeal. Under such circumstances we are unable to understand upon what basis we could properly order said appellants removed from any control of the litigation.

The motion is denied.

118 Cal.App.2d 294

GERING v. JAMESON et al.

Civ. 19113.

District Court of Appeal, Second District, Division 3, California.

June 2, 1953.

Rehearing Denied June 19, 1953.

Action to recover damages for plaintiff's ouster from a studio leased by him for conduct of a theatrical business. From a judgment of the Superior Court, Los Angeles County, Thomas P. O'Donnell, J., for defendants, plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where the parties waived findings by the trial court, plaintiff failed to take steps necessary to procure a reporter's transcript specified in his notice to the Superior Court clerk to prepare a record on appeal, and defendants had answers on file, the judgment must be affirmed, in the absence of error appearing on the face of the record.

Judgment affirmed.

1. Appeal and Error ⇐846(5)

Where plaintiff's attorney waived findings by trial court, as shown in clerk's minutes and partial reporter's transcript supplied by plaintiff and received, on motion, as part of record on appeal from judgment for defendant, who also waived findings, and court denied plaintiff's later motion to correct record on showing that findings were not waived intentionally, District Court of Appeal must give full effect to waiver of findings.

2. Appeal and Error ⇐695(1)

Where plaintiff did not take steps necessary to procure reporter's transcript, specified in his notice to superior court clerk to prepare record on appeal from judgment for defendants, and record consists of clerk's transcript and numerous exhibits containing nothing of assistance to appellate court in disposition of appeal, sufficiency of such documents, which were only part of evidence, if received in evidence and considered by court, may not be questioned.

3. Appeal and Error ⇐846(5)

In absence of findings by trial court, District Court of Appeals must presume that trial court found all facts necessary to support judgment appealed from.

4. Appeal and Error ⇐846(5)

In absence of findings by trial court, District Court of Appeal must presume that evidence supported trial court's implied findings of all facts necessary to support judgment appealed from.

5. Appeal and Error ⇐611

Where all parties to action waived findings by trial court and plaintiff did not take steps necessary to procure reporter's transcript specified in his notice to superior court clerk to prepare record on appeal from judgment for defendants, who had answers on file judgment must be affirmed, in absence of error appearing on face of record.

Edward Gering, in pro. per.

Stanley Sapiro and Aaron Sapiro, Los Angeles, for respondents Jameson, Kline and Raimond.

Zagon, Aaron & Sandler, Los Angeles, for respondents, Sophia Herman and Herman Properties, Inc.

SHINN, Presiding Justice.

Plaintiff Edward Gering brought this action against Carl S. Jameson and others named Kline, Baumert, Raimond, Herman and Herman Properties, Inc., a corporation. The facts alleged in the complaint may be summarized as follows: Plaintiff, a theatrical director of wide experience and ability as a drama coach and theatrical manager, leased a studio in the city of Los Angeles from Herman Properties, Inc., for one year at $100 per month; he entered into an oral agreement of partnership with Jameson and Kline which was to continue for one year, and he assigned the lease to the partnership to which Jameson and Kline had contributed some cash; the theatrical business was conducted in the studio for a time, plaintiff being in charge of the dramatic work and Jameson and Kline acting as business managers; about a month and a half after the enterprise was launched the defendants conspired to expel plaintiff from the partnership, to obtain a lease on the studio for themselves, and to appropriate to themselves the business of the partnership. In order to accomplish this Jameson and

Kline, with the connivance of the other defendants, refrained from paying the rent which fell due June 1st; Herman Properties served notice upon them to pay the rent or surrender possession; plaintiff tendered the rent in two checks of $50 each, one of which required the endorsement of Jameson which he maliciously refused to furnish, and the lessor declined to accept them. In an action brought by Herman Properties, Inc., with the connivance of the other defendants, judgment was rendered for possession of the premises and plaintiff was ousted therefrom. Damages, compensatory and exemplary, were sought for alleged detriment sustained by plaintiff.

[1] The defendants answered, and all parties being represented by counsel, the action was tried, a nonsuit was granted as to Kline and judgment was given in favor of the other defendants. At the conclusion of the trial, findings were waived by plaintiff's attorney, a fact which appears in the clerk's minutes and also in a partial reporter's transcript which has been supplied by plaintiff and, on motion, received as a part of the record on appeal. It appears also that shortly thereafter all the defendants waived findings. Plaintiff later made a motion to correct the record upon a showing that findings had not been waived intentionally. This motion was denied. We must therefore give full effect to the waiver of findings.

[2] Plaintiff duly gave notice to the clerk to prepare a record on appeal, specifying a partial reporter's transcript, including a statement of the trial judge at the beginning of the trial, the testimony of a witness, Schrop, the testimony of plaintiff and that of certain defendants, and also a clerk's transcript, and all exhibits filed in the case, without copying the same. Plaintiff did not take the steps necessary to procure the reporter's transcript which he had specified in his notice. The record consists of a clerk's transcript and numerous exhibits which have been transferred to this court. We have examined the exhibits and find nothing in them which would be of assistance to the court in a disposition of the appeal. If it be assumed that the documents were received in evidence and were considered by the court, they would have been only a part of the evidence, the sufficiency of which may not be questioned on the present record.

[3] In the absence of findings, we must presume that the court found all the facts necessary to support the judgment. Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 130 P.2d 421.

[4] We must presume also that the evidence supported the implied findings. Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 139 P.2d 666; Engasser v. Engasser, 75 Cal.App.2d 80, 170 P.2d 116.

[5] Since the judgment was in favor of the defendants who had answers on file, the only question to be considered is whether error appears on the face of the record. Error does not appear.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d Supp. 894

PARRY et al. v. SAN BERNARDINO COUNTY.

Civ. A. 7.

Appellate Department, Superior Court, San Bernardino County, California.

May 27, 1953.

Action by attorneys against county for services rendered in representing sheriff's deputies before the Civil Service Commission in connection with deputies' appeal from order of demotion. The trial court sustained demurrer to complaint, and attorneys appealed. The Superior Court, Appellate Department, held that, where attorneys, who were engaged by demoted county civil service employees, prepared and presented appeal to Civil Service Commission on behalf of employees, under civil service ordinance granting employees right and privilege of having counsel and directing board of supervisors to

appropriate funds for purpose of defraying expense of operation of commission, attorneys were not entitled to recover from county for services rendered.

Judgment in accordance with opinion.

Counties ⇐74(1)

Where attorneys, who were engaged by demoted county civil service employees, prepared and presented appeal to Civil Service Commission on behalf of employees, under civil service ordinance granting employees right and privilege of having counsel and directing board of supervisors to appropriate funds for purpose of defraying expense of operation of commission, attorneys were not entitled to recover from county for services rendered. Government Code, § 31000.

Thomas C. Parry and Thomas M. Eckhardt, San Bernardino, for plaintiffs.

Albert E. Weller, County Counsel, and John B. Lawrence, Deputy County Counsel, San Bernardino, for defendant.

PER CURIAM.

The plaintiffs seek, by this action, to recover a judgment against the County of San Bernardino for services which they rendered in representing two deputies in the sheriff's office before the Civil Service Commission in connection with the deputies' appeal from an order of demotion.

It is alleged that plaintiffs presented to the Board of Supervisors their claim for $1,000. A copy of this claim is made a part of the complaint. It contains a detailed account of the services rendered by plaintiffs to the two officers in connection with their application to the Civil Service Commission for relief from an order of demotion.

It is alleged that the Board of Supervisors refused to allow the claim.

It is not alleged that the plaintiffs were employed by the county.

In support of their claim the plaintiffs attached thereto a "Memorandum of Merit and Legality of Claims" in which Sections 3 and 11 of Ordinance 580 (Civil Service) are cited as authority for the payment thereof.

Section 3 directs the Board of Supervisors to

> "appropriate funds to defray the expenses necessary and incident to the operation of the civil service system * * *".

Section 11 grants to any employee, who is dissatisfied with any order of dismissal, suspension or reduction, the privilege of appealing from such order to the Civil Service Commission.

This section also provides as follows:

> "The appellant shall be entitled to appear personally, produce evidence, and to have counsel and a public hearing."

It will be noted that the employee is not subjected to any mandatory duty by this section.

The employee is given the privilege to appeal if he so elects.

Similarly he is given the opportunity to "have counsel" if he so elects.

There is no provision in the Ordinance *directing* the Board of Supervisors or the Civil Service Commission to provide counsel for such an appellant, nor is there any provision *authorizing* the Board or the Commission so to do.

In support of their claim appellants point to the provision contained in Section 3 of Ordinance 580 with respect to the obligation imposed upon the Board of Supervisors, "to appropriate funds to defray the expenses necessary and incident to the operation of the Civil Service system", but there is no allegation in the complaint that the Board of Supervisors has made any such appropriation.

Nor is there any allegation that the fees of counsel for such appellants have any relation to the expense of operating the Civil Service Commission.

The allegation in the complaint is that

> "the plaintiffs performed services for the defendant * * *".

There is no allegation that the governing body of the defendant county, by resolution or otherwise, engaged the plaintiff's services.

It is obvious that the demurrer to the complaint was properly sustained.

We now come to the question as to whether or not the plaintiffs should have been afforded an opportunity to amend.

An examination of appellants' brief discloses that no such relief is sought—but that appellants are content to stand or fall on the adequacy of their complaint and their interpretation of the two cited portions of Ordinance 580.

Apparently the parties are content to seek the opinion of this Court on the question of the liability of the County to counsel under the circumstances discussed in their briefs —rather than our opinion of the adequacy of the complaint.

This question immediately arises. Is not such an opinion merely obiter dictum?

From the argument, if not from the complaint, we may conclude that appellants base their claim upon:

1. The fact that they were engaged by two county civil service employees who had been demoted;

2. That on behalf of said employees they prepared an appeal to the Civil Service Commission;

3. That they presented to the Civil Service Commission evidence in support of said employees;

4. That Ordinance 580 grants to said employees the right and privilege of having counsel;

5. That Ordinance 580 directs the Board of Supervisors to appropriate funds for the purpose of defraying the expense of the operation of the Civil Service Commission.

From these facts the appellants argue that the defendant County is indebted to them on account of the services rendered by them in presenting to the Commission the appeal of the demoted employees.

In their brief, appellants cite section 31000 of the Government Code which provides that the Supervisors

> "may contract with and employ any person for the furnishing * * * legal * * * services".

But the complaint contains no allegation of employment or contract for legal services.

In the absence of any employment by the County, appellants then assert that because the demoted employees have the right to be heard by the Commission and to be represented by such counsel as they may choose; and because the County may defray the cost of operating the Commission then it follows that the County must defray the cost of counsel fees for the demoted employees.

We are not provided with any statutory requirements to this end. In lieu thereof it is suggested that "equal justice" demands that the County pay for the employee's legal representation.

To this we must point out that our power is not in the legislative field.

It might be suggested that in the more serious field of criminal procedure the Legislature authorized the county to pay for counsel for persons charged with the commission of crimes but only when it affirmatively appears that such person is unable to employ counsel.

In the field of civil law the instances in which the Court may require the payment of attorney fees are few.

In the absence of such a direct mandate the Court is without power to make such an order even though an employee could convince the Court that he was unable to employ counsel, or even though the Court believed that "equal justice" would be denied unless the County paid counsel fees for the appellants.

In answer to the question presented by the briefs, if not that presented by the ruling on the demurrer in the Court below, we are persuaded that a cause of action against the County is not stated.

PEOPLE v. ONE 1949 FORD V-8 COUPE, ENGINE NO. 98BA871412, 1950 LICENSE NO. 92 A 3066.

L. A. 22639.

Supreme Court of California, In Bank.

May 29, 1953.

Rehearing Denied June 18, 1953.

Forfeiture proceedings against an automobile used to transport narcotics, wherein a claim was filed by the assignee of the conditional vendor of the automobile. The Superior Court, Los Angeles County, rendered a judgment decreeing forfeiture to the state, and the claimant appealed. The Supreme Court, Shenk, J., held that the findings did not support the judgment.

Reversed.

Prior opinion 249 P.2d 576.

1. Forfeitures ⇐2

Word used in forfeiture statute should be given its general meaning unless it is clear that legislature intended otherwise.

2. Forfeitures ⇐3

For purpose of statute requiring conditional vendor of automobile to make reasonable investigation of "purchaser" prior to acquiring his interest in order to protect his interest from being forfeited, quoted word may be defined as referring to one who acquires or obtains anything by purchase. Health and Safety Code, §§ 11610 et seq., 11620.

3. Forfeitures ⇐3

Financier which first acquired knowledge of registered owner's interest in automobile purchased by another under conditional sales agreement when it received pink registration slip was not required to investigate registered owner prior to purchasing contract. Health and Safety Code, § 11610 et seq.

4. Forfeitures ⇐3

In narcotics forfeiture case, question of reasonableness of conditional vendor's assignee's investigation of purchaser is one addressed to trier of fact.

5. Forfeitures ⇐5

Where it was impossible to determine from findings whether investigation had been made before or after claimant had acquired interest in automobile as assignee of conditional vendor and whether purchaser or registered owner of vehicle had been subject of investigation, findings would not support judgment for forfeiture of automobile used to transport marijuana.

6. Forfeitures ⇐5

Where there was no finding in narcotics forfeiture case to support conclusion that claimant had not proved that it made a reasonable investigation of moral responsibility, character and reputation of purchaser before acquiring its interest in vehicle, except an ambiguous finding, and to imply a finding to support the conclusion would, in effect, be to substitute a new finding for that of trial court, Supreme Court would not imply such finding.

7. Forfeitures ⇐5

Even though narcotics forfeiture case was tried without jury, Supreme Court would not resolve ambiguity in trial court's findings and make its own findings in view of conflict in evidence. Code Civ.Proc. § 956a.

McCarroll & McCarroll, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff ordering that the 1949 Ford V-8 coupe involved in this proceeding be forfeited to the State under sections 11610 et seq. of the Health and Safety Code.

The claimant and appellant Beverly Finance Company, here called the company, was the legal owner of the vehicle as the assignee of the conditional vendor. The conditional vendee, James Shaffer, was found in the car possessing narcotics. Relying on this undisputed fact, the State commenced this proceeding to have the car forfeited. In opposition the company relied on sections 11620 and 11622 of the Health and Safety Code. Those sections provide that the interest of a conditional vendor shall not be forfeited where his interest "was created after a reasonable investigation of the moral responsibility, character, and

reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

Much of the controversy centers about the trial court's finding number V. As first prepared the finding read as follows: "* * * that the right, title and interest of said claimant in and to said vehicle was bona fide and was made without any knowledge that said vehicle was being, or was to be, used in violation of the provisions of law relating to narcotics; that before its right, title and interest in and to said vehicle was acquired by said claimant, said claimant did not make a reasonable investigation of the moral responsibility, character and reputation either of said Mona H. Shaffer or of said James William Shaffer * * *." As signed and filed the last sentence was altered to read as follows, with deletions as shown and amendments indicated by added underlinings: "* * * that before its right, title and interest in and to said vehicle was acquired by said claimant, said claimant did ~~not~~ make ~~a reasonable~~ an investigation of the moral responsibility, character and reputation either of said Mona H. Shaffer or said James William Shaffer, but that said investigation was not reasonable."

The company was not satisfied with the finding as amended and brought a proceeding in mandamus to compel the superior court to correct it. The writ was denied on the ground that the finding was ambiguous; that any correction would be judicial in character and could not be compelled by mandamus. Beverly Finance Co. v. Superior Court, 112 Cal.App.2d 381, 246 P.2d 142. Since finding V may now be attacked on this appeal, the question of its sufficiency is presented. The Attorney General argues that the ambiguity in the finding with respect to who was investigated should be disregarded. He urges that the company never purported to investigate Mona Shaffer and that no evidence of any investigation of her was introduced in the trial court. The company does not dispute this. It claims that no investigation of Mona Shaffer was necessary. It is not clear whether the trial court thought an investigation of Mona Shaffer was necessary. Because of the ambiguity of the finding it is not clear whether the trial court meant: (1) that no investigation was made of Mona Shaffer but that this was not necessary; that an investigation was made of James Shaffer but it was not reasonable, or (2) that a reasonable investigation was made of James Shaffer, but that failure to investigate Mona Shaffer made the total investigation not reasonable.

[1–3] Section 11620 provides that a conditional vendor of an automobile must make a reasonable investigation of the "purchaser" prior to acquiring his interest in order to protect his interest from being forfeited in a narcotics forfeiture proceeding. A purchaser is defined as: "One who acquires or obtains anything by purchase; a buyer." (Funk & Wagnalls, New Standard Dictionary, 1933 ed., p. 2012.) Since sections 11610 et seq. are in the nature of a forfeiture statute, the word "purchaser" should be given its general meaning unless it is clear that the legislature intended otherwise. Johnson v. Kaeser, 196 Cal. 686, 239 P. 324; Binford v. Boyd, 178 Cal. 458, 174 P. 56; Oddo v. Hedde, 101 Cal.App.2d 375, 225 P.2d 929. In this case the record shows that the company communicated with the car dealer over the telephone. Information was taken down on a purchaser's statement which was unsigned because the transaction was by telephone. A signed purchaser's statement was received by the company two days later. Until the pink registration slip was received the company had no knowledge that Mona Shaffer had any interest in the transaction. The receipt of the pink slip was after the company purchased the contract. Under these circumstances the company was not required to investigate Mona Shaffer prior to purchasing the contract. People v. One 1939 Buick, 56 Cal.App.2d 163, 132 P.2d 308. Any investigation after the information conveyed by the pink slip that Mona Shaffer was the registered owner would have no bearing on this case because section 11620 provides for a reasonable investigation of the purchaser before the conditional owner's interest is acquired. Under these circumstances there should have been a clear finding of fact as

to the reasonableness of the investigation of James Shaffer. Franklin v. Franklin, 140 Cal. 607, 74 P.155; Sloss v. Allman, 64 Cal. 47, 30 P. 574; Polhemus v. Carpenter, 42 Cal. 375. The ambiguity of finding V makes it difficult to determine whether the conclusion of law, that the company did not make a reasonable investigation, is supported by the findings of fact and whether those findings are supported by the evidence.

[4–8] One of the main issues, relating to the reasonableness of the investigation of James Shaffer, was whether all of it was conducted prior to the time the company extended credit. There was conflicting testimony on this point. It is the company's contention that if its investigation was prior in time, it was reasonable as a matter of law. The general rule is that in a narcotics forfeiture case under sections 11610 et seq. of the Health and Safety Code, the question of the reasonableness of an investigation by a conditional owner of the purchaser is one addressed to the trier of fact. People v. One 1950 Studebaker, 116 Cal.App.2d 412, 253 P.2d 748; People v. One 1940 Buick, 70 Cal.App.2d 542, 161 P.2d 264; People v. One 1941 Cadillac, 63 Cal.App.2d 418, 147 P.2d 49; People v. One 1939 Plymouth, 41 Cal.App.2d 559, 107 P.2d 266. In finding V the trial court failed to make a finding as to the time of the investigation of the character reference. The finance company brought the mandamus proceeding previously referred to in order to compel such a finding. Because of the absence of a finding on this point this court cannot properly rule on the contention asserted by the company.

The contentions of the Attorney General concerning the construction of findings of fact and conclusions of law to support the judgment are correct as general propositions. Conclusion of law number II which is referred to states that the company: "* * * did not prove that its right, title or interest in and to said vehicle was created after a reasonable investigation of the moral responsibility, character and reputation of the purchasers of said vehicle as required by section 11620 of the California Health and Safety Code." There is no finding except finding V which could support such a conclusion but that finding is ambiguous. To imply a finding to support conclusion number II would in effect be to substitute a new finding for that of the trial court. Since this was a non-jury case this court has the power to make new or different findings under the authority of section 956a of the Code of Civil Procedure. But because of the conflict in the evidence this does not appear to be a case where this court should resolve the ambiguity and make its own findings. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970.

The judgment is reversed.

GIBSON, C. J., and CARTER, SCHAUER and SPENCE, JJ., concur.



41 Cal.2d 128

EATWELL et al. v. BECK et al.

L. A. 22683.

Supreme Court of California, in Bank.

May 29, 1953.

Action by purchasers of motel against vendors, real estate brokers, and encumbrancers for damages resulting from alleged fraudulent misrepresentation as to the income of the motel. The Superior Court, Los Angeles County, granted defendants' motion for nonsuit and denied plaintiffs' motion, made prior to ruling on defendant's motion, to reopen the case, to amend the complaint, and to offer additional evidence as to actual value of the property in question, and from the resulting judgment, plaintiffs appealed. The Supreme Court, Schauer, J., held, inter alia, that plaintiffs' motion should have been granted.

Affirmed in part and reversed in part.

Prior opinion 251 P.2d 24.

1. Trial ⇐159

One of the chief objects subserved by motion for nonsuit is to point out to court and to opposing counsel specific oversights and defects in plaintiff's proof in order that plaintiff may supply, if possible, the specified deficiencies in his proof.

2. Pleading ⇐245(3)
Trial ⇐69

In action by purchasers of motel for damages resulting from alleged fraudulent misrepresentations as to income of motel, where purchasers had already introduced evidence tending to show certain elements which went toward ascertainment of actual or market value of motel, it was incumbent upon court to accept purchasers' motion, made prior to ruling on motion for nonsuit, for permission to reopen case, for leave to amend the complaint, and for leave to offer additional evidence as to actual, or market, value. Civ.Code, § 3343.

3. Fraud ⇐60

Anticipated revenue from property purchased is not "additional damage" recoverable under statute relating to fraud action, but it is an element to be considered in determining the actual value of the property involved. Civ.Code, § 3343.

See publication Words and Phrases, for other judicial constructions and definitions of "Additional Damage".

4. Evidence ⇐142(1)

Evidence of sales of identical property in question, whether realty or personalty, is proper indicium of value in action for damages for fraud. Civ.Code § 3343.

5. Fraud ⇐61

Statute authorizing out-of-pocket measure of recovery for fraud was not intended to, and does not, preclude recovery of exemplary damages. Civ.Code, § 3343.

6. Pleading ⇐193(8)

Where facts stated in complaint show that plaintiff is entitled to damages of some sort, it is not fatal error that plaintiff has mistaken the rule by which such damages should be determined.

7. Courts ⇐89

Language used in opinion cited as precedent is to be understood in light of facts and issue then before the court.

8. Trial ⇐165

Testimony must be construed most strongly in favor of plaintiff on motion for nonsuit.

9. Fraud ⇐64(5)

In action by purchasers of motel against vendors, real estate brokers, and persons who had encumbrance on motel, for alleged misrepresentation as to monthly income of motel, evidence presented fact question as to whether encumbrancers had made such fraudulent misrepresentation as purchasers were entitled to rely upon. Civ. Code, § 3343.

10. Money Received ⇐1

Purchasers of motel were not entitled to recover from encumbrancer amount paid to satisfy existing encumbrance even if encumbrancer's wife, the vendors, and the real estate brokers had misrepresented the income of the motel so as to entitle purchasers to damages for fraud. Civ.Code, § 3343.

Emmett E. Patten and Glen A. Duke, Monrovia, for appellants.

Victor Bewley and W. Torrance Stockman, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiffs appeal from a judgment of nonsuit in their action to recover damages resulting from alleged fraudulent misrepresentations as to the income of a motel which they purchased. It is our conclusion that plaintiffs' request to reopen their case, amend their complaint, and present further evidence to meet the objections raised by defendants should have been granted, and that the judgment (except as to defendant David Craig Cummings) should be reversed.

Plaintiffs are Mr. and Mrs. (John C. and Florence) Botto, who are advanced in age, and their daughter and her husband, Mr. and Mrs. (James H. and Eunice A.) Eatwell. Defendants are Howard J. Beck and J. H. Rice, real estate brokers and partners who negotiated the transaction complained of, a Mr. and Mrs. (Sam M. and Loretta A.) Thomas,[1] sued as the owners who employed Beck and Rice to make the sale, and Mr. and Mrs. (David Craig and Anna Luella) Cummings, who

1. A second Mr. and Mrs. Thomas were also named as defendants but the action was dismissed as to them.

held an encumbrance on the property and formerly owned it.

Plaintiffs allege in substance: On October 19, 1948, the real estate brokers, acting as the agents of defendants Thomas, entered into negotiations with plaintiffs for the sale to plaintiffs of the Thomases' ten-unit motel property (including both realty and personalty) and business located near Fontana, California. Plaintiffs had informed the brokers that Mr. Botto was a carpenter by trade but was unable by reason of his age to obtain or perform regular work, that plaintiff Mr. Eatwell was a laborer who earned approximately $240 a month, that both Mrs. Botto and Mrs. Eatwell were "untrained and inexperienced in any occupation or business other than that of housewife"; that the Bottos were prepared to invest "their entire savings and accumulations" of $7,000 "in the purchase of a motel or motor court to be operated jointly by the plaintiffs and used and occupied by them as their home, if * * * they should be able to purchase such a property and business which had theretofore produced and was then producing a sufficient income" to meet monthly payments on any encumbrances on the property, to pay all expenses except wages and salaries, and to "provide a moderate surplus as * * * compensation for their services in the operation" of the motel. The brokers falsely and fraudulently informed plaintiffs that monthly gross income of the Thomas motel property was and had been for some time past between $700 and $800 a month and defendant Mrs. Cummings, who was managing the motel, falsely and fraudulently told plaintiffs that the gross income for the first nineteen days of October, 1948, was $450. Actually (plaintiffs further allege) the true gross income was not then and had never been over $275 a month. Thereafter on the same day (October 19) plaintiffs, in reliance upon the representations as to gross income, agreed to purchase the property for the total price of $43,000, paying $7,000 in cash and the balance by assuming two encumbrances on which payments totaling $275 monthly were required; defendants Cummings were the holders of one of such encumbrances, on which the unpaid balance was some $22,225.

Plaintiffs alleged damage in the sum of $7,000, paid on the purchase price of the property, plus other sums alleged to have been paid by them as insurance, escrow charges, and principal and interest on the two encumbrances. They prayed for recovery of all of such sums, plus exemplary damages.

The case was tried before the court without a jury. At the close of plaintiffs' evidence, during which it developed that subsequent to filing this action plaintiffs had lost the property by foreclosure, all defendants moved for a nonsuit on the ground that plaintiffs had failed to either plead or prove a cause of action under the so-called "out-of-pocket loss rule" included in the provisions of section 3343 [2] of the Civil Code and held to constitute the sole and exclusive measure of damages suffered by one defrauded in the purchase, sale, or exchange of property. (See Bagdasarian v. Gragnon (1948), 31 Cal.2d 744, 760–763, 192 P.2d 935.) For "non-suit purposes" defendants Thomas and the real estate brokers stipulated and "conceded" that the evidence would support a finding of fraud.[3]

Following argument on the nonsuit motion and prior to the court's ruling thereon, plaintiffs moved for permission "to reopen their case, for leave to amend the complaint therein, and for leave to offer additional

2. Civil Code, § 3343: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

3. Although the matter seemingly was not raised in the trial court, defendants Cummings urge on appeal that as to themselves a finding of fraud would be without evidentiary support. We discuss this contention hereinafter in this opinion.

evidence * * * as to the actual value of the property in question here * * * [T]he amendments are for the purpose of clarifying the point of the actual value vs. the representative value." The amendments proposed by plaintiffs would add to the complaint allegations that the real estate brokers falsely and fraudulently represented to plaintiffs that the property was worth $43,000 (the amount for which plaintiffs purchased the property), that such representation was untrue in that the property was worth only $30,000, and that plaintiffs were thereby damaged in the sum of $13,000; and would add a prayer for the $13,000. Plaintiffs also filed, with their notice of motion to reopen, an affidavit of a real estate appraiser to the effect that he had examined the property in question and had determined that its actual value at the time plaintiffs purchased it was approximately $32,500; and also an affidavit of one of plaintiffs' counsel to the effect that their failure to offer such evidence earlier in the proceedings was "due to the inadvertence of counsel." Following further argument the court denied plaintiffs' motion, granted defendants' motion for nonsuit, and rendered judgment accordingly. This appeal by plaintiffs follows.

As grounds for reversal plaintiffs contend that the allegations of their complaint and the evidence they produced would under concepts of fraud actions prior to the enactment of section 3343, or under any construction of that section other than as limiting recovery to that expressly authorized by it, have entitled them to some recovery or relief; that the fraudulent representations upon which they rely, and which were pleaded and prima facie established, were such that if the actual value of the property was less than the price they paid therefor then under the provisions of section 3343 they are entitled to recover; that the evidence already before the court when the motions were made tended to prove that the value of the property they purchased was less than the price they paid; that inasmuch as the evidence of the fraudulent misrepresentations, together with some evidence tending to show damages under the out-of pocket rule authorized by section 3343, was before the court and since plaintiffs before the ruling of the trial court on the motion for nonsuit applied for permission to amend their complaint to remedy the claimed deficiency in the pleading and also requested leave to introduce further evidence specifically substantiating the newly proffered allegations, the court abused its discretion in refusing to permit plaintiffs to reopen their case, amend their complaint, and cure the claimed deficiency in both pleading and proof.

[1] As is pointed out in Sferlazzo v. Oliphant (1914), 24 Cal.App. 81, 86, 140 P. 289, in which a judgment of nonsuit and an order denying a new trial were reversed, "One of the chief objects subserved by a motion for nonsuit is to point out to the court and to opposing counsel the specific oversights and defects in plaintiff's proof of his case; and this in order that, as to the latter, he may supply if possible the specified deficiencies in his proof. [Citations.] When the plaintiff in this case, his attention being called to the matter, offered to do this, it was the duty of the court to permit him to supply the missing evidence; and it was error to refuse this privilege to the plaintiff and, after such refusal, to grant a motion for nonsuit. [Citation.]" (See also Manford v. Coats (1935), 6 Cal.App.2d 743, 747, 45 P.2d 395; 9 Cal.Jur. 563–564, § 39; 24 Cal. Jur. 770–771, § 51.)

And in Low v. Warden (1886), 70 Cal. 19, 11 P. 350, a judgment of nonsuit was reversed where the court had refused to permit plaintiff to reopen the case and introduce testimony which "The court, after hearing argument [on the motion for nonsuit], intimated" was necessary. On appeal, this court stated (page 21 of 70 Cal. page 351 of 11 P.): "We are of opinion that justice to the plaintiff demanded of the court that he should have been allowed to introduce testimony to prove the indorsement. The views of plaintiff's counsel in regard to the questions presented were novel and peculiar, and the course pursued by him singular, but we do not think that this justified the court in refusing to allow the plaintiff to prove that the note

had been indorsed to him. * * * If the nonsuit were allowed to stand, the plaintiff would be compelled to bring a new action, to which the statute of limitations would be a bar. The plaintiff would thus suffer the loss of money justly due to him. Under the circumstances, this should not be allowed. We think the court erred in refusing to permit the plaintiff to introduce testimony as to the indorsement, for which the judgment must be reversed." (See also Code of Civ.Proc., § 581c.)

We are convinced that in the present case plaintiffs should likewise have been permitted to reopen their case and present further evidence (under the provisions of section 3343 of the Civil Code as construed and applied in Bagdasarian v. Gragnon (1948), supra, 31 Cal.2d 744, 760–763, 192 P.2d 935) of the actual value of the property as compared with the value with which they parted. As contended by them, they had already introduced evidence tending to show certain elements which go toward the ascertainment of "actual" or "market" value of the motel. (See page 754 of 31 Cal.2d, pages 940, 941 of 192 P.2d of Bagdasarian v. Gragnon, supra.) For example, there was evidence that during the four months just prior to plaintiffs' purchase of the property the income therefrom "would average between $300.00 and $450.-00, actually $438.00 per month * * *, never * * * any more than $438.00." Also, plaintiff Mrs. Eatwell testified that "As far as income was concerned I don't think it was worth a dime."

[2–4] It has been held that although "anticipated revenue from the property is not 'additional damage' within the meaning of section 3343 * * *. It is an element to be considered in determining the actual value of the property * * *." (Oliver v. Benton (1949), 92 Cal.App.2d 853, 856, 208 P.2d 375.) There was also evidence that defendants Thomas, from whom plaintiffs purchased the motel for $43,000 on October 19, 1948, had themselves purchased it only the previous day (October 18, 1948), for the sum of $40,000. Evidence of "sales of the *identical* property in question, whether realty or personalty" is also a proper indicium of value. (Bagdasarian v. Gragnon (1948), supra, 31 Cal. 2d 744, 758, 192 P.2d 935.) Under such circumstances and in view of the fact that upon the argument on the motion for nonsuit the trial court had indicated it felt the evidence as to value was insufficient, it was incumbent upon the court to accept plaintiffs' offer and permit them to produce further and more specific evidence as to the actual, or market, value of the property after taking into consideration the various elements properly entering into such value. (See page 754 of 31 Cal.2d, pages 940, 941, of 192 P.2d of the Bagdasarian case; see also 8 Cal.Jur. 906; 10 Cal.Jur. 843, et seq., 1021, et seq.)

[5] As already indicated, plaintiffs' complaint contained averments appropriate to an award of, and it demanded, exemplary damages. Section 3343 of the Civil Code, after authorizing the out-of-pocket measure of recovery, concludes: "Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled." We hold, therefore, that such section was not intended to, and that it does not, preclude the recovery of exemplary damages. (See Bagdasarian v. Gragnon (1948), supra, 31 Cal.2d 744, 763, 192 P.2d 935.

Cases relied upon by defendants[4] in which refusal to permit reopening for the introduction of further evidence was held proper do not involve motions for nonsuit, and are also otherwise distinguishable upon their facts from the situation here presented. No useful purpose would be served by discussing them in detail. In Mayer

4. Such cases are: Consolidated Nat. Bank v. Pacific Coast S. S. Co. (1892), 95 Cal. 1, 30 P. 96; San Francisco Breweries v. Schurtz (1894), 104 Cal. 420, 38 P. 92; Loftus v. Fischer (1896), 113 Cal. 286, 45 P. 328; Houghton v. Lawton (1923), 63 Cal.App. 218, 218 P. 475; Nulty v. Price (1927), 202 Cal. 279, 260 P. 291; Bovais v. Cassassa (1930), 108 Cal.App. 649, 291 P. 886; Mazzenga v. Rosso (1948), 87 Cal.App.2d 790, 197 P.2d 770; and Kan v. Tsang (1949), 90 Cal.App.2d 538, 203 P.2d 86.

v. Beondo (1948), 83 Cal.App.2d 665, 668–671, 189 P.2d 327, 190 P.2d 23, likewise not involving a nonsuit, in which it was held that the trial court erred in permitting plaintiff to reopen his case in order to present further proof in support of his request for specific performance of a contract to convey real estate, it appears that the defects in plaintiff's case were called to his attention early in the trial but he failed to take timely steps to remedy them. And in Engstrom v. Auburn Automobile Sales Corp. (1938), 11 Cal.2d 64, 67, 72, 77 P.2d 1059, it appears that during the first two days of a trial lasting several days plaintiff-appellant knew that the defendant Silkman was not expected to attend the trial but nevertheless made no effort to secure his presence or his deposition prior to the close of the trial; it does not appear that any offer of proof was made; it does appear that evidence on the point in question was clear and uncontradicted and that appellant made no effort to contravert it; and that on the appeal the "appellant merely states the point without argument to support it." Under those circumstances the court's refusal to permit plaintiff to reopen the case in order to procure Silkman's testimony after the judge had indicated his intention to grant defendants' motion for a directed verdict, was upheld. Such decision furnishes no precedent for denying the motion of plaintiffs in the present case.

It is likewise apparent that plaintiffs should be permitted to amend their complaint so as to plead the specific remedy and request damages under the out-of-pocket loss rule of section 3343 of the Civil Code, as construed by this court in Feckenscher v. Gamble (1938), 12 Cal.2d 482, 500, 85 P.2d 885, and Bagdasarian v. Gragnon (1948), supra, 31 Cal.2d 744, 760–763, 192 P.2d 935. By the complaint on file it is clear that plaintiffs were attempting to state a cause of action for damages for fraud. Their allegations as to the fact and substance of the fraud, and their reliance on it to their actual detriment, were adequate. They did not specifically allege damages under the theory and method of computation authorized by section 3343 but even under the limitations held to be imposed by that section the facts alleged tended at least inferentially to show that the actual value of the property purchased was less than the price paid. The defendants do not appear to have been misled or in any wise prejudiced by the failure of the plaintiffs to have earlier pleaded the more specific facts. Under these circumstances, and in accordance with the rule that amendments shall be liberally allowed in the interests of justice, we are satisfied that plaintiffs' request for leave to amend in the particulars noted should have been granted.

[6, 7] Our conclusion that the amendment should have been allowed is in accord with the general rule that where "the facts stated in the complaint show that the plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined." (Warfield v. Basso (1923), 62 Cal.App. 47, 49, 216 P. 48; see also Gallagher v. California Pacific Title & Trust Co. (1936), 13 Cal.App.2d 482, 486, 57 P.2d 195; Bonde v. Bishop (1952), 112 Cal.App.2d 1, 5, 245 P.2d 617; Barr v. Southern California Edison Co. (1914), 24 Cal.App. 22, 25, 140 P. 47; Riser v. Walton (1889), 78 Cal. 490, 21 P. 362; Sutter v. General Petroleum Corp. (1946), 28 Cal.2d 525, 532–533, 170 P.2d 898, 167 A.L.R. 271.) In Keidatz v. Albany (1952), 39 Cal.2d 826, 829, 249 P.2d 264, relied upon by defendants, the statement that "Plaintiffs' complaint did not, however allege that the property was worth less than the price they agreed to pay for it, Civ.Code, § 3343, and accordingly, it did not state a cause of action for damages for fraud," was made in the course of deciding that by the complaint being discussed plaintiffs were seeking to enforce rescission of the contract there involved rather than to recover damages for fraud, and is not controlling here. As we recently observed in Porter v. Bakersfield & Kern Electric Ry. Co. (1950), 36 Cal.2d 582, 590, 225 P.2d 223, it is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court. In the present case plainiffs do not purport to have made

a rescission nor do they plead facts (such as restoration or an offer to restore, promptness, etc.) entitling them to rescind. (See Davis v. Rite-Lite Sales Co. (1937), 8 Cal.2d 675, 678–679, 67 P.2d 1039.)

[8, 9] With respect to the contention of defendants Cummings that the evidence is insufficient to support a finding of fraud against them, the plaintiffs Mrs. Botto and Mrs. Eatwell testified that on the day of the transaction here involved Mrs. Cummings (who was managing the motel and collecting the rents) informed them that although "I don't have my books brought up to date * * * I know up * * * until today [October 19, 1948] I have done $450 worth of business this month." When Mrs. Eatwell "asked for the books she told me her books were not brought up to date." Mrs. Botto further testified that the following April Mrs. Cummings visited the motel and at that time Mrs. Botto "said to Mrs. Cummings, * * * 'Mrs. Cummings, why didn't you tell us the day we came out to look at the motel that * * * the place had been sold the day before, and it was not doing the business that [defendant] Mr. Beck had told us it was, and we would not have bought the place.' * * * She said, well, she started, but every time she started to say something, Mr. Beck would make a face or something or give her some expression on his face to that she wouldn't talk. * * * [And] she did make the remark that she had stopped a couple of deals for Mr. Beck." Mrs. Eatwell testified that Mrs. Cummings stated, "I wanted to say something to you, but every time I'd look at Beck, he'd frown and shake his head * * * We did mess up a couple of deals for him." It is apparent that the testimony quoted, when construed most strongly in favor of plaintiffs as is required on a motion for nonsuit (Raber v. Tumin (1951), 36 Cal.2d 654, 656, 226 P.2d 574), would support a finding of fraudulent misrepresentation on the part of Mrs. Cummings, upon which plaintiffs were entitled to rely. (See Bagdasarian v. Gragnon (1948), supra, 31 Cal.2d 744, 748, 192 P.2d 935; Feckenscher v. Gamble (1938), supra, 12 Cal.2d 482, 494, 85 P.2d 885.)

[10] As to defendant Mr. Cummings, plaintiffs state that what they seek from him is "compensatory damages in the amount of $624.40 on the theory of unjust enrichment." The $624.40 (the amount sought from Mr. Cummings under the prayer in the complaint) represents sums paid by plaintiffs to the Cummingses to apply on the encumbrance which they held against the motel. Since it is not contended that this sum was not owing to the Cummingses we are aware of no theory, and plaintiffs suggest none, upon which it could be recovered from Mr. Cummings. It follows that as to him, the motion for nonsuit was properly granted.

The judgment is affirmed as to defendant David Craig Cummings and is reversed as to all other defendants.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.



118 Cal.App.2d 240

In re KARBAN'S ESTATE.

Civ. 8131.

District Court of Appeal, Third District, California.

May 29, 1953.

Hearing Denied July 22, 1953.

Proceeding for final distribution of a decedent's estate. From a judgment of the Superior Court, Solano County, Harlow V. Greenwood, J., declaring that a bequest of the entire estate by decedent's will to a children's playground association or the trustees of a grammar school of a town in a foreign country for improvement of the school playground was void, that decedent died intestate, that his alien next of kin residing in such country were disqualified to inherit the estate, and that a resident American citizen was decedent's nearest relative qualified to inherit, and directing distribution of the entire estate to him, the playground association or trustees appealed. The District Court

of Appeal, Van Dyke, P. J., held that the trial court's findings that the association or trustees had no right to take the property bequeathed thereto must be sustained, where they introduced no evidence that American citizens had reciprocal right of inheritance under the laws of such country.

Judgment affirmed.

1. Aliens ⇐10

Though Probate Code section disqualifying aliens residing in foreign countries from inheriting estates of deceased residents of state, where laws of such countries do not accord reciprocal right of inheritance to American citizens, does not specifically apply to charitable gifts, such gifts cannot be made by will to institutions in foreign countries, in absence of such reciprocal laws. Probate Code, § 259.

2. Aliens ⇐10

The Probate Code section disqualifying aliens residing in foreign countries from inheriting estates of deceased residents of state, where laws of such countries do not accord reciprocal right of inheritance to American citizens, is not procedural, but part of substantive law of succession. Probate Code, § 259.

3. Appeal and Error ⇐1010(2)

Under statutory provision imposing on non-resident aliens, claiming right to inherit estate of deceased resident of state, burden of establishing existence of reciprocal right of inheritance in American citizens under laws of country wherein such aliens reside, a trial court's holding adverse to foreign claimant must be sustained on appeal, in absence of evidence on subject of such reciprocity. Probate Code, § 259.1.

4. Executors and Administrators ⇐314(1)

The purpose of petition for final distribution of decedent's estate, which is proceeding in rem within probate proceedings in matter of estate, is to call the world before court and obtain decree adjudging, after hearing, who takes property ready for distribution.

5. Executors and Administrators ⇐314(8)

A decedent's personal representative, filing petition for final distribution of decedent's estate, does not bear burden of proving who are entitled to distribution, as he has no interest in such subject and cannot enter into or litigate any controversy between rival heirs or claimants for distributive shares of estate.

6. Executors and Administrators ⇐1

A decedent's personal representative is mere officer of court, holding decedent's estate as stakeholder for delivery to those whom court decides to be entitled thereto.

7. Executors and Administrators ⇐314(12)

Where children's playground association or trustees of grammar school of town in foreign country appeared by Consul General of such country in proceedings for distribution of decedent's estate, bequeathed by his will to such association or trustees for improvement of school playground, and asserted claim as legatee under will, but introduced no evidence that laws of such country accorded reciprocal right of inheritance to American citizens, trial court's findings that claimant had no right to take property under will must be sustained on appeal. Probate Code, §§ 27, 259.

8. Executors and Administrators ⇐314(11)

In administrator's proceeding for final distribution of decedent's estate, bequeathed by his will to children's playground association or trustees for improvement of school playground in town located in foreign country, trial court's finding that decedent's alien next of kin, residing in such country, were disqualified to inherit estate because country's laws did not accord reciprocal right of inheritance to American citizens, as required by Probate Code section, was necessarily a general finding applicable to all within the scope of such section, including legatee, though not expressly directed thereto. Probate Code, § 259.

Hubbard & Etcheverry, San Francisco, for appellant.

Andrew F. Burke, Ivan N. Maroevich, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

Decedent, James Karban, died in Oakland, California, on June 22, 1948, being at the time of his death a resident of Solano

County. By will executed on December 18, 1946, he disposed of his entire estate to the "Childrens Playground Association or trustees, to be used in making and bettering the playground of the Grammar School in the Town of Velky Osek, Czechoslovakia". He declared it to be his intent to give all of his estate "to the Grammar School to be used on improvement of the Grammar School playground." On November 27, 1951, the administrator with the will annexed filed his final account and report and a petition for the final distribution of the estate. He alleged that the bequest made in the decedent's will was void under section 27 of the Probate Code; that decedent's next of kin were aliens residing in Czechoslovakia and that they were disqualified to inherit the decedent's estate by virtue of section 259 of the Probate Code in that the laws of Czechoslovakia did not accord a reciprocal right of inheritance to American citizens; that John Karban, respondent herein, was a naturalized American citizen and a resident of New York State; that he was the nearest relative of decedent who was not disqualified from inheriting and that he therefore was entitled to distribution of the estate. The Czechoslovakian Consul General filed an opposition to the petition for final distribution, wherein he took the position the bequest made in the will was valid and that distribution should be made to the named legatee. The personal heirs resident in Czechoslovakia did not appear. A hearing was held on April 9, 1951, and on April 13th following the court decree that: 1. The bequest in the decedent's will was void as alleged in the petition; 2. That the decedent died intestate; 3. That the next of kin were disqualified; and, 4. That John Karban (respondent herein) was the nearest relative who was qualified. The court therefore distributed the entire estate to John Karban. The Consul General has appealed.

The record on appeal consists of the clerk's transcript of estate proceedings, a reporter's transcript, to be later discussed, and certain records certified to this Court after petition granted to augment the record. The clerk's transcript presents the petition for distribution, appellant's pleading thereto, the decree of distribution and the notice of appeal. Many other matters having to do generally with the probate of the estate are contained in the transcript but have no importance here. The reporter's transcript is concerned entirely with oral proceedings had in the probate court almost two years before the distribution proceedings occurred. It reflects certain proceedings on petition for partial distribution which never eventuated in a decree and which petition was abandoned. It had been brought by certain alleged heirs, resident in Czechoslovakia. Appellant contends that it was stipulated on the distribution hearing that the evidence of the prior hearing might be considered. No such stipulation appears in the record and it would not help appellant if it did for the reason that the reporter's transcript does not show that any evidence whatsoever was taken, testimonial or documentary. The entire transcript consists of arguments to the Court, resulting finally in an order that the issues of law be briefed. The document contains nothing that is helpful here. Motion for augmentation was made by appellant, which resulted in a stipulation that three documents which had been lodged with the Clerk of this Court in connection with the appeal be returned to the probate court with directions of this Court that the Judge thereof who presided on the distribution proceedings cause to be prepared and executed a certificate which should correctly set forth all evidence, oral and documentary, introduced on the hearing on distribution and cause the certificate to be transmitted to this Court, where it should constitute and be deemed to be a part of the record on this appeal. It was further stipulated that this Court direct the clerk of the probate court to transmit all exhibits offered at or used on the hearing of the petition for final distribution as shown by the Court's certificate above mentioned, the clerk's certificate to identify such exhibits as those so offered and used. It was also stipulated that when these documents should be so transmitted they, too, would constitute a part of the record on appeal herein. Pursuant to this stipulation there has been filed herein the probate court's certificate and the clerk of

that court has certified and forwarded the required documents.

We think it unnecessary in the decision of this appeal to discuss appellant's contention that the trial court erred in holding that the testamentary legatee could not take property under the provisions of section 27 of the Probate Code, which section designates who may take property by testamentary disposition. This is so because on the state of the record here, and assuming the bequest in its favor was otherwise valid, the appellant completely failed to bear the burden cast upon it by section 259 of the Probate Code to show that reciprocal rights of inheritance existed under the laws of Czechoslovakia.

[1] Although section 259 of the Probate Code does not specifically apply to charitable gifts, nevertheless we think it clear that such gifts cannot be made to institutions in foreign countries in the absence of such reciprocal laws. The underlying purpose of the section was to prevent the property in decedents' estates, or the proceeds thereof, being sent into foreign countries whose laws did not give reciprocal rights of inheritance to our citizens. In the statement made by the California Legislature when it first passed the reciprocity statute it was declared that many foreign countries were at war, preparing for war, or under the control of conquering nations; that money left to citizens of California in such foreign countries was impounded there or used for war purposes; that money left by California decedents to relatives in those countries did not reach them, but was used by their governments; and that property and money of persons dying in this country should remain here and not be sent to foreign countries and be used in waging a war that eventually might be directed against the United States. While the foregoing declarations were made as explaining the passage of the act as an emergency measure, nevertheless therefrom and from the wording of the act it is, we think, clear that the purpose of the legislation was as we have hereinabove stated it, and that this purpose would be defeated in part unless those provisions of the section were construed as including charitable gifts.

[2, 3] At the time of the death of the decedent, James Karban, the code section had been amended to its present form. It has been held that the statute is not procedural, but is a part of the substantive law of succession. In re Estate of Giordano, 85 Cal.App.2d 588, 193 P.2d 771. The statute itself provides that "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights". Probate Code, § 259.1. This means that in the absence of evidence upon the subject of reciprocity a holding of the trial court adverse to the foreign claimant must be sustained. That is the situation here. The documentary evidence which we will consider as having been offered and received and which we have hereinabove referred to is entirely concerned with the facts that there is a school which was described in the decedent's will and which is conducted by the Government of the Republic of Czechoslovakia in the Town of Velky Osek in that country, that it has a playground that needs betterment and that certain persons occupy positions in respect to the school, comparable to local school trustees under our own public school system, which persons herein claim the right to have and receive for the school the attempted testamentary gift of decedent. This was the only evidence that was offered by appellant and it does not touch upon the issue of reciprocity. Indeed, appellant asserts: "No evidence concerning reciprocal rights of American and Czechoslovakian citizens to inherit was ever offered in this case, as an examination of the record will show."

[4–7] But appellant argues that the question of reciprocity was not in issue. In this appellant is mistaken. The purpose of a petition for final distribution, which is a proceeding in rem within the probate proceedings in the matter of an estate of a decedent, is to call the world before the court and to obtain a decree, after a hearing, that will adjudge who takes the property which is ready for distribution. In re Estate of Ross, 180 Cal. 643, 647, 182 P. 755. It is not for the personal representative of decedent, if he files the petition, to bear the burden of proving who are entitled to dis-

tribution, for he has no interest in that subject and cannot enter into or litigate any controversy arising between rival heirs or claimants for distributive shares of the estate. Roach v. Coffey, 73 Cal. 281, 14 P. 840. The personal representative is a "mere officer of the court, holding the estate as a stakeholder, to be delivered to those whom the court shall decide to be entitled thereto." In re Estate of Healy, 137 Cal. 474, 477, 70 P. 455, 456. When, therefore, the appellant appeared in the proceedings for distribution and asserted its claim and introduced no evidence on this vital matter as to its right to take, the findings of the trial court against the existence of that right must be sustained.

[8] Complaint is made that the court made no findings as to want of reciprocity as to appellant. It is true that the court found such want as to the personal heirs and did not expressly direct that finding to appellant. But that is of no moment. The finding of want of reciprocity could not be one way as to personal heirs and another way as to appellant. It is of necessity a general finding applicable to all who fall within the scope of section 259 of the Probate Code.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.



118 Cal.App.2d 368

PARKS et al. v. ATWOOD CROP DUSTERS, Inc. et al.

Civ. 4635.

District Court of Appeal, Fourth District, California.

June 5, 1953.

Rehearing Denied June 26, 1953.

Hearing Denied July 28, 1953.

Action for damage to plaintiffs' immature cotton crop when a defoliant being used by defendants in dusting operations across roadway was cast upon plaintiffs' crop. The Superior Court of Kern County, Warren Stockton, J., entered judgment from which defendants appealed. The District Court of Appeal, Mussell, J., held that evidence warranted finding that defendants were guilty of negligence which proximately caused plaintiffs' damage.

Judgment affirmed.

1. Negligence ⇐134(1, 11)

In action for damage to plaintiffs' growing cotton crop when defoliant being dusted on defendants' mature crop across roadway was deposited on approximately 45 acres of plaintiffs' growing crop, evidence warranted finding that despite defendants' awareness of effect of such defoliant upon growing plants, and warning from plaintiffs' superintendent, defoliant was applied to defendants' property at time when defendants should have known that wind would carry the substance over and upon plaintiffs' crop, and that defendants were consequently guilty of negligence proximately causing plaintiffs' damage.

2. Adjoining landowners ⇐1

No person is permitted by law to use his property in such manner that damage to his neighbor is a foreseeable result.

3. Damages ⇐112

Where plaintiffs' immature cotton crop was damaged by defoliant dust which was being dusted on defendants' mature cotton crop across roadway, proper measure of damages was the market value of the estimated product at time of destruction, less cost of producing and marketing the same.

4. Damages ⇐217

In action for damage to plaintiffs' immature cotton crop as result of defoliant being cast thereon when defendants engaged in dusting of defoliant on their mature crop across roadway at time when prudent person would not have done so, instruction on measure of damages and matters which might be considered by jury in arriving at damages, was not erroneous.

5. Negligence ⇐138(3)

Trial ⇐260(7)

In action for damage to plaintiffs' immature cotton crop as result of defoliant being cast thereon when defendants en-

gaged in dusting of defoliant on their mature crop across roadway at time when prudent person would not have done so, refusal to give instructions pertaining to unavoidable accident was not erroneous under the evidence, and the instructions given on doctrine of negligence and proximate cause.

6. Trial ⊂127

In action for damage to plaintiffs' immature cotton crop as result of defoliant being cast thereon when defendants engaged in dusting of defoliant on their mature crop across roadway at time when prudent person would not have done so, record did not warrant conclusion that counsel for plaintiff had been guilty of misconduct by allegedly endeavoring to inject insurance into case in chief.

Conron, Heard & James, Bakersfield, for appellants.

Mack & Bianco, Henry C. Mack, Bakersfield, for respondents.

MUSSELL, Justice.

This is an action for damages caused by a crop dusting operation conducted by defendants. On September 18, 1950, defendant Robert Pelletier employed defendant Atwood Crop Dusters, Inc., to spread a defoliant (aereo cyanamide dust) on his 165 acre cotton field in Kern county. Defendant Tom Jameson was the pilot who spread the defoliant by airplane and James French, another employee of Atwood Crop Dusters, Inc., was in charge of the work. Pelletier's cotton crop was mature and ready to defoliate for harvest and the purpose in defoliating it was to remove the leaves from the cotton plants so that they would not be picked up by the mechanical harvesters and mixed with the cotton. The dusting was done by airplane east and west along the rows and in the operation, the pilot passed over a portion of plaintiffs' 100 acre cotton crop on land adjacent to Pelletier's property on the east and south. Plaintiffs' 100 acre field and Pelletier's adjacent 165 acre field on the west were separated by a farm road approximately 20 feet in width. A pole line, about 20 feet high, ran north and south about 20 feet west of this road and Pelletier's cotton extended about 20 feet east of this pole line to the road.

In dusting Pelletier's field, the pilot, when flying east and upon approaching the pole line, pulled his plane up and flew over it. The gate on the bin on the plane was left open to dust the plants east of the road and this had a tendency to deposit the defoliant dust on plaintiffs' crop across the road. The pilot, in making a turn to fly back over the Pelletier field, flew over plaintiffs' acreage from one-fourth to one-half mile, depending on how tight the turn was.

Mr. French, in charge of the dusting, testified that when the field was dusted, there was a wind from the northwest which was sufficient to carry some of the dust over plaintiffs' field; that on the slight wind prevailing, he estimated that the draft would carry enough for damage for one-third of a mile; that he was familiar with the particular cyanamide dust; that it was ground fairly fine and that the finer particles, which are the most effective in defoliating, drift the farthest in the air; that it will float or drift with the wind; that Mr. Garlow, the field superintendent for plaintiffs, had warned him the day prior to the dusting of defendants' adjoining field against getting any of the dust on the 100 acre field of plaintiffs as it was immature and not ready for defoliation.

Evidence was adduced showing that defendants' crop was planted in April and plaintiffs' on May 10, 1950; that plaintiffs' crop, on September 18, 1950, was immature and not ready for harvest; that it was at least 45 days from harvest time and that plaintiffs' cotton crop was still in growing condition, some of it still blooming.

The evidence is conflicting as to the effect of the defoliant on plaintiffs' cotton crop. However, there was substantial testimony to the effect that about 45 acres of plaintiffs' cotton field was affected by the dusting; that the plants had been burned; that where the defoliant was used on immature cotton plants, the immature cotton bolls dropped off; that one effect of de-

foliant was to cause cotton plants to cease manufacturing food while it put out new leaves; that the application of the defoliant retarded the growth of the cotton plants; that plaintiffs' field, before the damage, was in excellent condition.

Various witnesses estimated the yield per acre on plaintiffs' land before damage as "3 bales or better" and witnesses for both parties relied in part upon boll counts made in the field at various times in arriving at the probable yield per acre. The actual yield after damage was shown to be 2.28 bales per acre, showing a loss of approximately 72 bales at the stipulated net value per bale of $211.90. The plaintiffs testified that in preparing the complaint, they used an average of the estimated loss of the various men who had examined the field, arriving at 61.5 bales, for which suit was brought. The amount of the verdict returned by the jury in favor of plaintiffs was $13,031.85.

Appellants' assignments of error are that the evidence was insufficient to justify the verdict; errors of law in instructing the jury upon the question of damages; errors of law in refusing instructions pertaining to unavoidable accident; and misconduct of counsel in endeavoring to inject insurance into the case in chief. We see no error in any of these assignments.

[1] There was substantial evidence that defendant Pelletier, who caused the aereo cyanamide to be applied, was fully aware of its effect upon cotton plants. In fact it is conceded that the substance used was a defoliant applied for the purpose of removing the leaves from the cotton plants. There is evidence that Mr. French was warned by plaintiffs' foreman not to dust plaintiffs' crop. It was immature and not ready for defoliation. The defoliant was applied to defendants' property at a time when defendants knew or should have known that the wind would carry the substance over and upon plaintiffs' cotton crop. The dusting was done under conditions which would indicate to a reasonable and prudent person that damage to plaintiffs' crop would result.

[2] As was said in Miles v. A. Arena & Co., 23 Cal.App.2d 680, 683, 73 P.2d 1260, 1262; "No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result." In that case plaintiff was awarded damages for destruction of bees by drifting dust which was spread by airplane on a crop of melons growing on land owned by defendants. While the dust in the instant case was not poisonous, as in the Miles case, it was shown to be harmful when applied to immature cotton plants and the same rule is applicable.

In Adams v. Henning, 117 Cal.App.2d 376, 255 P.2d 456, this court held that it was error to grant a nonsuit where part of the evidence justified an inference that some of a spray which defendants caused to be released from an airplane over land of one defendant adjoining that of plaintiff, and which contained elements used for killing weeds and insects, was deposited on plaintiff's land and that some damage resulted therefrom.

[3, 4] Appellants contend that the court erred in giving the following instruction:

"If, adhering to the Court's instructions, you should find plaintiffs are entitled to a verdict against the defendants, or some of them, then it will be your duty to award plaintiffs such damages as will compensate them reasonably for all detriment suffered by them of which defendants' negligence as found by you was a proximate cause, whether such detriment could have been anticipated or not.

"In this case it has been stipulated that the value of the cotton at the time of the accident was $277.90 a bale, for seed and cotton; and that the cost of harvesting and ginning was $66.00 a bale, leaving a net value per bale of $211.90.

"Therefore, in fixing plaintiffs' damages, if any, you must determine the number of bales of cotton lost by the acts complained of, and multiply that number of bales by $211.90, which is the damage to which plaintiffs are entitled if they are entitled to a verdict.

"In determining these matters, you may consider the average yield per acre of such

crops where not so injured and on other similar lands in the immediate neighborhood cultivated in like manner, the state of growth at the time of injury, all to the end of determining the crop which would have been produced had no injury been done thereto by the acts of the defendants. Wolfsen v. Hathaway, 32 Cal.2d 632 [198 P.2d 1]. Dutra v. C[a]bral, 80 Cal.App. 2d 114 [181 P.2d 26]."

The argument advanced is that the instruction is erroneous in singling out one type of evidence of damage to the exclusion of all others and thereby giving undue prominence to a particular type of evidence. We find no merit in this argument. The proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same. Wolfsen v. Hathaway, 32 Cal.2d 632, 644, 198 P.2d 1. After plaintiffs introduced testimony that their cotton crop would have matured from the date of the dusting to harvest without further work or expense, and that the harvesting and ginning costs were respectively $55.20 and $10.80 per bale, defendants stipulated that the market price of cotton was $46.40 per bale for seed and $231.50 for lint, less $10.80 for ginning and $55.20 for picking, leaving the net value per bale at $211.90.

In arriving at the number of bales lost by plaintiffs by reason of the dusting, the jury was instructed to consider the average yield per acre if plaintiffs' crop had not been injured and in this connection to consider the condition of crops on similar land in the immediate neighborhood. The instruction did not rule out consideration of the testimony that there was no damage at all or consideration of the testimony of experts or the method used by some witnesses to estimate the damage. The instruction did not overemphasize any particular type of evidence to the exclusion of other evidence as to damage. An instruction quite similar to the one criticized here was given in Wolfsen v. Hathaway, supra, 32 Cal.2d at page 646, 198 P.2d at page 10.

[5] Appellants next argue that the court should have given offered instructions pertaining to unavoidable accident. Under the evidence here it was not error to fail to instruct the jury on this subject since the jury was fully and fairly instructed on the doctrine of negligence and proximate cause. McMahon v. Marshall, 111 Cal.App.2d 248, 244 P.2d 481; Jaeger v. Chapman, 95 Cal.App.2d 520, 213 P.2d 404.

[6] Finally, it is argued that counsel for plaintiffs were guilty of misconduct "in endeavoring to inject insurance into the case in chief", by efforts to infer that one Gordon Roesch was an insurance representative interested in the case. However, there was no testimony introduced to the effect that Roesch was an insurance representative and he was not referred to as such during the trial. A letter, which, on its caption referred to Lloyds of London was marked for identification but never introduced in evidence or shown to the jury. No prejudicial misconduct appears.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



118 Cal.App.2d 313

UTEMARK et al. v. SAMUEL et al.

Civ. 19463.

District Court of Appeal, Second District, Division 3, California.

June 2, 1953.

Action for rescission of contract to purchase unimproved realty because of vendors' refusal to perform upon tender of purchase price. The Superior Court of Los Angeles County decreed rescission and entered judgment on balance it found due to purchasers, and purchasers appealed. The District Court of Appeal, Shinn, P. J., held that purchasers were entitled to recover amount expended by them in improving the realty and should not have been limited to amount by which improvements enhanced value of realty.

Judgment affirmed in part and reversed in part.

1. Vendor and Purchaser ⇐127

One who has rescinded his contract to purchase land is entitled to receive, as part of his detriment caused by vendor's breach, cost of permanent improvements which purchaser has placed upon land in good faith. Civ.Code, § 3408.

2. Vendor and Purchaser ⇐127

In action for rescission of contract to purchase unimproved realty because of vendors' refusal to perform upon tender of purchase price, where no showing was made that purchasers had acted in bad faith, improvidently, or recklessly, in improving realty, recovery should have been allowed for amount expended by purchasers and not limited to amount by which improvements enhanced value of realty. Civ. Code, § 3408.

3. Cancellation of Instruments ⇐1

Purpose of remedy of rescission is to restore plaintiffs to their former position and not to place defendants in status quo regardless of plaintiff's loss.

4. Contracts ⇐274

Equity is solicitous that innocent party who rescinds be not made to suffer but exercises no such solicitude for wrongdoer who has brought about a situation in which he or innocent party must lose.

5. Vendor and Purchaser ⇐125

When vendors elected not to convey realty in accordance with contract of purchase, vendors necessarily elected to take consequences, which meant restoration of purchasers to position they were in at time of execution of contract.

6. Reference ⇐6

Parties are entitled to time of court with no extra expense in absence of reasonable necessity for a reference.

7. Vendor and Purchaser ⇐126, 127

In action for rescission of contract to purchase unimproved realty because of vendors' refusal to perform upon tender of purchase price, vendors were entitled to offset reasonable rental value of the unimproved land against any sums due from them but were not entitled to receive as a credit the value of the use of the improvements installed by purchasers.

8. Vendor and Purchaser ⇐127

In action for rescission of contract to purchase unimproved realty because of vendors' refusal to perform upon tender of purchase price, where purchasers had been in possession of realty, purchasers' earnings from realty did not constitute proper criterion for determination of rental value of realty.

9. Appeal and Error ⇐172(3)

In action for rescission of contract to purchase unimproved realty because of vendors' refusal to perform upon tender of purchase price, purchasers' contention, which was raised for first time upon appeal, that they should have been allowed interest on money paid out on contract, for taxes, and for broker's commission would not be considered by the District Court of Appeal.

10. Vendor and Purchaser ⇐125

In action for rescission of contract to purchase unimproved realty because of vendors' refusal to perform upon tender of purchase price, interest should be allowed upon purchaser's recovery, and it is matter to be considered by trial court in balancing equities.

11. Vendor and Purchaser ⇐127

Under statute providing that, on adjudging rescission of contract, court may require party to whom relief is granted to make any compensation to other to which "justice may require", considerable discretion rests with trial court in determining what justice may require, and, when purchasers are given interest on their money, other matters, such as whether amount paid by vendors for cost of improvements should be reduced by depreciation of improvements, must be considered.

Wm. J. Clark, Los Angeles, for appellants.

Albert A. Albeck, Los Angeles, for respondents.

SHINN, Presiding Justice.

In this action plaintiffs had judgment for the rescission of a contract to purchase unimproved land for $10,000. The reason for the rescission was that while plaintiffs performed and offered to perform their agreement, the defendants refused to perform and to give a deed upon tender of the purchase price.

The date of the agreement was September 14, 1946, and the date of the judgment, January 24, 1952. During this interval plaintiffs were in possession and made valuable improvements, consisting of the construction of a shop for a welding business, and the installation of a small office building.

The court rendered an interlocutory decree May 17, 1950, by which rescission was decreed and a referee was appointed to take evidence and report upon: (1) The reasonable value of the usage of the land while plaintiffs were in possession; (2) the present market value of the land and buildings; (3) the value of the buildings apart from the land; (4) the cost to plaintiffs of construction of the building; (5) the value of the buildings removed from the land and the feasibility and cost of removal; (6) knowledge of defendants at the time of the sale as to the uses plaintiffs intended to make of the property. The referee reported: (1) That the reasonable value of the use of the land, unimproved, was $50 per month; (2) the reasonable value of the use of the land after it was improved by plaintiffs was $286 per month; (3) the present market value of the land with the buildings was $11,650; the value of the office building was $250; (4) there were no other improvements which would enhance the value of the land; (5) the value of the office building removed from the land was $250; (6) the fair market value of the shop building was $6,400; (7) he could not determine whether it would be feasible to remove the shop building.

The court found: (1) $10,000 was a fair price for the land at the time of the purchase; (2) plaintiffs had complied, and offered to comply, with the agreement; (3) defendants failed and refused to convey the land; (4) plaintiffs gave due notice of rescission and offered to make restoration; (5) plaintiffs had paid $6,419.30 on the contract price, $508.42 as taxes, and a real estate commission of $500; (6) cost of the improvements placed on the land by plaintiffs was $12,154.41 (these items total $19,582.13); (7) the value of the shop building was $6,400, and of the office building, $250; (8) present value of the land and improvements was $11,650; (9) the rental value of the land from September 14, 1946 to July 14, 1947, was $50 per month, or $500; the rental value of the land and shop building from July 14, 1947 to December 1, 1947, was $1,810 ($810); for the land and shop from January 1, 1948 to December 31, 1948, $2,600, and from January 1, 1949 to August 30, 1951, $135 a month, or $4,320. According to these figures the total rental value was $8,230. The court then added $6,419.30, the amount paid on the contract, $508.42 taxes paid, $500 commission paid, $6,400 the present value of the shop building, and $250 the value of the office building, making a total of $14,077.72. From this sum was deducted $8,230 as the value of the use of the land and buildings, leaving a balance of $5,847.73, the amount for which plaintiffs were given judgment, which was declared to be a lien on the land.

Plaintiffs were ordered to pay $500 as half of the fee fixed for the referee, and defendants were ordered to pay the other half. The amount of the fee was declared to be a lien on the land.

Plaintiffs appeal on a clerk's transcript. Their principal contentions are that the court erred in not restoring them to their original position by giving them judgment for the sums they had expended under the agreement, including the reasonable cost of their improvements which became attached to the land, and that it was error to require them to pay a part of the fee of the referee.

We shall discuss first the use by the court of the market value of the improvements at the time of trial as a basis for reimbursement of plaintiffs for their expenditures upon the land. As already noted, the cost of the improvements was found to be $12,154.41, and their present value of $6,650.

By the judgment plaintiffs were compelled to lose the difference of $5,504.41.

[1] The statutory law on the subject is § 3408 of the Civil Code: "On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." We think it is safe to say that the invariable rule is that one who has rescinded his contract to purchase land is entitled to receive as a part of his detriment caused by the seller's breach the cost of permanent improvements which he has placed upon the land in good faith. Mr. Williston says (Rev.Ed. Vol. 5, p. 4136): "So where a vendor wrongfully refuses a conveyance to a purchaser in possession, the latter may recover what he has paid the vendor and also what he has expended in improvements on the land and not merely the increased value of the land by virtue of the improvement. That is, the law should impose on the wrongdoing defendant a duty to restore the plaintiff's former status, not merely to surrender any enrichment or benefit that he may unjustly hold or have received; though if the market value or, in the absence of a market value, the benefit to the defendant of what has been furnished exceeds the cost or value to the plaintiff, there is no reason why recovery of this excess should not be allowed." Citing, Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 P. 82; Fletcher v. Fletcher, 158 Ga. 899, 124 S.E. 722; Carroll v. Mundy & Scott, 185 Iowa 527, 170 N.W. 790, 4 A.L.R. 811; Kunde v. O'Brian, 214 Iowa 921, 243 N.W. 594; McClure v. Lewis, 72 Mo. 314; Gibert v. Peteler, 38 N.Y. 165, 97 Am.Dec. 785; Bottemiller v. Ball, 130 Or. 255, 279 P. 542, 69 A.L.R. 951; Larson v. Thomas, 51 S.D. 564, 215 N.W. 927, 57 A.L.R. 1246; McIndoe v. Morman, 26 Wis. 588, 592, 7 Am.Rep. 96; Fischer v. Kennedy, 106 Conn. 484, 138 A. 503; Bradley Heating Co. v. Thomas M. Sayman, etc., Co., Mo.Sup., 201 S.W. 864, 868. Many other cases have applied this rule. California cases which applied it are Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 P. 82, and Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800.

[2] Defendants have not brought to our attention any case in which the court required the defaulting seller, upon rescission, to pay only the amount by which the improvements enhanced the value of the property, regardless of the reasonable cost expended by the buyer thereon. Defendants merely argue that the court had power to adjust the equities between the parties, but this does not satisfy. The authority expressed in § 3408 of the Civil Code is one that must be exercised in accordance with settled principles of law and equity. In the absence of evidence, and of any finding of bad faith on the part of plaintiffs, or improvidence or recklessness in making the expenditures or improvements, it was error not to allow plaintiffs judgment for the amount found to have been expended by them, since it must be presumed that they acted in good faith. There was no finding that the building was not suitable for uses which were permitted under zoning regulations which affected the property, all of which were specified in the findings.

[3–5] It appears to have been the purpose of the court to place the *defendants* in *status quo* regardless of any loss *plaintiffs* might suffer, but it was the plaintiffs, not the defendants, who were entitled to be restored to their former position. This is the purpose of rescission. Equity is solicitous that the innocent party who rescinds be not made to suffer. It exercises no such solicitude for the wrongdoer who has brought about a situation in which one or the other must lose. When defendants elected not to convey the property they necessarily elected to take the consequences, which meant restoration of plaintiffs to the position they were in at the time they entered into the agreement.

[6] Insofar as the fees of the referee are concerned, we must say initially that the record does not disclose any good reason for a reference of the issues. It appears to have been made for the benefit of defendants. Plaintiffs were interested only in the amount of money which they had expended, which would seem to have been a simple matter for the court to determine. All the other questions submitted to the referee pertain to the

rental value, the present value of the land with the improvements, and the improvements separated from the land, and the determination of these questions had relation only to the defendants' theory, adopted by the court, that the defendants should not be required to pay on account of the improvements any more than their market value at the time of trial. The parties were entitled to the time of the court without extra expense, in the absence of reasonable necessity for a reference. So far as the findings go, if there was necessity, it appears to have been caused by the defendants. The matter of the referee's fees should be re-examined and the charge reapportioned. If plaintiffs were prepared to prove the cost of their improvements expeditiously, and without wasting the time of the court, they should have been permitted to do so without a reference. If they were not so prepared, or if they agreed to the reference, they should be charged with a share of the reasonable expense of the reference proportionate to the time consumed before the referee in hearing their evidence. Where the parties have not agreed upon a different rate of compensation, the fees of a referee are $5 per day. Code Civ. Proc. § 1023. We may add that there is nothing in the findings to explain or justify a fee of $1,000 for the services of the referee. Neither can we understand how the land, found to be worth $10,000, plus the improvements worth $6,650, could be found to have a present value of only $11,650, although these were all immaterial findings.

[7, 8] Defendants were entitled to offset the reasonable rental value of the unimproved land against any sums due from them. They were not entitled to receive as a credit the value of the use of the improvements installed by plaintiffs. Also, the rental from January 1 to December 31, 1948, of $2,600, or $216.66 per month, was based upon a finding that plaintiffs earned in their business in that year $26,000, and that ten per cent of it was a reasonable rental. This was not a proper criterion of rental value.

[9–11] In their closing brief plaintiffs, for the first time, make the claim that they should have been allowed interest on the money they had paid out on the contract, for taxes and a broker's commission. No reason being shown for not raising the point in the opening brief, it does not deserve consideration. Graner v. Hogsett, 84 Cal.App.2d 657, 191 P.2d 497. We may say, however, that interest should have been allowed, Kane v. Ott, 73 Cal.App. 124, 128, 238 P. 126, and that it is one of the matters to be considered by the trial court in balancing the equities. A considerable discretion rests with that court in determining "what justice may require," in the way of compensation due from plaintiffs upon rescission of their purchase. But when plaintiffs are given interest on their money, there will yet be other matters to consider. One question would be whether the amount to be paid by defendants as the cost of the improvements should be reduced by the amount of normal depreciation of the buildings. Plaintiffs have had the use of them, and if defendants are to be charged with the original cost it would not be inequitable to reduce the cost figure by the amount of normal depreciation or deterioration due to use. Such matters are within the discretion of the trial court. We therefore confine our opinion to the questions of law which we have discussed. We may add, however, that the record discloses no reason for not allowing plaintiffs their costs of suit.

The judgment is affirmed insofar as it decrees a rescission of the agreement of purchase and denies relief to defendants on their cross-complaint; in all other respects it is reversed for further proceedings.

PARKER WOOD and VALLÉE, JJ., concur.

118 Cal.App.2d 230

AGNEW v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19511.

District Court of Appeal, Second District, Division 1, California.

May 29, 1953.

Proceeding for a writ of mandate commanding a Superior Court, sitting as a juvenile court, to order preparation of a clerk's and reporter's transcript on appeal from such court's order referring the matter of a minor girl, charged with two misdemeanors, to a municipal court for prosecution under the general law, and an order restraining the municipal court from proceeding further in the matter until final determination of an appeal from the juvenile court's order. The District Court of Appeal, White, P. J., held that the juvenile court had no jurisdiction to enforce its order transferring the cause to the municipal court while the appeal was pending and owed a duty to order preparation of the transcript on appellant's petition.

Peremptory writ of mandate and restraining order granted.

1. Infants ⇐16.14

An appeal from order of superior court, sitting as juvenile court, declaring a minor girl charged with two misdemeanors, a ward of juvenile court, was settled and determined by court's subsequent order remanding matter to municipal court for prosecution under general law after vacating previous order, so that juvenile court was justified in refusing to order preparation of clerk's and reporter's transcript on appeal from such order. Welfare and Institutions Code, §§ 580, 700(m), 834.

2. Appeal and Error ⇐781(4)

Where a controversy existing when appeal was taken ceases to exist because of matters subsequently transpiring, appellate court need not consider question, but should dismiss appeal.

3. Appeal and Error ⇐436

The effect of appeal is to remove from trial court jurisdiction subject-matter of judgment of order appealed from.

4. Infants ⇐16.14

A superior court, sitting as juvenile court, had no jurisdiction to enforce its order, transferring to municipal court case of infant charged with two misdemeanors for prosecution under general law while appeal was pending from court's previous order declaring infant a ward of juvenile court, as notice of such appeal vested District Court of Appeal with jurisdiction of subject-matter and deprived juvenile court of power to move in conflict with such jurisdiction. Welfare and Institutions Code, §§ 580, 700(m), 834.

5. Constitutional Law ⇐249

One taking timely appeal is entitled to perfect it, and suppression of his exercise of such right amounts to denial of equal protection of law guaranteed by fourteenth amendment to federal constitution. U.S.C.A.Const. Amend. 14.

6. Infants ⇐16.14

An infant charged by petition, filed in superior court sitting as juvenile court, with commission of two misdemeanors, was entitled to preparation of clerk's and reporter's transcript on her appeal from such court's order remanding case to municipal court for prosecution under general law after vacating order declaring infant a ward of juvenile court, which owed duty to order preparation of such transcript. Welfare and Institutions Code, §§ 580, 700(m), 834.

7. Constitutional Law ⇐209

Equal protection of law is not mere abstract right, but a command, which state must respect and benefits of which every person may demand. U.S.C.A.Const. Amend. 14.

Rosemary Agnew, in pro. per.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

WHITE, Presiding Justice.

On December 11, 1951, a petition was filed in the Superior Court of Los Angeles County sitting in separate session as a juvenile court, charging petitioner Rosemary Agnew, a juvenile, with the commission of two misdemeanors and praying that she be made a ward of the juvenile

court. At that time petitioner was of the age of seventeen years and married to R. W. Agnew. On December 26, 1951, respondent juvenile court made its order declaring petitioner a ward of that court, pursuant to the provisions of subdivision (m), § 700 of the Welfare and Institutions Code.

From that order petitioner, joined by her husband, filed notice of appeal to this court. After the filing of said notice of appeal, and on January 16, 1952, respondent juvenile court made its order finding said minor an unfit subject for consideration by said court and remanding the case to the Municipal Court of Los Angeles Judicial District for prosecution under the general law. On January 17, 1952, a complaint was filed in respondent municipal court against petitioner Rosemary Agnew. A notice of appeal from the aforesaid order of the juvenile court was filed on January 16, 1952.

The municipal court action proceeded to trial and petitioner was found guilty of one of the offenses charged against her. An appeal from said judgment of conviction resulted in a reversal thereof by the Appellate Department of the Superior Court of Los Angeles County, 114 Cal.App.2d Supp. 841, 250 P.2d 369. Thereupon, said municipal court action was reset for trial on January 28, 1953.

Neither of petitioner Rosemary Agnew's appeals from the foregoing juvenile court orders have been perfected for the reason that she has been unable to obtain a reporter's and clerk's transcript from the juvenile court.

On January 26, 1953, petitioner and her husband filed in this court a "Petition for aid to docket a pending appeal, for an order to show cause and restraining order".

The petition alleged the filing of the aforesaid petition in the juvenile court to declare Rosemary Agnew a ward of said court. That the court made its order declaring her a ward thereof and committing her to juvenile hall until January 16, 1952, to which date the cause was continued and placed on "Appearance Calendar". The petition then alleges that within the time allowed by law petitioner Rosemary Agnew and her husband, "did duly take an appeal to the above entitled District Court of Appeal from said order of juvenile court made on December 26, 1951, ordering said Rosemary Agnew made a ward of said juvenile court". That a written notice of appeal was filed, together with a request for clerk's and reporter's transcript on appeal. That the judge of respondent juvenile court refused to order said transcripts and directed the clerk and reporter not to prepare the same.

The petitioners further aver that following the hearing on January 16, 1952, when petitioner Rosemary Agnew was found by respondent juvenile court to be an unfit subject for consideration by said court, and the cause referred to the Municipal Court of Los Angeles Judicial District for prosecution under the general law, petitioner Rosemary Agnew and her said husband regularly and duly filed a timely notice of appeal from said order. That a request was regularly made to the judge of respondent juvenile court for a clerk's and reporter's transcript but that said request was denied, and the clerk and reporter were instructed by the judge of the juvenile court not to prepare said transcripts.

It is then alleged that by reason of the foregoing appeal taken from the order of respondent juvenile court made on January 16, 1952, the said municipal court is without jurisdiction to proceed with the trial of petitioner Rosemary Agnew on the complaint filed in the latter court pursuant to the aforesaid order of respondent juvenile court.

On January 27, 1953, this court issued an order directed to respondent juvenile court to show cause why it should not prepare and lodge in this court a clerk's and reporter's transcript in the above-mentioned appeals taken by petitioners. The order to show cause was also directed to the Municipal Court of Los Angeles Judicial District directing that tribunal to show cause before this court why it should not be restrained from proceeding with the trial of that certain action above referred to, and which was commenced pursuant to the order of respondent juvenile court made on January 16, 1952, referring the cause to said respondent municipal court.

On the return day of the order to show cause both respondent courts appeared and filed a demurrer contending that the aforesaid petition does not state facts sufficient to entitle the petitioner to the relief prayed for.

[1, 2] In that regard, respondents first contend that the appeal from the order declaring petitioner a ward of the juvenile court was settled and determined by reason of the subsequent order of January 16, 1952, remanding the matter to the municipal court for prosecution under general law.

We find ourselves in accord with respondents' contentions in that regard. The juvenile court having vacated its order declaring petitioner Rosemary Agnew a ward of that court, determination of an appeal therefrom would be now of no practical advantage or benefit to petitioners. The controversy over that matter, which is the only point involved in the appeal therefrom, ended when the juvenile court made its order of January 16, 1952, remanding the matter to the municipal court for prosecution. Such being the situation, this court is not called upon to pass judgment on a question which, when given, can have no practical effect; where a controversy existing at the time the appeal was taken has, by reason of matters subsequently transpiring, ceased to exist. When this appears the proper course is to dismiss the appeal, Lovell v. Griffin, 51 Cal.App.2d 322, 323, 124 P.2d 615; McKenna v. McCardle, 97 Cal.App.2d 304, 305, 217 P.2d 433. Therefore, it must be held that the juvenile court was justified in refusing to prepare a clerk's and reporter's transcript in the appeal from the order of December 26, 1951, declaring petitioner Rosemary Agnew a ward of that court.

[3, 4] As to the order of January 16, 1952, referring the matter to the municipal court for prosecution, respondent courts contend that "the juvenile court had full jurisdiction to remand the petitioner to the municipal court for further proceedings therein". It is true that pursuant to section 834 of the Welfare and Institutions Code, the juvenile court, if it "finds that the minor is not a fit subject under the Juvenile Court Law * * * shall dismiss the petition, and direct that criminal proceedings be instituted against the minor under the general law", but section 580 of the Welfare and Institutions Code provides that a decree of the juvenile court declaring any one to be a ward of that court, "may be appealed from in the same manner as any final judgment", and the same section further provides that "any subsequent order may be appealed from as from an order after judgment * * *". Manifestly, the order of January 16, 1952, is an appealable order, and it is conceded that an appeal therefrom was regularly and duly taken. The effect of an appeal is to remove from the jurisdiction of the trial court the subject matter of the judgment or order appealed from. While the appeal was pending, the juvenile court had no jurisdiction to enforce its order transferring the the cause to the municipal court. The notice of appeal invested the District Court of Appeal with jurisdiction of the subject matter and deprived the juvenile court of power or authority "to move in conflict with such jurisdiction." People v. Owens, 71 Cal.App.2d 831, 834, 164 P.2d 28, 29; People v. Helsley, 41 Cal.App.2d 935, 939, 108 P.2d 97; Ingrao v. Karsten, 94 Cal. App.2d 517, 521, 211 P.2d 41.

[5–7] It is axiomatic that one who takes a timely appeal is entitled to perfect it, and to suppress the exercise of such right amounts to denial of the equal protection of the law, because the Fourteenth Amendment of the Constitution of the United States prohibits any such suppression. The petitioner Rosemary Agnew was entitled to have a clerk's and reporter's transcript prepared and it was the duty of the court to order their preparation. Equal protection of the law is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.

For the foregoing reasons the demurrer of respondents is sustained as to the petition insofar as the order of December 26, 1951, is concerned, and overruled as to the

petition insofar as the same refers to the order of January 16, 1952.

It is ordered that a peremptory writ of mandate issue commanding respondent superior court, sitting in separate session as a juvenile court, to order the preparation of a clerk's and reporter's transcript on the appeal taken from the order of January 16, 1952, referring the matter of Rosemary Agnew to the municipal court for prosecution under the general law.

It is further ordered that respondent Municipal Court of Los Angeles Judicial District refrain from proceeding with or taking any further proceedings in that certain action now pending therein and numbered 4314, until final determination of the appeal taken from the order of respondent juvenile court dated January 16, 1952, referring said cause to respondent municipal court.

DORAN, J., concurs.



118 Cal.App.2d 319

AUSLEN v. JOHNSON et al.

Civ. 8268.

Sac. 6321.

District Court of Appeal, Third District, California.

June 3, 1953.

Action for specific performance of contract to convey realty, which allegedly arose upon exercise of an option by an assignee thereof. The Superior Court, El Dorado County, Thomas Maul, J., entered judgment in favor of optioner, and assignee appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence supported findings that option had been extended for a reasonable time but that it had expired before accepted by assignee.

Judgment affirmed.

1. Contracts ⇐211

Question whether time was of the essence of an agreement is not a consideration where agreement is an option.

2. Specific Performance ⇐119

It was incumbent upon assignor of option, who sought specific performance of contract to convey realty, which allegedly arose upon exercise of the option, to prove that option under which he claimed was alive at the time of his attempt to exercise it.

3. Specific Performance ⇐121(3)

In action for specific performance of contract to convey realty, which allegedly arose upon exercise of an option, evidence with respect to various extensions of the option which parties thereto had negotiated justified finding that their last transaction, which involved the transfer of money but no definite extension of the option, constituted agreement to extend option for a reasonable time, which, under circumstances, was 30 days.

4. Trial ⇐404(1)

A finding will be construed in support of the judgment if that may reasonably be done.

5. Specific Performance ⇐121(3)

In action for specific performance of contract to convey realty, which allegedly arose upon exercise of option, where preliminary finding was that last transaction between parties to the option constituted an extension of the option for a reasonable time of 30 days, ultimate finding that option expired before acceptance by plaintiff, to whom it was assigned, was supported by evidence.

6. Vendor and Purchaser ⇐75

Even though last of a series of extensions of an option constituted only an agreement to extend the option for a reasonable time, it was not incumbent upon optioner to notify optionee of the expiration of the reasonable time. Civ.Code, § 1587.

7. Vendor and Purchaser ⇐18(1)

Testimony that option price for realty was less than half value of the land would

sustain conclusion that price was not adequate, fair or reasonable.

8. Vendor and Purchaser ⇐57

Provisions of option placing upon optioner the duty of furnishing good title and of performing other obligations would not become due for performance until and unless offer contained in option was accepted.

Milham & Baer, by Russell F. Milham, Placerville, for appellant.

Lewis & Lewis, by Clifford R. Lewis, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

This is an action for specific performance of an alleged contract to convey real property. One Armstrong, the assignor of appellant Auslen, had for several years been engaged in business with Elwood Chris Johnson, hereinafter called respondent, in the subdivision and sale of real property near Lake Tahoe. On October 1, 1949, their association was terminated and respondent agreed with Armstrong that with regard to certain real property which respondent still owned he would give to Armstrong what was called "a right of first refusal". On August 1, 1950, respondent wrote Armstrong, saying he had received an offer for some of the real property involved in his agreement with Armstrong and as a result of a discussion which thereafter occurred respondent gave to Armstrong a written option for thirty days to purchase certain described property. He received $250 in consideration of this option. The thirty days elapsed and on December 14, 1950, Armstrong paid Johnson an additional sum of $300 and obtained a written "extension" of the original option agreement for a period stated as lasting until a preliminary title report which Armstrong had already ordered should be completed by a title company. On December 19th a third sum of $200 was given to Johnson by Armstrong. The preliminary title report was received by Armstrong December 22, 1950, but he did not then exercise his option. However, on December 30th Armstrong paid a further sum of $200 to respondent who then orally agreed with Johnson to "extend" the option to February 1, 1951. On January 26th Armstrong paid respondent a further sum of $100. Concerning this last sum respondent testified that he gave no extension on the option beyond the date of February 1st and Armstrong testified that the option was for that consideration extended for a reasonable period of time. On March 15th following Armstrong advised respondent he would be unable to exercise the option and offered to release respondent from the agreement giving him a "right of first refusal" for the sum of $10,000. On April 2, 1951, Armstrong assigned his rights under the option agreement to appellant and appellant deposited with the title company who had made the preliminary report a sum more than sufficient to meet the purchase price named in the option agreement. Appellant demanded conveyance and upon it being refused brought this action. There is conflict in the testimony concerning the foregoing, but under the settled rule we must disregard it.

The trial court found that the option had been extended to February 1st, as above recited, and that during that period and on January 26th for the sum of $100 the time was further extended for a period of thirty days; that it expired on February 26th, prior to the date of the assignment from Armstrong to appellant and that the option had not been exercised during its life. While the complaint did not contain an allegation that the consideration was adequate, fair and reasonable, leave was given appellant during the trial to amend his complaint in that regard and testimony was received upon the issue. The amendment was not filed, but in that connection the court found that the consideration was neither fair, reasonable nor adequate. The court concluded from all the findings that appellant should take nothing and, accordingly, gave judgment in favor of respondent, from which judgment appellant appeals.

Although appellant has made a number of specific contentions in his briefs they really add up to a contention that the evidence is insufficient to support the trial court's findings. Additionally, appellant claims that

there were errors committed in the rulings upon testimony, which errors were prejudicial to him.

[1–5] The contention that the evidence is insufficient cannot be sustained. It is undisputed that the original written document executed between Armstrong and respondent was nothing more than an option to purchase the subject property at a specified price and within a specified time. The nature of such an option is too well settled to require much discussion. It is a unilateral agreement. The optioner offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused. It is futile to discuss, as appellant does discuss, the question as to whether or not the written option contained anything indicating that time was of the essence thereof. Such considerations have nothing to do with options. Concerning the option given Armstrong by respondent it is not contended other than that the first attempted acceptance occurred not earlier than April 4, 1951. It was incumbent upon appellant to prove that the option under which he claims was alive at the time of his attempt to exercise it. There was ample evidence, which has been hereinbefore stated, from which the court could conclude that the option had been extended from time to time up to February 1st, and that on January 26th, for a consideration received, it was further extended for a reasonable time. The court found this reasonable time to be thirty days. This finding is supported by the history of the transactions concerning time and the extensions thereof that preceded the extension of January 26th. The first period of time was fixed at thirty days for a consideration of $250. The sums thereafter paid were comparable. No extension thereafter exceeded thirty days, although the one which depended upon the furnishing of a title report might have. In fact, however, it did not. The definite extension thereafter was within that time and hence the court, from the way in which the parties had dealt with the matter, was justified in finding that the last extension, for a reasonable time, did not exceed thirty days. The finding made by the court was not expressed in terms of reasonable time, but it is apparent from the record that such was the meaning of the finding, and the finding will, of course, be construed in support of the judgment if that may reasonably be done. City of Napa v. Navoni, 56 Cal.App.2d 289, 132 P.2d 566. No attempt to accept was made until more than thirty days after the expiration of the last extension as determined by the trial court's findings. The ultimate finding of the trial court that the option expired before acceptance is well supported.

[6] Appellant says that since the last extension was for a reasonable time it was incumbent upon the optioner to notify the optionee of the expiration of that time. The contention is unsound for "A proposal is revoked: * * * 2. By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance; * * *." Civil Code, § 1587.

[7] Since the foregoing disposes of the appeal it is unnecessary to discuss at any length the finding of the court that the price was inadequate since this issue does not properly arise until and unless the unilateral option contract ripens through acceptance into a bilateral contract of purchase and sale. It may be said, however, that there was testimony that the option price was less than half the value of the land. Such evidence would sustain the conclusion that the price was not adequate, fair or reasonable.

[8] A good deal is said in appellant's brief, based upon a claim that the option placed upon respondent the duty of furnishing a good title and other obligations which he had never been in a position to perform. However, these obligations would not become due for performance until and unless the offer was accepted. The parties

clearly must have realized this. Notwithstanding there was something said in the option concerning such matters, yet the parties dealt in terms of definite limits of time for acceptance of the proposal of respondent to sell. We find nothing further in the briefs that requires extended discussion.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



118 Cal.App.2d 22

MEYER et ux. v. TERRITO et ux.

Civ. 15354.

District Court of Appeal, First District, Division 2, California.

May 21, 1953.

Action by plaintiffs against defendants on oral agreement that defendants would pay their share of paving and sewer work in alleyway behind each landowner's property at such time as defendants sold improved property or otherwise derived financial benefit from use of property and improvements wherein defendants contended that their oral agreement was that they were to pay their share if and when they built on property which they never did. The Superior Court, County of San Mateo, A. R. Cotton, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Goodell, J., held that where in trial court stipulation of parties that answer could be amended to show defense of statute of limitations was approved by court, but no amendment was ever made, statute of limitations could not be considered on appeal.

Judgment affirmed.

1. Appeal and Error ⇐173(10)

Where stipulation of parties that answer might be amended to show defense of statute of limitation was approved by court, but no amendment was ever made, statute of limitation could not be considered on appeal. Code Civ.Proc. § 339.

2. Limitation of Actions ⇐182(5)

If statute of limitations is not pleaded, it is waived.

3. Appeal and Error ⇐758(1)

When it is contended that evidence does not support findings, appellant must point out in his brief the evidence and must show wherein evidence does not sustain findings.

4. Contracts ⇐350(2)

In action by plaintiffs against defendants on oral agreement that defendants would pay their share of paving and sewer work in alleyway behind each landowner's property, evidence sustained finding that defendants were to pay their share if and when they derived financial benefit from property.

5. Appeal and Error ⇐1011(1)

Determination on questions of fact decided on conflicting evidence should not be disturbed by Appellate Court.

Lakin, Rumwell & Spears, Palo Alto, for appellants.

George P. Larrouy, Redwood City, for respondents.

GOODELL, Justice.

Plaintiffs sued for $1701.30 and recovered judgment for that sum. This appeal followed.

Early in 1945 respondents and three other persons purchased adjoining parcels of land in Redwood City at the intersection of El Camino Real and Brewster Street. Respondents' parcel was approximately 200 feet from the intersection, with a frontage of 50 feet on El Camino Real and a depth of 150 feet.

In contemplation of the purchase respondents and the other three persons (the latter being appellants' predecessors in interest) entered into an agreement which provided that the rear 20 feet of each lot would be set aside for a paved alleyway wherein a sewer would be installed to which all the properties could connect, and that the cost of the paving and the sewer would

be shared proportionately by the owners. The agreement was recorded.

All the work was done by respondents at a total cost of $2625.52, which they paid on July 30, 1946.

On November 29, 1946 appellants purchased the property owned by the other three parties, lying between respondents' lot and Brewster Street, with a frontage of 200 feet on El Camino Real and a depth of 130 feet.

Respondents contend that appellants acquired the property with actual and constructive notice of the agreement and *that they also orally agreed at about that time that they would pay their share of the paving and sewer work at such time as they* improved their property and sold it as improved, or otherwise *derived financial benefit from the use of the property and the improved alleyway, driveway and sewer.*

Appellants contended at the trial that their oral agreement was that they were to pay their share if and when they built on the property (which they never did).

[1] Appellants' first contention is that the action is barred by § 339, Code Civ. Proc. in that it was not commenced until some 3½ years after the alleged oral contract was made.

The answer is silent with respect to the statute of limitations. "The general rule is firmly established that if a statute of limitation is not pleaded it is waived." Hall v. Chamberlain, 31 Cal.2d 673, 679, 192 P.2d 759, 763, citing 16 Cal.Jur. 603–604.

Appellants say: "We have not cited any cases in this brief because of the fact that the points involved are very elementary and covered by the Code of Civil Procedure with reference to the provisions of the statute of limitations * * *." They also say: "At the outset of the trial in the lower court it was stipulated by the parties, which stipulation was approved by the court, that the answer may be amended on its face to set forth the statute of limitations, section 339 of the Code of Civil Procedure of the State of California, as a defense to said action." This is not correct; no section was mentioned. This is what the record shows: "Mr. Rummell: Before we start, I would like to state that the answer, when it was originally prepared was prepared in my office by somebody else and when I went over the pleadings two or three weeks ago, I discovered they had failed to state a substantial defense, which I would like to have shown on the record, the defense of the statute of limitations. Mr. Larrouy: It is stipulated the answer may be amended on its face to so state. The Court: All right." No amendment was ever made. Thus appellants' number one point is being pressed on this appeal without § 339 or any other section having been pleaded. Section 339 appears in the case for the first time on appeal.

Respondents cite Calvary Presbyterian Church v. Brydon, 4 Cal.App.2d 676, 678, 41 P.2d 377 and Downs v. Benatar's, etc., Stores, 75 Cal.App.2d 61, 68–69, 170 P.2d 88, but we are left without the benefit of appellants' views on these cases since they refrain from citing any case at all in their opening brief, they did not file any closing brief, and did not argue orally. The Brydon case is closely in point. At the trial there Brydon sought leave (just as appellants did here) to amend to plead "that the action 'is barred by the statutes of limitation,' without citing any section of the code upon which he relied." 4 Cal.App.2d 676, 41 P.2d 378. The court said that "Such an amendment, even if permitted, would not be a sufficient plea of the statute of limitations to bar the present action. [Citing cases.]" A hearing by the Supreme Court was denied. In Manning v. Dallas, 73 Cal. 420, 421, 15 P. 34, likewise, the defendant attempted to plead the statute of limitations in broad and general language instead of by section and subdivision, see § 458, Code Civ.Proc. It was held that this could not be done. The case of Murphy v. Murphy, 71 Cal.App. 389, 392–393, 235 P. 653 is also in point.

For these reasons and on these authorities it must be held that appellants cannot rely on the statute of limitations.

Appellants state their second contention as follows: "Did the agreement between respondents and appellants' predecessors in

interest constitute a covenant running with the land and thereby bind appellants to pay part of the cost of the improvements made by respondents?"

Respondents in their brief show that they rely "on an oral contract made during the year 1946, to be performed upon the happening of certain events and contingencies, which events and contingencies occurred in the year 1949, six months prior to the institution or filing of this suit." They add: "It does not involve any theory of covenants running with the land." This latter statement removes the covenant question from the case.

Respondents have relied on the oral contract from the very outset. In their complaint they alleged that "it was orally agreed by the parties that defendants would pay their proportionate share of the expenses * * * at such time as defendants would improve their property, sell the same as improved, *or derive financial benefit from the use of their property and the improved alleyway, driveway and sewer line.*" (Emphasis added.) They then alleged that about December 29, 1949 defendants sold the property for $67,500, a price far in excess of that paid therefor. Also, "that prior to the sale, and for a period of time unknown to plaintiffs, defendants had been deriving rental from their said property, and that their tenant and/or lessee had been during said time enjoying the use and benefits of said driveway and sewer line installed by plaintiffs; that subsequent to said sale by defendants, plaintiffs again requested payment to them by defendants of the latters' [sic] share of the expenses incurred by plaintiffs relative to said alleyway and sewer line; that defendants again deferred payment, and, eventually did, and still do, refuse to pay the same; that the fair and equitable proportionate share of said costs and expenses due, owing and unpaid, from defendants to plaintiffs, based on the frontage of 150 feet of defendants' property was, and still is, the sum of $1,701.30."

These allegations were denied, hence they were of course important issues in the case. Respondents proved by Territo's own testimony that appellants' profit was $25,000 on the resale.

The court found in respondents' favor on these issues, and when confronted, as appellants are, with such adverse findings, they make no attempt to show how or why the evidence is insufficient. The subject of the oral contract is not even mentioned in appellants' brief, and instead of argument supported by authority the following is found therein: "We respectfully urge that the decision of the lower court in this case was absolutely ridiculous. We did not file a motion for new trial because we felt the judge's attitude was so arbitrary that it was a waste of time. We respectfully submit that the judgment should be reversed."

It is scarcely necessary to say that "It is incumbent upon the appellant to make it affirmatively appear that error was committed by the court below." Cockrill v. Clyma, 98 Cal. 123, 126, 32 P. 888, 889.

[2–4] In Wieczorek v. Texas Co., 45 Cal.App.2d 450, 456–457, 114 P.2d 377, 381, the appellant contended that it was not his task to convince the appellate court that the findings were unsupported. This court said: "This is not in accord with the accepted rule of practice. The rule to the contrary is found in 2 Cal.Jur. p. 730, where it is said: 'When it is contended that the evidence does not sustain the findings, the appellant must point out in his brief the evidence, * * * and he must show wherein the evidence does not sustain the findings.' [Citations.]" See, also, Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 687, 296 P. 1088 and Metzenbaum v. Metzenbaum, 96 Cal.App.2d 197, 199, 214 P.2d 603.

With respect to the oral contract, respondent Meyer, and Bryan, his secretary and office manager, and appellant Territo all testified. The principal difference between the litigants was not *whether* Territo had orally obligated himself to pay his proportionate share of the $2625.52 total cost, but simply as to *when* he had to pay. The court apparently accepted respondents' version that appellants' obligation was to pay if and when they derived a financial benefit

from the property. It is undisputed that appellants sold at a $25,000 profit. Territo "admitted the liability all along", according to Meyer's testimony. Meyer testified that Territo had said in one of their telephone conversations "that he didn't want anything for nothing and that he would pay us. He asked for a bill and I sent him one." Bryan testified to a phone conversation between Meyer and Territo, to which he listened in at Meyer's request, in which this was said: "Q. Did they have a discussion about the alleyway and sewer lines? A. Yes, Mr. Meyer said 'Now you have sold the property when will we get it settled?' and Mr. Territo said 'I don't want to beat anybody, but I have no bill', so Mr. Meyer made a bill and sent it to him." When appellants' counsel objected the court said: "Let him deny it." Territo, however, was not put back on the stand to deny this conversation.

[5] Respondents say in their brief "All other matters [meaning subjects aside from the statute of limitation and covenants] involve questions of fact decided upon conflicting evidence. Such matters should not be disturbed by an appellate court." We agree with that statement.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



118 Cal.App.2d 235

PEOPLE v. LOPEZ.

Cr. 4851.

District Court of Appeal, Second District, Division 2, California.

May 29, 1953.

Defendant was convicted of first-degree robbery. The Superior Court, Los Angeles County, Charles W. Fricke, J., rendered judgment and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence sustained conviction.

Affirmed.

1. Robbery ⇐24(1)

Evidence sustained first-degree robbery conviction. Pen.Code, § 211a.

2. Robbery ⇐24(1)

Character of weapon used by defendant charged with robbery may be shown by circumstantial evidence. Pen.Code, § 211a.

3. Robbery ⇐24(1)

In robbery prosecution, testimony of victim that he was hit by hard object, rendered semi-conscious, and remained in that condition for period of seven minutes justified inference that dangerous weapon was used in commission of robbery. Pen.Code, § 211a.

4. Criminal Law ⇐739(1), 742(1)

In robbery prosecution, contention of defendant that he was framed by police and that police officers had lied in court raised questions for trier of fact. Pen.Code, § 211a.

5. Criminal Law ⇐741(1), 742(1)

It is duty of trier of fact to weigh evidence and pass upon credibility of witnesses.

6. Criminal Law ⇐1159(1)

District Court of Appeal is bound by factual determinations of trier of fact.

7. Stipulations ⇐14(7)

Where it was stipulated by defendant that testimony given by prosecuting witness at preliminary hearing could be read at trial, reading of such testimony was proper.

Frank Lopez, in propria persona.

Edmund G. Brown, Atty. Gen., Ellis Peter Miller, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of first-degree robbery. He appeals from the judgment and the order denying his motion for a new trial.

On January 4, 1952, at approximately 11:00 p. m., Carl Morgan, a mill operator,

was standing on the sidewalk in the vicinity of Sunset Boulevard and Silverlake, in Los Angeles. An unknown man approached him from the rear, grabbed him around the neck, and struck him in the jaw with "some hard object," with very serious results. The criminal then beat and kicked his victim and took his jacket and $52 from his billfold. There were street lights in the vicinity. The injured man viewed his assailant's face from a distance of not more than five feet and noticed he was wearing khaki trousers, a maroon sport coat, and a blue sport shirt. While Morgan was not rendered wholly unconscious he did not fully regain consciousness for about seven minutes, when he was picked up by a police squad car. About an hour later, from the description supplied by the victim, the officers apprehended defendant, talking to the manager of a motel on Sunset Boulevard, which was about 800 yards from the scene of the assault and robbery. Underneath his maroon sport coat the officers found the jacket that had been taken from Morgan, who identified it by a one-inch tear in the left pocket and by the laundry mark. Defendant first said he got the jacket from the State but later he claimed he had purchased it from an unidentified person for a couple of dollars after he had left a certain cafe that night with his girl friend. The defendant was identified by Morgan as his assailant. When defendant was removed from the police car and brought under the street light for purposes of identification, the officers noticed that he made a throwing motion and discovered on the floor of the car $49 crumpled up and directly in front of the place where defendant had been seated. Defendant initially denied any knowledge of this money. He first claimed he only had $5 on his person; later, however, he changed his story and stated he had about $60. He thought the money on the floor of the police car fell out of his billfold.

Defendant contends that (1) the evidence is insufficient to sustain his conviction, and (2) he was framed by the police.

[1–3] The identification of defendant by the victim and his possession of the victim's jacket, which the owner also identified, furnish substantial evidence in support of the jury's implied finding that it was the defendant who attacked and robbed Mr. Morgan.

The evidence is also sufficient to sustain the jury's implied finding that defendant was armed with a dangerous or deadly weapon when he committed the offense, hence was guilty of robbery in the first degree. Penal Code, sec. 211a. Morgan was attacked from behind, consequently he could not see the instrument with which he was hit. However, the character of the weapon used by a defendant may be shown by circumstantial evidence. The testimony of the victim, that he was hit by "some hard object," rendered semi-conscious, and remained in that condition for a period of some seven minutes, justifies an inference that a dangerous weapon was used. People v. Sampson, 99 Cal.App. 306, 278 P. 492.

[4–6] Defendant's contention that he was framed by the police and that the police officers lied in court raises factual questions which were finally determined by the jury and trial court. It was their responsibility to weigh the evidence and pass upon the credibility of the witnesses. An appellate court is bound by such determination People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[7] Defendant also complains that the victim was out of the state at the time of the trial, and that the testimony he gave at the preliminary hearing was therefore read to the jury. It appears that this case had been previously continued. It was then stipulated by the defendant, through his attorney, that such former testimony could be read at the trial. The procedure followed was entirely proper.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

118 Cal.App.2d 297

BOWEN et al. v. CITY OF LOS ANGELES et al.

Civ. 19352.

District Court of Appeal, Second District, Division 3, California.

June 2, 1953.

Rehearing Denied June 19, 1953.

Hearing Denied July 28, 1953.

City firemen and policemen brought action against city for declaratory relief. The Superior Court of Los Angeles County entered judgment adverse to city, and city appealed. The District Court of Appeal, Shinn, P. J., held that city firemen and policemen, who were appointed after effective date of statutory amendment changing pension rates and terms, were not entitled to pensions at rates and on terms which prevailed at time they were placed on lists of eligibles, though those appointed from same list of eligibles prior to amendment were not affected by amendment.

Judgment reversed with directions.

1. Municipal Corporations ⇐187(1, 7), 200(1, 7)

City firemen and policemen, who were appointed after effective date of statutory amendment changing pension rates and terms, were not entitled to pensions at rates and on terms which prevailed at time they were placed on lists of eligibles, though those appointed from same list of eligibles prior to amendment were not affected by amendment. St.1925, p. 1085, § 181, as amended by St.1927, p. 2020.

2. Municipal Corporations ⇐220(9)

Pension rights are contractual in nature and become vested at time employee enters public service.

Ray L. Chesebro, City Atty., John J. Tully, Jr., Asst. City Atty., Los Angeles, for appellants.

Kenneth Sperry, Long Beach, for respondents.

SHINN, Presiding Justice.

Respondents, with others who do not appeal, members of either the Fire Department or the Police Department of Los Angeles City, passed civil service examinations and were placed on eligibility lists, the firemen on November 17, 1925, and the policemen on October 13, 1926. At that time the charter of the City of Los Angeles provided a yearly pension for firemen and policemen equal to *50* per cent of the annual salary attached to the position *one year* prior to the date of retirement for *20 years* of service, plus *1⅔* of such salary for each year over *20* and less than *30*, and ⅔ of such salary for *30* years of service. Stats.1925, p. 1085, § 181. By Statutes 1927, page 2020, § 181 was amended to provide a pension equal to *50* per cent of the average monthly salary during the *three years* immediately preceding his retirement with *25 years* of service, plus *1⅔* per cent of such rate for *each year over 25 and less than 35*, and ⅔ of such rate *for 35 years of service.* The effective date of this amendment was January 17, 1927, and it was provided that any member appointed prior to that date should receive a pension *50* per cent of the *average* monthly rate of salary he received during *3 years* immediately preceding retirement for *20* years of service, plus *1⅔* per cent of such rate for each year over *20* and less than *30*, and ⅔ of such average monthly rate for *30* such years of service. The charter was again amended by Statutes 1947, page 3679, but it affected plaintiffs only by continuing in effect the 1927 schedule.

Respondents were appointed subsequent to the effective date of the 1927 amendment. In this action for declaratory relief they contend they are entitled to pensions at the rates and on the terms which prevailed at the time they were placed on the lists of eligibles and, although they were appointed after the effective date of the 1927 amendment, that the city could not lawfully reduce their pensions below those received by others appointed prior to January 17, 1927, from the same eligibility lists. The amounts which would have accrued in favor of respondents under the schedule effective prior to the 1927 amendment, in excess of those which accrued under the schedule provided by the amendment ranged from $125.05 to $336.84

up to the time of judgment. Respondents were awarded these respective sums and defendants appeal.

The trial court held that the amendments were ineffective as to respondents for the reason that they were in conflict with the provisions of §§ 11 and 21 of Article I of the California Constitution and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

The argument of respondents is simply this: The city could not constitutionally discriminate between those who were appointed prior to January 17, 1927 and those who were appointed afterwards from the same lists of eligibles; they had preferred rights to appointment from the time they were placed on the eligibility lists, which is true; although they were appointed after January 17, 1927, they have rendered the same services rendered by others who were appointed from the same eligibility lists prior to January 17, 1927, and that the discrimination between the two classes was unreasonable, arbitrary, and not founded upon any natural, intrinsic or constitutional ground of distinction. In other words, they claim that being on the lists of eligibles is the same as being appointed as members of the classified civil service. The charter does not so provide.

[1] In reaching its conclusion, in consonance with the contentions of the respondents, the trial court was in error. No pension rights accrued prior to the time respondents entered the service of the city. This point was decided in Smith v. City of Long Beach, 105 Cal.App.2d 618, 234 P.2d 191. In that case the plaintiffs were claiming pension rights which had been extended by § 187 of the City Charter to employees in the classified service. Section 187 was repealed March 29, 1945. At that time the plaintiffs were on lists of eligibles but they were not appointed until after the repeal. The court said 105 Cal.App.2d at page 621, 234 P.2d at page 193: "Persons who are on eligible lists are not persons in the classified service. (Jones v. O'Toole, 190 Cal. 252, 256, 212 P. 9; cf. People ex rel. Laist v. Lower et al., 251 Ill. 527, 96 N.E. 346, 347, 36 L.R.A.,N.S., 1203; Hurley v. Board of Education of City of New York, 270 N.Y. 275, 200 N.E. 818, 820.) Under this rule and the foregoing authorities the sole right which plaintiffs obtained as a result of their names being placed on the eligible list was to be certified for appointment in the manner provided by law. They did not in any manner become 'persons in the classified service' nor did they acquire any civil service status. They could only become 'persons in the classified service' when they were appointed by the appointing power." It was also said that the plaintiffs had acquired none of the rights of city employees prior to the date they entered service of the city, citing Kern v. City of Long Beach, 29 Cal.2d 848, 852, 179 P.2d 799.

[2] Pension rights, such as those here involved, are contractual in nature and they become vested at the time the employee enters the public service. Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 59 P.2d 104; Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799.

In Allen v. City of Long Beach, 101 Cal.App.2d 15, 224 P.2d 792, it was held that policemen and firemen, while holding positions under temporary appointments pursuant to charter provisions were not regular members of the civil service, and that their subsequent appointment to the departments, after the repeal of the pension provisions of the charter, gave them no pension rights.

The arguments of plaintiffs in support of the claim of unconstitutionality are merely an extension of their contention that they had pension rights prior to the dates of their several appointments. Distinguishing between those who had acquired pension rights and those who had acquired none, as was done by the 1927 amendment, impaired no contract rights of members of the latter class. Plaintiffs have equal rights with others who are in the same class of appointees, namely, those who were appointed after January 17, 1927.

The judgment is reversed with directions to amend the conclusions of law and to

enter judgment in accordance with the foregoing views.

PARKER, WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 391

TALIAFERRO v. WAMPLER et al.

Civ. 15486.

District Court of Appeal, First District, Division 2, California.

June 9, 1953.

Proceedings wherein the Superior Court, Contra Costa County, Harold Jacoby, J., sustained a demurrer to an amended complaint without leave to amend, and plaintiff attempted to appeal. The District Court of Appeal, Dooling, J., held that no appeal would lie from the order sustaining the demurrer.

Appeal dismissed.

Appeal and Error ⇐102

No appeal would lie from an order sustaining demurrer to complaint without leave to amend.

E. A. Taliaferro, in pro. per.

Richard C. Johnston, City Atty., City of San Pablo, Richmond, for respondent.

DOOLING, Justice.

Plaintiff has attempted to appeal from a minute order and a written order subsequently signed by the trial judge sustaining a demurrer to his second amended complaint without leave to amend. No judgment appears in the record and since no appeal lies from an order sustaining demurrer the appeal must be dismissed. Cole v. Rush, 40 Cal.2d 178, 252 P.2d 1.

Appeal dismissed.

NOURSE, P. J., and McCOMB J. (assigned), concur.

118 Cal.App.2d 159

HO GATE WAH v. FONG WAN.

Civ. 15337.

District Court of Appeal, First District, Division 2, California.

May 27, 1953.

Action for declaratory judgment that employment contract was terminated about three months prior to end of term for good cause, and that employer did not have exclusive right to employee's services thereafter. The Superior Court, County of Alameda, Chris B. Fox, J., rendered decree that contract of employment was not terminated prior to end of term, and that employer did not have exclusive right to employee's services after expiration of term, and employer appealed. The District Court of Appeal, Goodell, J., held, inter alia, that no finding was required on employer's allegations that he spent large sum of money for employee's medical expenses in China before her departure for the United States, and that he spent large sums in advertising her as a performer, where neither employer or employee sought damages.

Affirmed.

1. Declaratory Judgment ⇐145

Where action for declaratory judgment was commenced almost one year after end of term provided by contract of employment, was tried 19 months after term, and judgment was entered 21 months after terminal date, action was not for declaratory judgment before breach or violation of contract. Code Civ.Proc. §§ 1060, 1062.

2. Trial ⇐395(5)

Trial court need not make express findings on evidentiary and probative facts.

3. Trial ⇐395(5)

In action for declaratory judgment that employment contract was terminated about three months prior to end of term for good cause, and that employer did not have exclusive right to employee's services thereafter, allegations of fact constituting misconduct on part of employer in support of employee's claim were allegations of evidentiary and probative facts upon which no express findings were required. Code Civ.Proc. §§ 1060, 1062.

4. Trial ⇐397(3)

In action for declaratory judgment that employment contract was terminated about three months prior to end of term for good cause, and that employer did not have exclusive right to employee's services thereafter, no finding was required on employer's allegations that he spent large sum of money for employee's medical expenses in China before her departure for the United States, and that he spent large sums in advertising her as a performer, where neither employer nor employee sought damages. Code Civ.Proc. §§ 1060, 1062.

5. Trial ⇐397(3)

In action for declaratory judgment that employment contract was terminated about three months prior to end of term for good cause, and that employer did not have exclusive right to employee's services thereafter, no finding was required on employer's allegation that about five months prior to expiration of term employee left employment without notice, where no damages were pleaded, no breach of contract was alleged, court impliedly determined that employee's leaving did not terminate contract, and employer pleaded that contract was still in force and effect. Code Civ.Proc. §§ 1060, 1062.

6. Trial ⇐394(1)

Requirement that findings of fact and conclusions of law should be separately stated is directory.

7. Declaratory Judgment ⇐253

An action for declaratory relief is an equitable proceeding. Code Civ.Proc. §§ 1060, 1062.

8. Equity ⇐51(1)

Equity abhors litigation by peacemeal and will prevent multiplicity of suits by, whenever possible, settling and determining all differences between the parties and leaving nothing further to be litigated between them on the same subject matter.

9. Declaratory Judgment ⇐366

Where employee sought judicial determination of rights under employment contract, and neither employee nor employer sought damages or other relief, and employer did not seek to enlarge issues, but joined issues as tendered, employer was not entitled to have entire controversy settled in order to avoid multiplicity of suits. Code Civ.Proc. §§ 1060, 1062.

10. Appeal and Error ⇐763

Where respondent's brief answered appellant's opening brief with arguments and authorities, but appellant filed no closing brief, respondent's points remained unanswered.

11. Declaratory Judgment ⇐344

In action for declaratory judgment that employment contract was terminated three months prior to end of term for good cause, and that employer did not have exclusive right to employee's services thereafter, excluding answer to question whether bond which employer had put up for employee when employee entered United States had been forfeited was proper, where employer sought no money judgment but proceeded to trial under issues tendered by employee. Code Civ.Proc. §§ 1060, 1062.

12. Appeal and Error ⇐1056(1)

In action for declaratory judgment that employment contract was terminated about three months prior to end of term for good cause, and that employer did not have exclusive right to employee's services thereafter, error, if any, in excluding evidence of other actions pending between the parties was not prejudicial, where issues were narrowed to determination of employee's rights and duties. Code Civ.Proc. §§ 1060, 1062.

William E. Ferriter and William Petros, San Francisco, for appellant.

Bruce Walkup, San Francisco, Dan L. Garrett, Jr., San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from a decree in a proceeding for declaratory relief.

On February 22, 1949 a written contract was entered into between appellant Fong Wan as the party of the first part and six Chinese actors, all of whom are described therein as citizens and residents of China, (one of whom is respondent Ho Gate Wah), as the parties of the second part.

The contract recites that Fong Wan owns and operates several night clubs; that the six actors perform acrobatic acts; that Fong Wan desires to engage them to perform in his night clubs in San Francisco and Oakland "and for other persons in the United States".

Fong Wan then engages them to come to San Francisco and Oakland "and to other places in the United States" to so perform and agrees to pay them the prevailing union rate of salaries, i. e., when performing as a group $55 each per week, and when performing singly $75. The six accept the employment.

They agree that while in the United States they "will not perform for anybody else except the party of the first part."

Fong Wan agrees to pay for their transportation from China to San Francisco and upon the expiration of the contract to pay them for their return transportation to China. He agrees also to post any necessary bond with the Immigration authorities for the issuance of visas for their admittance to the United States.

The contract provides that the term thereof shall be one year immediately after the arrival of the troupe, which arrival admittedly was on February 22, 1949. The court found that the contract was executed on February 23, 1949; that the period of employment expired by reason of its own provisions on February 22, 1950, and the judgment so decreed.

[1] This action was commenced almost a year after the end of the term of employment; it was tried 19 months after the end of the term, and judgment was entered 21 months after the terminal date. It thus appears that this was not a case where the parties sought a declaratory judgment "before a breach or violation occurs". See Kessloff v. Pearson, 37 Cal.2d 609, 613, 233 P.2d 899, 901.

Section 1060, Code Civ.Proc. provides that the plaintiff "may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time". Section 1062 provides that "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

In this case the plaintiff did not seek any award of damages, nor did the defendant.

Moreover, while the plaintiff set out in her complaint the questions in controversy, the defendant denied "that an actual controversy has arisen and presently exists between plaintiff and the defendant herein with respect to the legal rights and duties of plaintiff and defendant under the contract set forth in the plaintiff's complaint on file herein."

The court found that plaintiff entered the United States on February 22, 1949; that the contract was entered into the next day; that plaintiff left defendant's employ prior to February 22, 1950. It found also:

"That an actual controversy has arisen and presently exists between the plaintiff and defendant concerning the interpretation and effect of said contract * * * and the respective legal rights, duties and obligations of the parties under said contract in that plaintiff contends that the said contract * * * was terminated on November 25, 1949, by reason of her leaving the employment of defendant for a good and sufficient cause and that alternately if said contract * * * was not then terminated, plaintiff's term of employment thereunder expired by the express terms of the contract on February 22, 1950, and that any limitation in said contract on plaintiff's right to seek employment with persons other than defendant after February 22, 1950, is void; and defendant contends that plaintiff did not terminate said contract * * * by leaving the employment of defendant and that said contract * * * is still in full force and effect and plaintiff is prevented by the terms of the said contract from seeking employment with any person other than defendant."

The court concluded: "1. That the said contract * * * was not terminated at

any time prior to February 22, 1950. 2. That plaintiff did not have a good and sufficient cause for the termination of plaintiff's employment prior to February 22, 1950. 3. That plaintiff's term of employment under the said contract * * * expired by reason of the express terms of said contract * * * on February 22, 1950. 4. That any purported limitation in said contract * * * on plaintiff's employment with persons other than defendant subsequent to February 22, 1950, is void and of no force or effect whatsoever."

The judgment decreed: "1. That the contract of employment * * * was not terminated prior to February 22, 1950. 2. That the term of plaintiff's employment under said contract * * * terminated by the express terms of said contract on February 22, 1950. 3. That any limitation or restriction contained in said contract * * on plaintiff's right of employment with persons other than defendant from and after February 22, 1950, is void and of no effect and that from and after February 22, 1950, plaintiff has at all times been free to obtain employment with persons other than defendant." It awarded costs to plaintiff.

The principal, if not the only, questions in controversy in this case were (1st) whether the contract had been terminated by plaintiff for cause before the end of its one-year term, and (2nd), whether appellant had the exclusive right to respondent's services after that year expired. The first question was definitely settled against respondent's contention. The second was just as definitely settled against appellant's contention, since the finding of a termination on February 22, 1950 meant, of course, that appellant had no right to respondent's services thereafter. In addition to that the court expressly found that any provisions in the contract limiting plaintiff's right to find employment after February 22, 1950 with persons other than defendant were void.

[2, 3] Appellant's first contention is that the decision is against law because of the failure to find on material issues presented by the pleadings.

Plaintiff alleged that on November 25, 1949 for good and sufficient cause *she* terminated the contract by leaving defendant's employ and that such cause was that during the entire period from her entry into the United States to and including November 25, 1949 defendant "as a condition of plaintiff's employment, attempted to force plaintiff to enter into an immoral relationship with him, and on or about * * * November 25, 1949 * * * threatened to kill plaintiff and subjected her to physical abuse." In response to these charges defendant alleged that in September, 1949, she left his employ without any notice or any reason therefor; defendant denied the alleged misconduct generally and specifically.

The findings, conclusions, and judgment were in defendant's favor on all these issues in so far as they held that there was no termination until February 22, 1950.

Appellant complains that the court should have found on each of these allegations of misconduct. Obviously the allegations of misconduct were made in support of plaintiff's claim that she was justified in terminating the contract in November, which was almost three months before the end of its one-year term. The finding that she had not done so was a finding of ultimate fact. The allegations of misconduct were allegations of evidentiary and probative facts on which express findings are not required. Bloss v. Rahilly, 16 Cal.2d 70, 76, 104 P.2d 1049, citing 24 Cal.Jur. p. 968. Moreover, respondent concedes that she cannot again litigate the question of "whether or not she had the right to discontinue performance of her contract prior to the expiration of its one year term. Hence, the appellant cannot possibly be 'twice vexed with the same cause'."

[4] Appellant next complains that there should have been a finding on his allegation that "the defendant herein has spent a large sum of money for plaintiff's medical expense in China immediately prior to her departure for the United States, has paid for plaintiff's transportation to the United States and has spent a large sum of money for plaintiff in featuring and advertising her as a performer in newspapers and posters in Oakland and San Francisco, California."

Plaintiff's medical expenses in China are not mentioned in the contract. The contract does mention transportation, but it binds defendant to pay for the round trip. The contract is silent with respect to expenses for featuring and advertising, and there is nothing to show or even suggest that such charges were not naturally defendant's own obligation as the producer of the entertainment. The real answer to this point is that neither by answer nor cross-complaint did defendant claim or pray for a money judgment.

[5] Appellant's next complaint is that the court failed to find on his allegation "that on or about the month of September, 1949 the plaintiff herein left the defendant's employment without any notice to the defendant herein or any reason therefor whatever;" There was no reason for any finding thereon (1st) because no damages were pleaded or claimed therefor, nor was any breach of contract alleged, based thereon; (2nd) because the court's finding (heretofore discussed) impliedly determined that plaintiff's leaving did not terminate the contract, (3rd), and perhaps most important, because defendant in his answer asserted "that plaintiff's contract with this defendant is now, and has, ever since the 22nd day of February, 1949, been in force and effect." It is difficult to see how appellant could be harmed by the absence of the finding as claimed when at the time of answering, on April 20, 1951, he was asserting that the contract was still in force.

We find no merit in any of appellant's contentions based on the failure to find on the matters just discussed.

[6] Appellant's claim that conclusions of law numbered 1 and 2 are in reality findings of fact, is likewise without merit since it has long been settled that the requirement that findings of fact and conclusions of law should be separately stated is merely directory (24 Cal.Jur. pp. 960–962, § 199).

[7–9] It appears from the record that there is another action pending wherein respondent is suing appellant for damages. It is because of this other litigation that the points heretofore discussed have been pressed in the present case. Appellant's counsel so indicate, and in support of their position they invoke several familiar rules of equity (1) that the court should have determined the entire controversy between the parties and left nothing for future litigation; (2) that he who seeks equity must do equity, and (3) that the court should either have settled the entire controversy between the parties or should have withheld all equitable relief and remitted plaintiff to her remedy at law.

We have already pointed out that the plaintiff in this proceeding sought a declaration of rights and duties "alone" and not "with other relief", § 1060 Code Civ. Proc.; she did not elect to join herein any claim she might have for damages as § 1060 permitted her to do. The answer herein was filed on April 20, 1951, but defendant did not seek by cross-complaint or otherwise to enlarge the issues which plaintiff tendered, but merely joined issue as tendered, apparently in recognition of the provisions of § 1062, already quoted.

It is true that "An action * * * for declaratory relief is an equitable proceeding", Adams v. Cook, 15 Cal.2d 352, 362, 101 P.2d 484, 489, citing Rolapp v. Federal, etc., Ass'n, 11 Cal.App.2d 337, 342, 53 P. 2d 974, but appellant's contention that the controversies between these parties should not be tried piecemeal is answered by the case of Giese v. City of Los Angeles, 77 Cal.App.2d 431, 436, 175 P.2d 562, 564, where the court said:

"We fail to perceive wherein the well-known precept that equity abhors litigation by piecemeal and will prevent a multiplicity of suits by, whenever possible, settling and determining all differences between the parties and leaving nothing further to be litigated between them upon the same subject matter, can be successfully invoked in the instant proceeding. * * * The question posed on this appeal is whether, under his present position, respondent is currently entitled to be classified as a person entitled to a fireman's pension when he elects to go on the retired list. Respondent was, therefore, merely seeking a judicial declaration of his present existing rights under the * * * Pension System and was not petitioning the court to order him re-

tired with such a pension." The court then quotes §§ 1060 and 1062, supra, and holds that the trial court's ruling was supported by the latter section.

The Giese case was cited in respondent's brief, but appellant did not see fit to answer it by filing a reply brief. We find no merit in this contention.

[10] What has just been said respecting appellant's failure to file a closing brief applies as well to all the other points heretofore discussed. Respondent's brief answered appellant's opening brief with arguments and authorities, but with no closing brief on file her points remain unanswered by appellant.

Appellant's final point is that the court erred in excluding material evidence offered by him.

The contract contains the provision that the defendant "will also post any necessary bond with the * * * Immigration authorities for issuance of visas * * * for their admittance to the United States."

[11] Defendant testified that he furnished a bond for the plaintiff and the other members of the troupe in the sum of $1,000 for each of them, paying a premium of $100 on each bond. He was then asked: "Q. Doctor, has the bond you put up for Lana Wong been forfeited * * *? A. Yes, sir." The trial judge sustained an objection and struck out the answer. Appellant argues that "If the defendant had been required to pay the amount of this bond to the United States, it was the clear duty of the plaintiff to reimburse him in that amount and the court should have conditioned any equitable relief to which plaintiff might have been entitled upon her payment of that sum."

As repeatedly pointed out, defendant did not seek any money judgment but went to trial under the issues tendered by plaintiff and on her statement of the rights and duties to be determined.

[12] Appellant also claims that the court erred in excluding the evidence of other actions pending between the parties. If, technically, such evidence should have been admitted, it could not have been prejudicial error to reject it since the issues in this action were necessarily narrowed as we have repeatedly pointed out.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



McCARTHY et al. v. CITY OF MANHATTAN BEACH.*

Civ. 19286.

District Court of Appeal, Second District, Division 3, California.

May 27, 1953.

Rehearing Denied June 9, 1953.

Hearing Granted July 22, 1953.

In suit for judgment declaring void ordinance permitting only recreational activities on ocean beach land on which plaintiffs had intended to construct houses on pilings, the Superior Court, Los Angeles County, rendered judgment in favor of defendant, and plaintiffs appealed. The District Court of Appeal, Wood, J., held that the ordinance, as applied to plaintiffs' property, was confiscatory and constituted a taking of such property for public use without compensation and without due process of law.

Reversed.

1. Evidence ⇐8

As respects sand beaches of Southern California, it is a matter of common knowledge that piers and other structures built upon piling, in areas washed by waves, do not have effect of eroding or washing away sand, and endure indefinitely.

2. Municipal Corporations ⇐601(7)

A zoning ordinance enacted pursuant to a comprehensive plan of community development, when reasonable in object and not arbitrary, will be sustained as a proper exercise of police power.

3. Municipal Corporations ⇐63(1), 122(2)

Every intendment is in favor of validity of zoning ordinance, and court will not,

* Subsequent opinion 264 P.2d 932.

except when limitation is clearly arbitrary, interfere with legislative discretion.

4. Municipal Corporations ⇐122(2)

It is presumed that zoning ordinance is adapted to promote public health, safety, morals, and general welfare.

5. Municipal Corporations ⇐63(1)

A court may differ with legislative body as to propriety of enacting ordinance, but if question is one upon which reasonable minds might differ, court will not interfere with legislative body's determination of policy.

6. Trial ⇐375

Even though trial judge, in suit to have declared unconstitutional ordinance permitting plaintiffs to use their ocean-front property only for beach facilities, had, pursuant to stipulation, viewed property involved, his conclusions as to tide, wave or wind action, based upon his observations of property during time of calm, as distinguished from time of storm, would not be evidence.

7. Trial ⇐375

Even though trial judge, in suit to have declared unconstitutional ordinance permitting plaintiffs to use their ocean-front property only for beach facilities, had, pursuant to stipulation, viewed property involved, conclusions of trial judge, based upon his observations of premises, regarding safety of houses which might be constructed thereon upon pilings, would not be controlling as against opinion of expert; but trial judge's observations as to location and surface conditions of property and nearby property could be considered as evidence to aid judge in understanding other evidence presented in courtroom.

8. Trial ⇐375

Where trial judge, in suit to have declared unconstitutional ordinance permitting plaintiffs to use their ocean-front property only for beach facilities, had, pursuant to stipulation, viewed property involved, trial judge was not required to find in accordance with opinion of particular expert as to safety of houses which might be constructed thereon upon pilings.

9. Declaratory Judgment ⇐346

In suit for judgment declaring void ordinance permitting only recreational activities on beach land on which plaintiffs had intended to construct houses on pilings, evidence would not sustain finding that public safety would be promoted by ordinance.

10. Declaratory Judgment ⇐346

In suit for judgment declaring void ordinance permitting only recreational activities on beach land on which plaintiffs had intended to construct houses on pilings, evidence would not sustain finding justifying ordinance as exercise of police powers because construction of houses on pilings might create problems by possible use of areas under residences for immoral purposes.

11. Constitutional Law ⇐278(1)
Eminent Domain ⇐2(1)

Ordinance permitting only recreational activities on ocean beach land on which plaintiffs had intended to construct houses on pilings was confiscatory and constituted a taking of plaintiffs' property for public use without compensation and without due process of law.

Cosgrove, Cramer, Diether & Rindge, John N. Cramer, Leonard A. Diether, J. D. Barnum, Jr., Los Angeles, for appellants.

Clyde Woodworth, City Atty., Manhattan Beach, and Dunlap, Holmes, Ross & Woodson, Pasadena, for respondent.

WOOD, Justice.

Action for declaratory relief. Plaintiffs appeal from judgment in favor of defendant.

Plaintiffs are owners of approximately three-fifths of a mile of sandy beach frontage in the City of Manhattan Beach (hereinafter referred to as city). In 1941, the city adopted an ordinance (No. 502), section 10 of which is to the effect that said land could be used only for beach recreational activities and for the operation of beach facilities for such activities for an

admission fee; that the only structures permitted thereon were lifeguard towers, open smooth wire fences and small signs. Plaintiffs have not used the property for such purposes and have not received any income therefrom, but they have paid taxes thereon ranging in amounts from approximately $4,200 in 1940 to approximately $9,000 in 1950. In 1950 plaintiffs made application to the city for a modification of the ordinance which would permit the construction of single residences on the property. The application was denied. In the first cause of action herein, the plaintiffs sought a declaration that section 10 of said ordinance,[1] as applied to appellants' property, was unconstitutional in that it deprives them of their property without due process of law in violation of section 1 of the 14th amendment to the Constitution of the United States; it denies them the equal protection of the laws in violation of section 1 of said amendment; and it takes their property for public use without compensation. They also alleged that said section is unreasonable, arbitrary and discriminatory, and is an abuse of legislative discretion. In the second cause of action, they sought a declaration that the ordinance was invalid because it was not passed in good faith, but was passed pursuant to a scheme, conceived by the mayor and councilmen, to keep plaintiffs' property unimproved so that it could be used by the public for park purposes, and to depreciate its value so that it might be acquired by eminent domain for park purposes at the lowest possible amount of money.

The said property of plaintiffs extends from 1st Street, which is the south boundary of the city (and is also the north boundary of the City of Hermosa Beach) to 13th Street. The width of the strip of land varies from 174 feet to 186 feet. Its west boundary is the line of mean high tide of the Pacific Ocean. Its east boundary is the west side of the former right of way of the Pacific Electric Railway Company, which right of way is now a state park. That right of way is 50 feet wide. East of, and adjacent to, the right of way is a cement walk, 15 feet wide, which is referred to as "The Strand." East of the strand there are residential and business houses. The land, from east to west—that is facing oceanward from the strand, has a slope varying from 1 to 2 feet vertical in 10 feet horizontal. At the south end of the land, the strand is approximately 2 feet above the Pacific Electric right of way; and at 12th Street (near the north end of the land), the strand rises to an elevation of not less than 15 feet above the right of way.

The accompanying photograph (Exhibit 2) shows plaintiffs' property and adjacent and other nearby property. North is at the top of the photograph. The row of houses at the bottom of the photograph (extending north and south, nearest to the ocean) is in Hermosa and will be referred to as the Hermosa houses. The south boundary of plaintiffs' property (1st Street —the boundary between Manhattan and Hermosa) is at a point in the photograph

1. "Section 10. B–1 Beach Recreation District

"A. Land Uses Permitted

"1–The following beach recreation activities: swimming, surf-fishing and athletics including operation of beach facilities for the above activities for an admission fee;

"2–Rental of the following beach equipment: back-rests, chairs, benches, picnic tables and stoves, unbrellas, wind screens, surf-rafts, surf-boards, surfing bags, paddle-boards, kayaks, canoes, and other small boats.

"B. Other Uses

"No use other than those specifically mentioned in this section as permitted uses or those determined by action of the Commission * * * to be not more obnoxious or detrimental to the welfare of the community, shall be permitted * * *.

"C. Structures Permitted

"1–No buildings, structures, walls, or fences shall be erected in the B–1 District, except life guard towers and open smooth wire fences neither of which shall have a height greater than four (4) feet above the grade of the nearest portion of the strand.

"2–No sign shall be permitted or displayed in the B–1 District other than directional signs as specified below * * *."

about 4 houses north of the Hermosa houses. The north boundary of plaintiffs' property (13th Street) is at a point about 5 houses north of the pier (the south pier).



In 1923, the city council passed an ordinance (No. 249), dividing the city into an industrial district and a residential district. Under that ordinance plaintiffs' land was in the residential district.

In 1924, the city, claiming title to said land by reason of alleged dedication of the land for public use by the subdividers, commenced an action to quiet title. In 1935, the superior court rendered judgment therein against the city, quieting title in the predecessors in interest of the present plaintiffs. On February 15, 1938, the judgment was affirmed by the Supreme Court. City of Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 76 P.2d 483.

In 1929, while the quiet title action was pending, the council passed an ordinance (No. 337—amending the 1923 ordinance) which provided that no building should be erected westerly of the right of way, except a one-story one-family dwelling house with garage.

On March 17, 1938, about one month after the decision of the Supreme Court, the city passed a resolution to the effect that the withdrawal of said property (plaintiffs') from use as a public beach would be a great hardship to the public generally; the property should be acquired by the public for continued use as a public beach and particularly at a time when no structures had been erected thereon; the city did not have sufficient funds with which to acquire the property; and the city recommended to the county and the state that steps be taken looking to the acquisition of the property at the earliest possible moment in order to minimize the cost of such acquisition and to continue the use of the property as a public beach.

Thereafter, over a period of several years, the plaintiffs and defendant cooperated in various unsuccessful efforts to cause the property to be acquired for public use by the city or county or state.

In July, 1938, the mayor and the city attorney told Mr. McCarthy that they did not want appellants to sell the property or improve it because that would increase its value and the city wanted to acquire it within its means.

On July 21, 1938, the city council passed a resolution which recited that: The city did not have adequate funds for the acquisition of said property; it is deemed essential that said property "should nevertheless be preserved for public use"; that the board of supervisors of the county give immediate consideration to the matter of leasing the property from appellants.

On July 20, 1939, the city council passed a resolution instructing the city attorney to attend a meeting of the state park commission and request it to make arrangements for the preservation of the property for public use.

On July 25, 1939, pursuant to instructions from the city council, the city attorney sent a letter to the governor requesting that in the event that he called a special session of the Legislature he include in the call the consideration of an act which would allocate money for the acquisition of the property. In that letter it was stated that unless something is done the appellants proposed to sell the property to various persons, and if that should be done the cost of acquisition would be materially increased since the property was not improved.

On February 1, 1940, the council instructed the city attorney to attend a session of the Legislature for the purpose of ascertaining the progress of legislation regarding the allocation of money for acquiring the property.

On June 24, 1940, Mr. McCarthy sent a letter to the mayor stating that, upon assurance from the city officials that arrangements were being made to acquire the property, he had delayed putting the property on the market; he was arranging to enclose the property and charge admission for the use of it; he had cooperated fully in an effort to make it possible for the city to acquire the property but since it apparently was unable to do so, he had no alternative except to secure as much revenue from the property as he could in order to pay the taxes.

On July 1, 1940, the city passed an ordinance which made it unlawful for anyone to construct a barbed wire fence in the city

without first obtaining written permission from the council.

On August 12, 1940, Mr. McCarthy sent a letter to the council stating that he understood the property was zoned for residential purposes; that under existing conditions it could not be sold or subdivided for such purposes and consequently he was paying taxes on property limited to use, by the zoning ordinance, for which it could not be utilized profitably; and he requested that the city rezone the property for business purposes. On August 22, 1940, the council denied the request.

On June 26, 1941, as above stated, the council passed said zoning ordinance No. 502, which is the subject of this action.

On March 1, 1945, the council passed a resolution which stated that: The city is without adequate funds with which to acquire the property; at the present time no improvements exist upon the property, and good policy dictates "that now is the time during which the same should be acquired by and for the public"; the board of supervisors is requested to give its earliest consideration to the acquisition of the property to the end that it may be preserved for public use.

On September 8, 1948, the state commenced an action to condemn the property for park purposes. The action has been at issue since November, 1949, but it has not been set for trial.

On November 15, 1950, appellants made the application, above referred to, for a modification of ordinance No. 502, which would permit the construction of single residences on the property. The application was referred to the city planning commission and, after hearings, the application was denied by the commission on January 10, 1951. On March 6, 1951, the council denied said application.

The court found, in part, that: The property is subject, from time to time, to erosion and replacement by reason of storms and wave action of the ocean; any residences which could be constructed upon said property would necessarily be erected on pilings, and that reasonable minds might differ as to the safety of residence properties so constructed; the construction of residence properties on pilings and, subject to erosion and replacement by the waves of the ocean, might create problems by reason of possible uses of the areas underneath the residences for immoral purposes; one of the principal characteristics of the city is that it is a beach city bordering upon the Pacific Ocean; said property has been suitable, at all times since the adoption of said ordinance, for use and has been used by the residents of the city and the public generally for beach recreation purposes; it is not true that the city, through its mayor and its councilmen, or otherwise, conceived any scheme designed to accomplish the keeping of the property unimproved so that it could be used by the city and visitors to the city as a beach recreation area; it is not true that the city conceived any scheme to depreciate the value of the property so as to enable public authorities to acquire the property for the lowest possible amount of money. The court also found that reasonable minds might reasonably differ, and in 1941 might have reasonably differed as to the following matters: Whether the property is or was suitable for residential or commercial development; whether the city would be subjected to liability by reason of the necessity of employing lifeguards, wrecking crews and salvage employees to protect the property and installations thereon from the ravages of high tides and storms; the propriety of the enactment of said section 10; and the proper classification of the property as being within a beach recreation district.

Ordinance 502 purported to be a city-wide zoning plan. It provided for 10 zoning districts in the city. The 4 districts which are material here are: R–2, for two-family residences; R–3, for limited multiple family residences; B–1, a beach recreation district; and C–1, for retail commercial purposes. All the property east of and next to the strand, facing oceanward, was in zone R–2, R–3 or C–1. The property west of the strand was in zone B–1. That property consisted of appellants' property, the beach frontage in the city which is north of plaintiffs' property, and the Pacific Electric right of way. The beach

frontage north of plaintiffs' property was acquired by the state as a state park prior to the passage of said ordinance 502. The Pacific Electric right of way also was acquired by the state as a state park (in 1948). At the time this action was commenced, the only privately owned property in zone B–1 (beach recreation district) was appellants' property.

Section 1 of said ordinance 502 provides: "In order to provide the economic and social advantages resulting from an orderly planned use of land resources and to conserve and promote the public health, safety and general welfare, there is hereby adopted and established an Official Land Use Plan for the City of Manhattan Beach. * * *"

Appellants contend in effect that the evidence does not support the material findings; that the evidence demonstrates that said section 10 has no substantial relation to public objects which government may legally accomplish; and said section is arbitrary and unreasonable, and was not designed to accomplish a legitimate public purpose.

It was stipulated that Col. Leeds, who was called as a witness by appellants, was eminently qualified as a civil and consulting engineer. He testified that he had made a study of appellants' property; that as a former United States district engineer in this area and a former State Sea Coast engineer he had a degree of familiarity with the Southern California coast, and with Coast and Geodetic Survey charts; he had examined profile maps made by the county surveyor of the area immediately landward and seaward from the shoreline—showing an elevation above and below the shoreline at intervals of 200 or 500 feet; he had examined the two aerial photographs of appellants' property; as Coast engineer he had observed property that had been damaged as a result of action of the sea; he had observed the conditions at Redondo Beach in recent years where structures on the shore had been damaged. He was asked the following question: "Assume * * * that the easterly 35 feet of plaintiffs' property is to be devoted for a street * * * and that plaintiffs' property is to be subdivided into lots approximately 30 feet in width, and each of the lots would face on the street * * * just mentioned; in your opinion, can houses be constructed upon said lots which would comply with the provisions of the zoning ordinance * * * 502 * * * on said lots safely?" He replied, "Yes." He testified that his answer pertained to construction of such a house as of the date of adopting the ordinance in 1941, and at all times thereafter up to the present. He also testified that he would place the structure on concrete or steel piles, the top of which would be at an elevation of approximately 20 feet above mean lower low water, and in his opinion, the top of the foundation could be placed "somewhat lower as a matter of safety"; he prepared a diagram (Exhibit 62) which is entitled "Representative Profile Across McCarthy Property"—and also recites "Showing Possible Development"; the diagram sets off 35 feet (next to the Pacific Electric right of way) to be dedicated for public use as a road; then it sets off 75 feet (next to the road) as an assumed suitable space on which to construct a house—with a 1-foot setback from the road—which would leave (on the average at each lot) approximately a minimum of 60 feet between the house and mean high tide; on some of the wider lots there would be 6 or 7 feet more between the houses and mean high tide; the approximate elevation of the top of the piling above mean lower low water would be between 16 and 17 feet; that such elevation would be 12.4 feet above mean high tide; if the house extended 75 feet from the road, the top of the piling at that point (75 feet from the road) would be on the average about 12 feet above the sand; that, in his opinion, if a house were constructed as indicated on the diagram, it could be constructed without fear of damage from the ocean. On cross-examination, he testified that he did not know that on occasions the Pacific Electric right of way at Manhattan Beach had been under water; he did not know that water came up over the strand in 1938; he had not made any investigation as to whether the city would approve the 35-foot road; he had not seen a subdivision plan for the property; in

forming his opinion regarding the safety of constructing houses on appellants' property, he considered the presence of houses at Hermosa Beach, just south of the southerly limits of Manhattan Beach (as shown on the aerial photographs, Exhibits 1 and 2); the front of the houses that he would build on appellants' property would be on a line, which if extended southerly into Hermosa Beach, would be westerly of the front of said houses in Hermosa Beach; the line of mean high tide is 4.6 feet above mean lower low tide; the highest estimated possible tide in Southern California is 8 feet above mean lower low tide; a tide is measured as a level surface,—not as wave or wind action might send the water farther up on the beach; the height to which water is projected shoreward depends upon wave and wind action—ground swells are a form of wave; damage to piers and structures on beaches is usually caused by ground swells, which are usually produced by distant storms or submarine earthquakes; he would construct the building on pilings driven about 10 feet below lower low water, so that if an unanticipated storm should occur, it could gouge out several feet of the beach and the house would still stand and be safe; succeeding lesser waves will soon restore the gouged out places; the profiles of the beach at Hermosa are somewhat different from those in Manhattan; the attack of waves, wind or ground swells upon the shoreline is seriously influenced by the underwater configuration of the earth; in front of the Manhattan-Hermosa area there is a ridge, and therefore the severest attacks do not occur there; there have been very destructive waves at Redondo; how far a wave would extend shoreward, above the 8-foot (possible) high tide, depends upon many things, including the contour of the beach; the contour is normally a good indication of how far the waves have gone; the crest of the beach is normally around 12 to 15 feet. He was asked the following question: "Would you feel, Colonel, that intelligent and reasonable minds might reasonably differ as to the possible danger of construction of residences in accordance with the scheme indicated on Exhibit 62?" He replied: "Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors. Only a very, very foolish engineer claims to be infallible."

Mr. Flanagan, a building inspector and secretary of the planning commission of Manhattan Beach, testified that he had been an employee of that city since 1937; there have been some heavy storms at the beach; on one occasion a fishing barge drifted onto the beach; in a heavy storm he has seen the breakers come over the Pacific Electric right of way or splash over it.

Mr. Sights, who is and has been for 17 years chief of police at Manhattan Beach, testified that on two or three occasions he has seen water against the westerly edge of the Pacific Electric right of way—in the areas near 1st, 5th and 9th Streets; one of the occasions was about 17 years ago, when a barge was washed ashore on 1st Street.

[1] It was stipulated that the judge might view the property and that he might consider as evidence everything he saw in viewing the premises. The judge viewed the premises in the presence of an attorney for appellants, an attorney for respondent, and the clerk of the court. Thereafter, the judge made a statement in open court regarding the observations he had made. Among other things, he said that the westerly side of the proposed 35-foot road (north of the pier in the vicinity of a row of sand dunes) is at least 12 feet lower than the general level of the Pacific Electric right of way; the westerly side of the proposed road is obviously subject to flooding at extremely high tides or during storms; about 500 feet south of the pier, the distance from the westerly side of the proposed road to the line of kelp and debris is about 75 feet, and the area within that distance is sand and generally level with a gentle slope seaward; from 6th Street to the south boundary of appellants' property there is an outcropping of soil; on the seaward side of the houses in Hermosa Beach, shown in the foreground of the photographs in evidence, there is a 20-foot

cement walk; adjoining the walk there is a concrete wall, the top of which is level with the walk; the top of the walk is about 2 feet above the sand to the west of it; the distance from the wall to the break of the beach is about 65 feet; the front line of the houses in Hermosa, if continued northward, would be about 12 feet west of the westerly side of the proposed 35-foot roadway; the houses that might be built on plaintiffs' property would extend seaward of that line to the extent that appellants' houses would exceed 12 feet; if the proposed houses were built on plaintiffs' property westerly of the proposed 35-foot road, they would be right on the beach and unless they were protected by an adequate seawall they would be subject to a constant hazard of destruction by the sea. It may be noted that the judge's statement with reference to the necessity for "an adequate sea wall" was not consistent with the finding that houses would be built on piling, as Colonel Leeds testified. Also, as respects the sand beaches of Southern California, it is a matter of common knowledge that piers and other structures built upon piling, in areas washed by the waves, do not have the effect of eroding or washing away the sand, and endure indefinitely.

[2–5] Principles of law applicable in cases involving questions as to validity of zoning ordinances are stated in Clemons v. City of Los Angeles, 36 Cal.2d 95, at pages 98 and 99, 222 P.2d 439. Generally stated some of those principles are (1) a zoning ordinance enacted pursuant to a comprehensive plan, when reasonable and not arbitrary, will be sustained as a proper exercise of police power; (2) every intendment is in favor of its validity, and a court will not, except when the limitation is clearly arbitrary, interfere with the legislative discretion; (3) it is presumed that the ordinance is adapted to promote the public health, safety, morals, and the general welfare; and (4) a court may differ with the legislative body as to the propriety of enacting the ordinance, but if the question is one upon which reasonable minds might differ, the court will not interfere with the legislative body's determination of policy.

It appears that from 1923 to June 26, 1941 (when ordinance No. 502 was passed), the property was zoned as residential property; that on August 12, 1940 (while it was zoned as residential property), Mr. McCarthy requested that it be zoned for business purposes (the request was denied); and that on November 15, 1950 (while the property was zoned for beach recreation activities under ordinance 502), he requested that it be rezoned for residential purposes (the request was denied).

It also appears that the city, after it had failed in 14 years of litigation to quiet title in itself, and it being financially unable to buy the property, recommended that the county or state buy it so that it might continue to be used as a public beach; and that the city, after it had tried unsuccessfully for approximately three years (after the Supreme Court decision) to cause the county or state to buy the property, and it being unable to buy the property, passed ordinance 502 which in practical effect has caused the property to remain available for public use without requiring the city, county or state to expend any money therefor; and to remain without income to plaintiffs, but subject to heavy taxes—about $9,000 per year.

[6–9] The engineering expert, called by appellants, testified to the effect that houses built upon pilings in a specified manner on appellants' property would be safe. That testimony was not contradicted by an engineering or construction expert. Even though the trial judge viewed the property, pursuant to stipulation, his conclusions as to tide, wave or wind action, based upon his observations of the property during a time of calm as distinguished from a time of storm, would not be evidence. The trial judge, in stating his observations, said that the houses would be subject to a constant hazard of destruction by the sea. He also stated in effect that during storms the houses would be within the area affected by the storms. In Fendley v. City of Anaheim, 110 Cal.App. 731, 294 P. 769, it was claimed that a power plant of defendant jarred and shook plaintiffs' residence and thereby caused damage. The judge therein viewed the premises in the daytime. The

reviewing court said, 110 Cal.App. at page 736, 294 P. at page 771, that no observation was made by the trial court "at nighttime when most of the discomforts complained of appeared. We are of the opinion that under such circumstances the inspection of the premises by the court cannot add sufficient weight to sustain the questioned finding [that the operation of the plant caused no discomfort to plaintiffs]." In Wall v. United States Mining Co., C.C. 232 F. 613, it was held that where the factual issue is a matter for expert testimony, the impressions obtained by a trial judge as to that issue, in viewing the premises, should not be considered as against the opinion of an expert. The observations of the trial judge herein as to the location and surface conditions of appellants' property and nearby property in Manhattan and Hermosa could be considered as evidence to aid the judge in understanding the evidence presented in the courtroom. The conclusions of the trial judge, based upon his observations of the premises, regarding the safety of houses constructed upon pilings, would not be controlling as against the opinion of the expert. The trial judge, however, was not required to find in accordance with the opinion of the expert. The finding of the court was contrary to that opinion. As above stated, there was no other testimony of an engineering or construction expert. The question therefore arises as to what the basis was for the finding that reasonable minds might differ as to the safety of houses constructed upon pilings. A statement of the judge, made during the trial, indicates that he based the finding, in part at least, upon his observations of the premises. He said: "I have an unusually high regard for Colonel Leeds and I know him to be an extremely well-qualified engineer, but I also have viewed the property, and what I have observed is evidence, and I think that that is a question upon which reasonable minds might differ." As above stated, the judge's conclusions as to safety, based upon his observations, were not evidence; and his opinion as to safety, based upon his observations, was not controlling as against the opinion of the expert. It might be that the judge based the finding in part upon the answer of the expert to the question by defense counsel as to whether he felt that "reasonable minds might reasonably differ as to the possible danger of construction of residences *in accordance with the scheme indicated on Exhibit 62*?" That answer was, in part, "Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors." That was not an answer that reasonable minds might reasonably differ as to the safety of houses *built on pilings*—it was an answer that such minds might reasonably differ as to the safety of houses built *in accordance with the scheme indicated on Exhibit 62.* As indicated by the answer, it might well be that engineers would not agree as to the safety of the one proposed solution,—and that a certain proposed solution might cause differences in opinion as to the degree of safety. The fact that engineers might not agree as to the safety of a proposed plan, such as the one indicated on Exhibit 62, would not signify that engineers would differ in opinion as to the safety of houses built in accordance with other plans, such as higher, stronger, or differently arranged pilings. The said answer of the expert was not a sufficient basis for the finding that reasonable minds might differ as to the safety of *houses built on pilings.* A question remains as to whether that finding was supported by the presumption that section 10 of the ordinance was adapted or suited to promoting public safety. Various circumstances here, when considered together, show that the presumption alone was not sufficient to support the finding. Some of those circumstances are: (1) The testimony of the expert was contrary to the presumption,—and the judge did not reject the expert's testimony on the ground that he considered the expert was not qualified, but he rejected it because he preferred to base his opinion, as to safety of houses built on pilings, upon his observations of the premises—which opinion, as above stated, was not evidence. (2) In 1923, the city zoned the property

for residences and it remained zoned for that purpose for 18 years—until 1941 when the present ordinance was enacted. (3) There was no evidence that there was any change in the physical condition of the property or any disadvantageous change in the action of the ocean. (4) The pictures of the property, received in evidence as Exhibits 1 and 2, show that on an easement across appellants' property for roadway purposes (where the pier is) there are houses adjoining each side of the pier, which houses presumably were built by the city. (5) Along the ocean front in Hermosa Beach, a few feet from the south boundary of appellants' property, there is a row of dwelling houses which is approximately in the same position, with reference to distance from mean high tide, as the row of proposed houses on appellants' property would be from that tide—those houses in Hermosa are not built on pilings but, at a point 20 feet oceanward from the houses (as hereinabove described), there is a cement wall which is about 2 feet higher than the sand. (The pictures indicate that those houses have been there many years.) (6) After the city had failed to quiet title in itself, following 14 years of litigation, and after it had failed in 3 additional years of negotiating for condemnation of the property, it enacted section 10 (prohibiting residences thereon) allegedly on the basis of promoting public safety, although the property had been zoned for residences during all the period of the litigation and negotiations. In summary, it appears that the testimony of the expert that houses built upon pilings would be safe was uncontradicted, notwithstanding the observations of the property by the judge; that the expert did not say that reasonable minds might differ as to the safety of houses built upon pilings, irrespective of height or kind of pilings; and that the presumption that section 10 was adapted to promoting public safety should not prevail as against the various circumstances herein which indicate that the section was not so adapted. The finding that reasonable minds might differ as to the safety of residences constructed on pilings is not supported by the evidence.

[10] Appellants also contend that another finding was not supported by the evidence. That finding is that the construction of houses on pilings might create problems by the possible uses of the areas under the residences for immoral purposes. Counsel for respondent (city) asked the chief of police if, in his opinion, he would have encountered any police problems if the McCarthy property had been improved by constructing residences on pilings. Appellants' objection to that question, upon the ground that it called for a conclusion, was overruled. The witness then said that he definitely believed that such improvement would cause a police problem because along other beach frontages where homes were built on pilings they "had trouble with juveniles, sex perverts; we have had that under our piers a number of times." On cross-examination, he testified to the effect that he was not familiar with any such police problem in other beach cities involving houses on pilings. Such opinion evidence as to public morals was not sufficient to warrant the enactment of section 10 as a measure that would promote public morals. The fact that it is easier to police the vacant property than it is to police the improved property is not a proper basis for restricting the appellants in the use of their property. The said finding to the effect that the construction of houses on pilings might create police problems is not supported by the evidence.

[11] As above stated, appellants' property could have been used for residential purposes prior to the enactment of said section 10. The city recognized that the property was of high value,—a value which the city, itself, was not able to pay in order to acquire the property for public use. Appellants were and are required to pay high taxes on the property. Said section 10 rendered the property of comparatively little value for the limited uses designated in the section. In practical effect, as above stated, the enactment of section 10 accomplished for the city and the public, without paying any compensation, substantially the same result that would have been accomplished by eminent domain. In Arverne Bay Const. Co. v. Thatcher, 278

N.Y. 222, 15 N.E.2d 587, 592, 117 A.L.R. 1110, the court said: "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L. Ed. 322, 325, Justice Holmes said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values * * * must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. *One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.* So the question depends upon the particular facts." (Italics added.) In Householder v. Town of Grand Island, Sup., 114 N.Y.S.2d 852, an ordinance required a 90-foot setback from a street, and as the result thereof all the owner's land except a strip 1 foot wide, at one end of his property, and 8 feet wide at the other end, was taken. The court said, 114 N.Y.S.2d at page 855: "Such an ordinance is confiscatory and unenforcible. It is an attempt to accomplish by so called 'set back ordinance' without any compensation what can legally be done, if at all, only by the exercise of the power of eminent domain." In Skalko v. City of Sunnyvale, 14 Cal.2d 213, at page 216, 93 P.2d 93, at page 94, it was said: "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." In practical effect section 10 of the ordinance, as applied to appellants' property, is confiscatory and constitutes a taking of plaintiffs' property for public use without compensation and without due process of law. Under the evidence here, said section, as applied to plaintiffs' property, is unconstitutional and invalid.

In view of our conclusion that section 10 of the ordinance is invalid, as applied to appellants' property, it is not necessary to consider claimed errors in the rejection of evidence.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



118 Cal.App.2d 188

PRUETT v. BURR et al.

Civ. 4624.

District Court of Appeal, Fourth District, California.

May 27, 1953.

Action against manufacturer of chemical spray and others for damage to plaintiff's crop sustained when spray was carried by wind onto plaintiff's land while airplane was spraying land of neighbor. The Superior Court, Kings County, entered judgment against the manufacturer, and the manufacturer appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evidence was insufficient to support the verdict.

Reversed.

1. Negligence ⇐136(6)

In action against manufacturer of chemical spray, seller thereof, airplane company, and plaintiff's neighbor for crop damage caused when chemical spray was blown by wind onto plaintiff's land as airplane was spraying neighbor's land, evidence presented jury questions as to whether sufficient facts had been established for application of doctrine of res ipsa loquitur as to all defendants, and as to whether each defendant had made sufficient

explanation of his participation so as to avoid inference of res ipsa loquitur.

2. Negligence ⇐138(2)

In action for damage to plaintiff's crop allegedly caused by chemical spray which was carried by wind onto plaintiff's land when airplane was spraying neighbor's land, instruction sufficiently stated general rules in reference to what facts were required to be established before res ipsa loquitur doctrine was applicable. Code Civ.Proc. §§ 1958, 1959.

3. Evidence ⇐333(1)

Official records and reports which public officers are required to keep or make, either by statute or by nature of duties of their office, are admissible in evidence as exceptions to general hearsay rule. Code Civ.Proc. §§ 1888 to 1894, 1953e to 1953h, 1953f.

4. Evidence ⇐383(3)

Where official records and reports of public officers which are required to be kept or made either by statute or by nature of duties of officers are of the type of records covered by Uniform Business Records as Evidence Act, and are proved as required, the entries therein are prima facie evidence of the facts stated therein. Code Civ.Proc. §§ 1888 to 1894, 1918, 1920 to 1926, 1953e to 1953h, 1953f.

5. Evidence ⇐333(1, 12), 383(3)

Exhibit consisting of copy of letter and memo received by Agricultural Commissioner from Bureau of Chemistry in connection with his official duties, and exhibit consisting of memo of Department of Agriculture, which exhibit related to nature and cause of crop damage, were not such "public records" as to be prima facie evidence of facts stated therein, and were not such "business records" as to be admissible under Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1888 to 1894, 1918, 1920 to 1926, 1953e to 1953h, 1953f.

See publication Words and Phrases, for other judicial constructions and definitions of "Business Records" and "Public Records".

6. Evidence ⇐370(1)

In absence of testimony as to mode or time of preparation of public documents claimed to be business records, and in absence of testimony identifying documents as business records made in regular course of business, there was not proper foundation for admission of such documents under Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1888 to 1894, 1953e to 1953h, 1953f.

7. Negligence ⇐134

In action against manufacturer of chemical spray and others for crop damage allegedly caused when spray was carried by wind onto plaintiff's land while airplane was spraying neighbor's land, evidence was insufficient to support verdict against manufacturer.

Ray W. Hays and James N. Hays, Fresno, for appellant.

Wingrove & Brown, Meredith Wingrove, and Lee G. Brown, Hanford, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action for damages against defendants Robert Burr, Central Valley Cooperative, a corporation, hereinafter referred to as CVC, Estate of J. A. (Tex) Rankin, and R. S. Norswing, copartners doing business as Rankin Aviation Industries, and the defendant and appellant Sherwin-Williams Co., a corporation (hereinafter referred to as appellant). The damage occurred to respondent's cotton crop and was alleged to have been the proximate result of the negligence of defendants in manufacturing, selling, and spraying, by airplane, the cotton crop of defendant Burr with a spray containing a product produced by appellant which was injurious to cotton plants. Respondent owned about 15 acres of land planted to cotton. Directly north of his acreage was a 40-acre piece of land belonging to defendant Burr. About July 16, 1949, defendant Burr discovered Lygus bugs or cotton daubers in his cotton. On advice of the agents of defendant CVC, of

which Burr was a member, he determined to spray it. The spray was purchased through defendant CVC, which had a consignment agreement with appellant Sherwin-Williams Co., who manufactured it, whereby CVC paid appellant each month for material that was used. The spray material was labeled "DTOL 25% Emulsifiable". It was contained in 30-gallon steel non-returnable drums and had been stored in CVC's warehouse since the 1948 season. On July 16, 1949, CVC delivered five drums to defendant Rankin Aviation Industries to be mixed with water in a specially prepared mixing tank and put in Rankin's airplane, equipped with a rotary brush type sprayer, and sprayed on Burr's cotton. The course pursued was in a general northerly and southerly direction back and forth over Burr's cotton field. In banking and making the turn the pilot of the airplane flew over respondent's cotton field and a considerable amount of the spray fell on his acreage. The wind also drifted some of the spray released on the Burr property over the respondent's cotton field. Respondent's cotton crop was heavily damaged and burned along the north side of his acreage. Burr's crops were likewise damaged. Expert witnesses agreed that the damage resulted from spraying and that the damage noticed was the result of the presence of a chemical compound known as 2, 4–D or one of its derivatives such as 2,4,5–T, which is a plant hormone stimulating the growth of plants, but which has an adverse effect on broad-leaf plants and particularly cotton.

The damage to the plants was immediately noticeable and increased over the period of growth. Samples from the various containers used, and others not opened, were taken by the several parties and chemical tests were made. Respondent relies principally upon a report of the State Department of Agriculture contained in a letter from that department dated October 24, 1949 (Plaintiff's Exhibit 1), and plaintiff's exhibit 2, which were received in evidence over objection. These exhibits indicate that certain tests were made of certain samples taken, and that a harmful plant hormone, probably 2,4,5–T, was present in the samples analyzed. The merits of this objection will be discussed later.

A motion for nonsuit was denied. Thereafter defendants testified and produced certain witnesses in their own behalf who endeavored to exculpate themselves from liability and claimed lack of knowledge of the presence of any type of substance harmful to cotton plants. Appellant produced a chemist who visited the property and took samples from the Burr containers. He testified that respondent's and defendant Burr's cotton had been affected by a chemical compound known as 2,4–D, or one of its derivatives; that quantities as low as one part per million would cause damage to cotton; that from an analysis of samples taken from three of the barrels it conformed to the statement on the label on the drums and that those samples showed no 2, 4–D was present; that to verify his analysis he later obtained four or five samples of the same lot number from CVC, that field tests on cotton were made with it and the presence of 2,4–D was not indicated.

The manager of CVC testified that the State Department of Agriculture gave him a report on samples taken from the contents of unopened drums left in its stock, which were of the same lot number as those used on the Burr job, and that the report was that no 2,4–D was found.

There was testimony to the effect that about eleven other growers had used DTOL in 1949, and that there were no complaints received from the growers. The jury returned a verdict in favor of respondent and against the Sherwin-Williams Co. for $1,068.38, and in favor of the remaining defendants.

At respondent's request the jury was instructed on the doctrine of *res ipsa loquitur* in six separate instructions, following generally the language contained in instructions 206-B and 206-C, pp. 321–322, California Jury Instructions Civil (B.A.J.I.). No particular objection is made to the form of instructions except that it is contended that only one of them stated that more was required than the mere happening of the accident to give rise to the inference of *res ipsa loquitur*, and that therefore the court erred in its failure to more force-

fully point out to the jury that before the doctrine of res ipsa loquitur could be applied it was necessary for respondent to show that he did not suffer damages at the hands of persons other than the defendant, citing Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 519, 203 P.2d 522; Zentz v. Coca Cola Bottling Co. of Fresno, 92 Cal. App.2d 130, 133, 206 P.2d 653; and further, that one instruction was erroneous because the jury was told that a mandatory rather than a permissive inference arose from the occurrence of the damage, citing Hardin v. San Jose City Lines, Inc., Cal.App., 252 P.2d 46.

Appellant's main claim, however, on this particular point is that the instructions on that subject should not have been given at all because the evidence did not, particularly as to appellant, show that the requirements for the introduction of the doctrine were met in this, that before it may be applied, it must be shown that the accident or injury was caused by an agency or instrumentality within the *exclusive* control of the defendant (appellant); that when, on the face of plaintiff's own evidence, it appears that the injury may have resulted from any one of two or more causes, for one of which the defendant may not have been responsible, plaintiff is not entitled to the benefit of the doctrine, citing Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 526, 203 P.2d 522; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344; Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352; and Note, California Jury Instructions Civil [J.A.J.I.] p. 315.

In this respect, it is argued that if respondent had sued the appellant alone in the instant case the doctrine would not have been available to him because the instrumentality had passed through several hands, for whose actions appellant would not be responsible, and its condition had been changed; that therefore it is possible that the accident was caused by the negligence of someone other than appellant; that to allow the respondent to rely upon *res ipsa loquitur* in this case would be to say that he can bring in as parties defendant all who handled the instrumentality and thereby use the doctrine against the appellant when it could not have been otherwise available; that the instrumentality had been handled by many others after it had left the appellant's possession; that while many of these persons were made defendants in this action and introduced evidence to show that they had not improperly handled appellant's product, the possession of the instrumentality had been changed; that the instrumentality had long been out of appellant's possession; that appellant had no control over mixing this spray; and that appellant had no superior knowledge of what occurred.

In reply respondent relies principally upon the doctrine as announced and applied in the late case of Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344. It was there stated, in reference to the contention that the instrumentality must be in the exclusive control of defendant before the doctrine is applicable, that the purpose of the requirement that the defendant must have management or control of the agency or instrumentality which caused the injury was to eliminate the possibility that the accident or injury was caused by someone other than the defendant and that its use is merely to aid the courts in determining whether, under the general rule, it is more probable than not that the injury was the result of defendant's negligence; that the requirement of control is not an absolute one and ordinarily will not apply if it is equally probable that the negligence was that of someone other than the defendant, yet the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident; that the fact that the accident occurred sometime after the defendant relinquished control of the instrumentality which caused the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by the plaintiff or some other third person, or its condition otherwise changed, after control was relinquished by the defendant. However, in this connection, it must appear that the defendant had suffi-

cient control or connection with the accident or injury so that it can be said that he was more probably than not the person responsible for plaintiff's injury. Another factor may be that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the injury may be accessible to the defendant but inaccessible to the plaintiff, and that the doctrine may be applied even though the defendant is not in a better position than the plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of the defendant. It then stated that the doctrine was applied in certain specific unusual situations where there was clearly a probability that one or more of several persons was negligent but where the plaintiff was unable to point out which of them was responsible for his injury such as Ybarra v. Spangard, 25 Cal.2d 486, 154 P. 2d 687, 162 A.L.R. 1258, where a patient received injuries while unconscious and in the course of medical treatment. It was there held that all persons having any control over his body could be properly called upon to give an explanation of their conduct.

The Zentz case also stated that the doctrine may be applied against several defendants where the circumstances are such as to show a probability that all of them were negligent. It then concluded that, as a general rule, *res ipsa loquitur* applies where the accident or injury is of such nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible; that in determining whether such probabilities exist with regard to a particular occurrence the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened; and that all of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence. See, also, Knell v. Morris, 39 Cal.2d 450, 455, 247 P.2d 352.

In Cavero v. Franklin General Benevolent Society, 36 Cal.2d 301, 223 P.2d 471, where the defendant hospital, as well as doctors and a nurse anaesthetist were sued for the wrongful death of a child while having its tonsils removed, and where the jury exonerated the doctors and held the hospital liable, it was held that it was not error to give an instruction on the *res ipsa loquitur* rule as to all defendants, where the jury accepted the explanatory evidence exculpating the doctors but not the hospital.

[1] In the present case it seems clear that the injury complained of would not have occurred without negligence by someone other than the respondent. It is equally clear that such injury was one that in the ordinary course of things does not happen and was, in all probability, due to the application of chemical spraying; that appellant, as well as the defendants were in a better position than respondent to explain what happened; that the chief evidence of the cause of the injury was accessible to defendants and not to respondent; that appellant had sufficient control or connection with the cause of the injury; that it was more probable than not that it was the one responsible for the injury to respondent's cotton crop and was the one called upon to give an explanation of its conduct; and that the circumstances were such as to show probability that all of the defendants were negligent.

We therefore conclude that there was sufficient evidence to submit to the jury the question whether sufficient facts had been established for the application of the doctrine as to all defendants, and that it became incumbent on each defendant to explain his participation therein if he or it sought to avoid the inference of *res ipsa loquitur*. It appears that the defendants, excepting appellant, did explain their activities to the satisfaction of the jury and that each produced positive evidence to

show that they had no knowledge of and were not responsible for the presence of the contaminating substance which damaged the cotton crop. It affirmatively appears that appellant did not meet, to the satisfaction of the jury, the burden placed upon it, although there was evidence produced by it in conflict with the inference.

The instructions given on the *res ipsa loquitur* doctrine, when considered as a whole, are not open to the criticism suggested. Some of the instructions recite, in language to this effect, that "From the occurrence of the damage involved in this case as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of defendants and if the inference preponderates over contrary evidence it warrants a verdict for the plaintiff." The court gave appellant's instruction reciting that "* * * the mere happening of an accident is not sufficient to enable the plaintiff to recover, but the burden is upon the plaintiff to show that the defendants were guilty of negligence which was the proximate cause of the injury". Proximate cause is then defined in the usual form and included therein is a statement: "It may operate directly or through intermediate agencies or through conditions created by such agencies". The court then instructed that those given instructions on *res ipsa lopuitur* "may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:" Then follows certain conditions which must be established before the doctrine may be applied. This is followed by the statement: "When all these conditions are found to have existed the inference of negligence to which they give birth may support a verdict for the plaintiff, in the absence of a showing by defendants that offsets the inference." This instruction is followed by one reciting that "If you find that the plaintiff * * * has been damaged and injured by the presence of 2,4–D or 2,4,5–T in a spray material applied to or drifting over and upon his growing cotton crop in the year 1949, then an inference of negligence arises and you are instructed that it is incumbent upon the defendants to explain how the loss occurred and by what reason they are not responsible for such damage." The statement in the instructions here given, which in part recite that "from the occurrence of the accident in this case, as established by the evidence, there arises an inference", has been criticized where the evidence shows that the application of the inference by the jury should be only permissive. Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 59 P.2d 962; Prosser on Res Ipsa Loquitur in California, 37 Cal.Law Review, pp. 217, 231.

Section 1958 of the Code of Civil Procedure provides that an *inference* is a deduction which the reason of the jury makes from facts proved, without an express direction of law to that effect. Section 1959 of the Code of Civil Procedure provides that a presumption is a deduction which the law expressly directs to be made from particular facts. In many of the reported cases it has been held that a permissible inference of negligence arises only upon the establishment of facts sufficient to support such an inference and the jury is permitted to accept the inference, i. e., it is not compulsory and if it sees fit to find for the defendant, even if the inference does arise, it is free to do so. Exceptional cases have held that under a given set of facts, where the inference is strong, it may be compulsory to accept the inference. Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Morris v. Morris, 84 Cal.App. 599, 258 P. 616; Pillars v. R. J. Reynolds Tobacco Company, 117 Miss. 490, 500, 78 So. 365, 366. As distinguished from a permissible inference, a different rule seems to apply to a presumptions.

[2] The instructions given sufficiently state the general rules in reference to what facts must be established before the rule is applicable. There was no request by defendants for additional instructions further qualifying this general rule. Under the facts here related no prejudicial error resulted in giving the instructions indicated.

Mudrick v. Market Street R. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533.

A more serious question arises in reference to the admissibility of the letters, plaintiff's exhibits 1 and 2, setting forth the information contained therein which indicates that certain tests were made by the State Department of Agriculture, Bureau of Chemistry, and a certain result was obtained indicating the presence of 2,4–D, or 2,4,5–T.

It is respondent's contention that these exhibits were admissible under sections 1888–1894, and sections 1953e–1953h, C.C.P., Uniform Business Records as Evidence Act, added by Stats.1941, chap. 482, § 1. Section 1953f, C.C.P. provides:

> "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Appellant's claim is that the exhibits are hearsay, not the best evidence, and that no proper foundation was laid for their admission into evidence; that accordingly the ruling of the trial court admitting them was prejudicial error under the circumstances related since this was the only evidence indicating the presence of 2,4–D, as opposed to the contrary sworn testimony of a chemist testifying for appellant.

In Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, the trial court rejected the offer into evidence of a nurse's chart pertaining to a patient. The Supreme Court recited therein the general rule that it is the object of the business records statutes to eliminate the necessity of calling each witness and to substitute the record of the transaction or event, and that it is not necessary that the person making the entry have personal knowledge of the transaction; that such record is competent evidence if authenticated in the prescribed manner, and if in the opinion of the court the source of information, method and time of preparation were sufficient to justify its admission. It was there held that while the nurse's chart did contain relevant evidence on the issue of the nature and extent of plaintiff's injuries, the Supreme Court could not say that its exclusion resulted in a miscarriage of justice.

In Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 481, 87 L.Ed. 645, the Supreme Court held that where the engineer of a train, who died before the trial, made a written statement covering the cause of an accident, it was not admissible under a similar federal act because it was not made as a part of the " 'regular course' of business" of the company.

Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569, 571, involved the question of the admissibility of the record of the coroner's office pertaining to certain tests made as to the presence of alcohol in the decedent's blood. The court there held that where sufficient foundation had been laid by the evidence, as there indicated, the report would have been admissible. In that case, however, there was detailed evidence by the head toxicologist for the coroner as to what was done and a more minute foundation laid for the admission of such a report into evidence. In that case there was sufficient additional evidence that the blood in the bottle labeled with decedent's name was his blood. Strong dissenting opinions were there filed reciting "that we should be more concerned with reliable and accurate evidence than with convenient methods of producing it", and, see footnote 38 Cal.2d at page 450, 240 P.2d at page 571, that the holding in that case "sets one more flagstone in the path departing from established standards", and as "impingements on federal constitutional guaranties". Therein, McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862, 21 A.L.R.2d 1206, was cited and distinguished because it was there the opinion of the trial court that the source of information, method and time of preparation of the record in question were not such as to justify its admission. There, neither the embalmer nor any other witness from the mortuary

testified as to the procedure followed in taking blood samples, and the court on appeal held that the trial court was justified in concluding that the proper foundation had not been laid.

The question here presented, then, is whether the exhibits received in evidence were, in fact, competent, relevant, and a record of an act or event where the custodian thereof or other qualified witness testified to their identity and mode of their preparation and whether they were made in the regular course of business, at or near the time of the act or event.

Exhibit 1 is but a letter, apparently written on the letterhead of the State Department of Agriculture, by a field supervisor (to Mr. Haupt, Agricultural Commission at Hanford) and contains what the writer denominates "copy of the memorandum on the subject of 2,4–D, injured cotton of Robert Burr". The letter contains many statements which are purely hearsay, and if the writer thereof were personally present and testified at the trial, which he was not, he would be precluded from testifying in relation to many of the statements contained therein on that ground. Attached to the letter is a two-page memo initialed "M.R.P." apparently intended for Murray R. Pryor. It recites that Haupt and the writer inspected Burr's cotton crop near Hanford and found it to be affected with 2,4–D; that Burr said he wanted him (the field supervisor) to confirm these findings at a contemplated trial and that he said he would be available as a witness. He then relates in detail what he did, what the several contentions of the respective parties were, and who might be at fault; that he advised that samples of the residue of insecticide be obtained and forwarded to the Bureau of Chemistry for analysis.

Exhibit 2 is entitled "Memorandum, Department of Agriculture—To—Allen B. Lemmon, from—L. R. Gillogly". It recites that according to the memorandum of Mr. Pryor, Pryor visited the Burr ranch; that he reported the injury and that "it is suspected that an insecticide treatment—by the Rankin Crop Dusting Concern—was contaminated with a plant hormone"; that "crop dusters state that the airplane sprayer used had never been used with 2,4–D but was reserved for insecticides alone"; that the Sherwin-Williams Co. maintained (according to Mr. Haupt) that their product DDTOL, 25% Emulsifiable, was free of contamination up and until the time it was shipped by them; that "according to Mr. Pryor's memo, Mr. Burr said that the cotton was treated on September 17, 1949"; that Mr. Scott stated the date to be August 21, 1949; that Pryor said one sample was taken "from five 30-gallon barrels on the air strip" and the other from two 30-gallon unopened barrels in the dealer's warehouse, and that he (Mr. Pryor) obtained a second sample from "what appeared to be the same empty barrels." Then the writer sets forth the nature of certain laboratory tests made pertaining to these samples. Neither Mr. Pryor nor Mr. Gillogly were witnesses at the trial.

The only foundation testimony concerning these exhibits was that of the Agricultural Commissioner, Mr. Haupt, who testified he and Pryor went to view the damaged fields; that they requested a Mr. Scott, of the State Bureau of Chemistry, to obtain samples of the material used; and that Exhibit 1 mentioned herein was a copy of a letter and memo received by him from the Bureau of Chemistry in connection with his official duties. As to Exhibit 2, counsel for plaintiff merely announced to the court that it was a memo of the State Department of Agriculture directed to one Allen B. Lemmon from L. B. Gillogly, with a notation "cc to L. O. Haupt". None of the parties named were witnesses at the trial.

Defendant Burr's Exhibit E was received in evidence over objection of appellant. It was a copy of a letter in reply to a request by Mr. Rempel of the Twining Laboratories for information from Mr. Lemmon of the Bureau of Chemistry pertaining to samples suspected of being contaminated with 2,4–D, in which he stated that the available information he had was only suggestive and that he had no conclusive evidence that the material used by Mr. Burr contained 2,4–D; that the sample taken from the opened container

could not be considered official unless it was taken from an unopened container filled by the manufacturer; that, however, some of the residue left in the barrels was taken and found to contain DDT 25–48 per cent, which conformed to the guaranteed analysis, but that there was some evidence that it was contaminated with 2,4–D or 2,4,5–T, and that official samples taken by their inspector from unopened drums found in the dealer's stock in Hanford, showed the same indications.

Rempel testified Mr. Lemmon was chief of the State Bureau of Chemistry, and that he received the original of the copy of the letter that went into evidence, about May 5th, when he was making some tests from samples obtained by him, in connection with his unsuccessful endeavor to substantiate Mr. Lemmon's findings. There was no further evidence as to a foundation for the admission of the document.

In Dobson v. Industrial Acc. Com., 114 Cal.App.2d 782, 251 P.2d 349, it was said (quoting from syllabus 2) that "Testimony that a blood sample contains alcohol without some evidence to show that the blood is that of the person charged with being intoxicated amounts to no proof at all that he was."

In Everts v. Matteson, 68 Cal.App.2d 577, 157 P.2d 651, it was held that a communication from a person who had been employed to appraise realty was not a corporate record, under Civil Code § 371, nor was it admissible in evidence merely because the employer had it among his papers.

In City of Stockton v. Vote, 76 Cal.App. 369, 396, 244 P. 609, 619, it is said:

> "No section of the Political Code relating to the department of public works has been called to our attention that would make the report by a subordinate officer or field officer to his superior, or whatever designation may be applicable to the position occupied by Mr. Barnes, a public document admissible in evidence in controversies between independent parties. These considerations show the opinions and statements of Mr. Barnes to be mere hearsay so far as this case is concerned, and wholly inadmissible."

In 20 American Jurisprudence, page 866, Sec. 1027, it is remarked that:

> "* * * a record of a primary fact made by a public official in the performance of official duty is, or may be made by legislation, competent prima facie evidence as to the existence of that fact, but records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records."

To the same effect is 153 A.L.R. p. 166, where it is said:

> "Notwithstanding the general rule that public records and reports are admissible in evidence, the courts almost universally exclude statements contained in such reports or records concerning the cause of or responsibility for an injury to the person or damage to property." The reason for this exception, stated at page 167, is that "One ground on which such a report is excluded is that the statement as to the cause of or responsibility for the occurrence is a mere statement of opinion, and that since the officer or employee would not be permitted to state his opinion if on the witness stand, there is all the more reason for excluding his statement of opinion when he is not under oath and is not subject to cross-examination."

[3, 4] The exceptions to the general hearsay rule are the official records and reports which public officers are required to keep or make, either by statute or by the nature of the duties of their office. 20 Am.Jur. 767. Under sections 1918, 1920 and 1926 of the Code of Civil Procedure, if they are the type of records meant and are proved as required, the entries are prima facie evidence of the facts stated therein.

22 Cal.Jur. p. 576, sec. 4, defines public records as "All documents or records which are required by law to be kept by a public officer, or which he keeps as necessary

or convenient to the discharge of public duties."

Even if these documents may be, under a proper showing, considered as official documents, there is no sufficient foundation laid that such documents are the ones kept as part of the regular function of the office by some department of the government or such as are authorized by the legislature. In the first place, the offered letters were not shown to be originals, nor were they certified as copies by any legal custodian thereof. They are not such a report as is made legal evidence by any statute. City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 48 P.2d 87.

[5] We conclude that these copies are not public records within the meaning of sections 1920–1926 of the Code of Civil Procedure. They are not entries made in public or other official books or records as required by those sections, but are only letters by officials to third persons, and copies of interdepartmental memorandums.

As to the claim that they fall within the Uniform Business Records as Evidence Act, it first must be established by competent evidence that these exhibits fall within that class. If they were business records of anyone, it was the State Department of Agriculture. There is no evidence by any person from that department or anyone qualified to testify to this effect. There was no testimony as to their mode or time of preparation, nor identifying them as business records made in the regular course of business. We do not believe that it was the intent of the act to make all correspondence received by a business man admissible in evidence merely because it might pertain to his business. If this were so, any written hearsay evidence concerning business matters would be competent evidence. It is clear that there was no competent evidence that the samples analyzed were taken from the particular drums here involved. The only evidence was hearsay evidence contained in the writings themselves. Miles v. A. Arena & Company, 23 Cal.App.2d 680, 73 P.2d 1260. It is also apparent that oral testimony by the author of the letters would have been inadmissible on this subject, as hearsay. These letters then should not, at least without laying the proper foundation as required by the statute, rate higher in the scale of evidence.

In an article by Professor William C. Hale, in 14 Southern California Law Review, p. 99, pertaining to the admission of hospital records under this act, it is said, at page 101, et seq.:

"* * * formal requirements for business entries are equally applicable to hospital records, viz.: that the entries should be original entries, contemporaneously made, based upon personal observation, and properly verified in court. (Citing cases.) The latter requirement looks normally to the calling of the person or persons who made the record, or a showing of nonavailability and the production, in the latter event, of someone sufficiently advised as to the identity of the records and the methods of keeping them." After reciting many of the instances where the courts have excluded records, the author states: "These illustrations indicate that those courts that extend the business entries exception to cover hospital records insist on the well established and formalistic foundation requirements of that exception."

Counsel for plaintiff argue that, by the admission into evidence of the exhibits, the expenses to the plaintiff and to the state were kept down by reason of the cost of producing witnesses employed by the state or the cost of taking their depositions; that the small sum here involved fully justified the court's action in holding that they were admissible.

While the judgment may appear to be just and comparatively small, and considerable expense might well be saved in not producing the testimony of witnesses in respect to the foundation, the rules of evidence should not be relaxed for these reasons alone. The statutory requirements necessary to have a writing admitted as a business record, official record or a public writing should be met. Otherwise, all legal barriers heretofore established by the law protecting one's right to be confronted by

witnesses and the right to cross-examination, might well vanish under these exceptions.

[6] It has been said that where the question whether a proper foundation has been laid for admitting a document under this act is debatable, and there is some evidence from which a reasonable deduction can be made that the proper foundation has been laid, the determination of such question is for the trial court. Uniform Laws Annotated, 9 Misc.Acts p. 393, Note 20. It does not appear to us under the evidence here produced, that the question as to whether or not the proper foundation had been laid was debatable.

[7] Assuming, then, that the jury was permitted to apply the doctrine of *res ipsa loquitur* under the facts established, and that an inference of negligence of appellant arose, appellant was then called upon to meet that inference. Appellant produced competent evidence, under oath. that the samples taken from the product originally furnished by it contained no 2,4–D type of substance. The only evidence opposed to this, other than the circumstances themselves and the possible inference of negligence arising therefrom, are the opinions, conclusions, and hearsay evidence set forth in the exhibits. Since we conclude that the exhibits were erroneously admitted, for the reasons stated, we are unable to conclude, as suggested by plaintiff, that the error was not prejudicial because of the operation of the *res ipsa loquitur* rule.

The facts related in the exhibits, no doubt, had a great influence on the jury in arriving at its verdict in relation to defendant's alleged liability. The motion for new trial should have been granted. Since the judgment must be reversed, there is no necessity at this time to pass upon certain novel questions presented pertaining to the allowance of certain costs to the plaintiff.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

118 Cal.App.2d 271

SCOTT v. BARNES.

Civ. 8256.

District Court of Appeal, Third District, California.

June 1, 1953.

Proceeding by divorced mother for modification of order relating to the custody of her four year old son, to award such custody to her. The Superior Court, Lake County, Benjamin C. Jones, J., entered order awarding custody of son to his father, who had married woman with three children of her own, for ten months of the year, and to the mother, who had remarried but had no other children, for two months of the year, and mother appealed. The District Court of Appeal, Schottky, J., held that the order was fully supported by the evidence and the law, and that under the record, to hold that trial court had abused its discretion would be an unwarranted usurpation of the function of the trial court.

Order affirmed.

Divorce ⇐312.6(5)

Order granting custody of four year old son of divorced parents to father, who had married woman with three children of her own, for ten months of year, and to mother, who had married but who had no other children, for two months of year, was fully supported by the evidence and the law, and under record, a holding that trial court had abused its discretion in making such an order would be an unwarranted usurpation of the function of the trial court.

H. G. Crawford, Lakeport, for appellant.

Fredric S. Crump, Lakeport, for respondent.

SCHOTTKY, Justice.

Appellant was awarded an interlocutory decree of divorce against respondent on May 23, 1949, and was awarded the custody of Kenneth Duane Barnes, the minor child of the parties, then aged one and one-half years. The final decree of divorce was entered on May 29, 1950. The record shows that the said minor child, after the entry

of the interlocutory decree and until the remarriage of his father the respondent, resided with his paternal grandmother and was under her supervision, although no modification of the order granting the custody of the child to appellant was made until October 15, 1951. During the summer of 1951, appellant mother and her husband (she also having remarried) planned to move to the state of Washington and to take the child with them, whereupon respondent father made a motion to modify the divorce decree by having the custody of the child awarded to him. After a hearing the Superior Court entered its order on October 15, 1951, granting respondent's motion, and awarded the custody of the child to respondent father.

Appellant mother did not appeal from said order modifying said decree but on November 14, 1951, filed a motion to modify the previous order changing the custody of said minor child to Victor D. Barnes, and to award the custody to her. This motion was heard on November 26, 1951, and appellant respondent and respondent's wife testified. On December 15, 1951, the court made an order awarding the custody of the child to respondent father for ten months of the year and to appellant mother for two months, until the further order of the court.

Appellant mother has appealed from said order and urges as grounds for reversal: (1) the order is not supported by the evidence; and (2) the order is contrary to law.

Appellant points out that the evidence shows that the minor child was four years old; that respondent himself testified that she (appellant) was a fit and proper person to have the care, custody and control of the child; that she and her husband are living in Los Angeles and have a home there which has one bedroom, large living room, kitchen, bath, and large fenced in yard with lawn; that her husband earns approximately $100 per week and wants the child in his home; that there are no other children in the home and that she intends to stay at home and take care of the child.

Respondent in reply points out that the evidence shows that after the parties were divorced the child was cared for by his father and paternal grandmother; that the child, after his father's remarriage, was taken into the home of his father's wife; that the child has three stepbrothers and sisters, aged 4, 6 and 8, with whom he gets along very well; that the father has a good home for the child and earns a salary which is adequate to support the family; that the father's present wife wants the child to live with her and be raised with her own children.

Appellant concedes that the trial court has an extensive discretion in custody matters, but contends that the court in the instant case ignored the plain mandate of section 138 of the Civil Code which provides, in part:

> "(2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

Appellant argues that evidence shows an equal situation, both parents having good homes and both being able to properly care for the child, and that therefore the court abused its discretion in not awarding the custody of the child to her. She quotes from the case of Bemis v. Bemis, 89 Cal. App.2d 80, 90, 200 P.2d 84, 90, as follows:

> "Upon the undisputed evidence in the case, section 138 of the Civil Code is controlling. When facts are established which clearly make applicable the quoted provision of the section that custody should be awarded to the mother, it is not within the discretion of the court to ignore it. There is no more sound or universally recognized rule of law to be found in the books. Where the court finds that 'other things' are equal, young children are invariably given into the custody of their mother. We say 'invariably' because we have not found in our reported cases a single instance in which the custody of young children has been awarded to their father upon evidence that the mother was a fit

and proper person to have their custody and was able to give them advantages equal to those that they would enjoy in the home of the father."

Appellant concedes that the implied finding of the trial court is that "the advantages offered by appellant mother and respondent father are not equal but preponderate in favor of respondent father," but argues that such finding is not supported by the evidence. We are unable to agree with this contention. It appears in the Clerk's Transcript that the learned trial judge who made the order appealed from was also the judge who granted the decree of divorce and who made the order changing the custody from appellant mother to respondent father, which latter order was made only one month before the instant proceeding was filed. The following statement of the trial judge in the order appealed from is fully supported by the record:

"In this case the child has been with its grandmother and father almost constantly since birth. Naturally its affection for these persons has taken root. Owing to circumstances beyond her control the mother, although awarded legal custody, has been obliged to leave her baby with its paternal grandmother for rearing. And in this respect the grandmother has done an excellent job. Recently the father has married again and the child has been accepted into his wife's family of three children of the approximate age group as that of his son. The evidence discloses that the son has fitted into the group well. In addition he is living within visiting distance of his grandmother and frequently spends some time in the only home which he has ever known. He appears to be a nervous child and easily upset. This indicates that association with other children will most likely permit a development and growth which will overcome this disability. There is no question presented of ability to support or morality. These factors are of the best with each parent. The question of environment is paramount. There is also the question of opportunity for the child as he grows and develops. From all of the evidence in the case it appears that his present environment is the best and that his opportunity for development mentally, morally and physically, will be greater where he now is."

As stated in Munson v. Munson, 27 Cal. 2d 659, at page 666, 166 P.2d 268, at page 272:

"Plaintiff relies on the proposition that, as between parents adversely claiming custody, 'other things being equal, if the child is of tender years, it should be given to the mother.' (Civ.Code, § 138, which refers to actions for divorce; the proposition is equally applicable here.) The evidence above recited is clearly sufficient to support the determination of the trial court that 'other things' are not equal in this case. 'In determining whether other things are equal within the meaning of the above Code section, the trial court is necessarily allowed a wide latitude in the exercise of its discretion. In the first instance it is for the trial court to determine, after considering all the evidence, how the best interests of the child will be preserved. The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interests of the child.' (Taber v. Taber, 1930, 209 Cal. 755, 756, 290 P. 36, 37.) It is settled that 'An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion. [Citations.]' (Foster v. Foster, 1937, 8 Cal.2d 719, 730, 68 P.2d 719, 724.)"

Also applicable here is the following language from Phillips v. Phillips, 48 Cal. App.2d 404, at page 407, 119 P.2d 736, at page 738:

"This section [Civ.Code, sec. 138, subd. 2] does not give the mother the *absolute right* to the custody of a child of tender years. The qualifying clause, 'but other things being equal', still leaves a large measure of discretion with the trial court. If the court finds that other things are *not* equal, as it evidently did here, and there is any substantial evidence to support such a finding, our inquiry is at an end."

See, also, Hamilton v. Hamilton, 104 Cal. App.2d 111, 231 P.2d 69.

We are satisfied that the order appealed from is fully supported by the evidence and the law, and that for an appellate court to hold upon the record here that the trial court abused its discretion would be an unwarranted usurpation of the function of the trial court.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



118 Cal.App.2d 263

HAMPTON v. PACIFIC ELECTRIC RY. CO.

Civ. 19251.

District Court of Appeal, Second District, Division 3, California.

June 1, 1953.

Rehearing Denied June 19, 1953.

Hearing Denied July 28, 1953.

In action under Federal Employers' Liability Act for injuries sustained by train conductor when he fell in descending from a loading platform at defendant railroad company's station, the Superior Court, Los Angeles County, Arthur S. Guerin, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that jury question was presented by evidence on issue as to whether defendant had provided plaintiff with a safe place to work.

Affirmed.

1. Master and Servant ⇐128

Where conditions and facilities of employment provide safety when used for purpose for which they were intended, employer cannot, under Federal Employers' Liability Act, be held guilty of negligence in failing to provide against unexpected uses which would involve danger. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and Servant ⇐286(17)

In action under Federal Employers' Liability Act for injuries sustained by train conductor when he fell in descending from a loading platform at defendant railroad company's station, jury question was presented by evidence on issue as to whether defendant had provided plaintiff with a safe place to work. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

C. W. Cornell, O. O. Collins, John R. Allport, Clyde C. Beery, Los Angeles, for appellant.

John M. Ennis and Robert M. Holstein, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff, about 65 years of age, for many years employed by the Pacific Electric Railway as a conductor, was injured when he fell in descending from a loading platform of the company at its station in Azusa. Suing under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., he was awarded substantial damages in a jury trial and following denial of its motion for a new trial the defendant company appeals.

The sole question is whether the evidence and proper inferences therefrom, viewed in the light most favorable to plaintiff, was such as to justify the determination by the jury that defendant failed to provide plaintiff with a safe place to work,

or in other words, that it was negligent with respect to that duty.

We can give a better recital of the facts by use of the accompanying photograph.



It shows the major portion of the south side of the building. The door seen in the picture, which we will refer to as the south door, leads into the room of the station master. To the west is the freight room. At the west end of the freight room is a door which was locked with an inside bolt. On the north side of the building is a single track for use in loading and unloading cars. Also on the north side of the building is a broad platform, the height of the loading platform, from which loading and unloading may be done. This platform extends easterly from the westerly loading platform and leads into a ramp which meets the ground level near a door which is opposite the south door. The floor of the loading platform seen in the picture at the west end of the freight room is approximately three feet nine inches above the ground. A short distance above the ground is a stringer, four inches wide and twelve inches deep. On the day of the accident plaintiff reached the north side of the shed in a box motor attached to a box car. He alighted onto the platform, went to the west door of the freight room, found it locked, went to the south edge of the loading platform, eased himself down onto the stringer, placing one foot thereon, and in his attempt to reach the ground fell heavily when his foot slipped off the stringer.

There is no conflict of authority as to the applicable principles of law. Defendant had no liability except for negligence, and that has been the question in all the cases under the Federal Employers' Liability Act. The usual rules of negligence apply. In the cases where the employer is charged with a failure to provide the employee with a safe place to work, the question usually is whether an occurrence of the nature of that which caused injury to the employee was one known to or within the reasonable anticipation of the employer, that is to say, whether he knew or should have known that the conditions, facilities or instrumentalities provided were likely to be used in the manner in which they were used and which resulted in the injury.

[1] It is axiomatic, as defendant says, that where the conditions and facilities of employment provide safety when made use of for the purpose for which they were intended, an employer cannot be held guilty of negligence in failing to provide against unexpected uses which would involve danger. This is the text of the cases cited by defendant. Brady v. Southern Ry. Co., 320 U.S. 476, 483, 64 S.Ct. 232, 88 L.Ed. 239, 245; Campbell v. Southern Pacific Company, 120 Or. 122, 250 P. 622; Hahn v. Chicago, M. & St. P. Ry. Co., 157 Minn. 354, 196 N.W. 257; McDonald v. Fryberger, 133 Minn. 156, 46 N.W.2d 260; Reynolds v. Atlantic Coast Line R. Co., 336 U.S. 207, 69 S.Ct. 507, 93 L.Ed. 618, 619, 620.

We agree with defendant that when the station was constructed it was doubtless anticipated that employees would use the ramp in descending from the platform and that it was not reasonably to be anticipated that they would descend by means of the stringer, which was installed solely as a protection against injury by freight trucks. Under these circumstances the duty of the company would have been fulfilled, inasmuch as it was not negligence to overlook what was not reasonably foreseeable; but if the employees had developed the practice of descending from the platform by stepping onto the stringer, and if the company had knowledge of it, the question of foreseeability disappeared. Therefore, if the company had knowledge that the stringer was commonly used as plaintiff was using it, and that the ramp was not used in descending from the platform, it was under a duty to take reasonable measures to halt the practice or to remedy any conditions which rendered use of the stringer unsafe, just as it had a duty to provide a safe manner of getting down in the first instance.

The rule is stated in 39 C.J. p. 441, as follows: "Where the place of work, machinery, or appliances is reasonably safe and suitable for the purpose for which it was intended, a servant cannot hold his master liable for personal injuries resulting from its inappropriate, unauthorized, unnecessary, careless, improper, or unusual use or test. But when an appliance is improperly used with the knowledge of the master, it makes no difference, so far as

his liability for such improper use is concerned, whether or not it was originally built for such purpose * * *." 56 C.J. S., Master and Servant, § 251, p. 1006; Kaumans v. White Star Gas & Oil Co., 92 Utah 24, 63 P.2d 231, 236.

It was clearly a question of fact whether the evidence brought the case within the operation of this rule. There was evidence of the following facts: When an employee found the west door of the freight room locked from the inside it was necessary to go to the station master's room and from there enter the freight room and unbolt the west door; the north door where the ramp was located was kept locked and plaintiff had no key to that door; the employee, then, desiring to enter the freight room could descend from the platform, as plaintiff did, in order to go to the main south door, or he could go to the north side of the building, walk along the platform, down the ramp, then to the sidewalk at the east end of the building and thence along the south side to the main door. This would be a distance of from 120 to 150 feet. Evidence was given by several trainmen as to the customary practice of employees when they found the west door of the freight room locked. Plaintiff had been working on the Azusa route for about five months. He had descended from the platform in the same manner as on the day of his injury "five, ten or twenty times"—"15 or 20 times"; he did not recall ever having used the ramp. A motorman who had worked the run for a year, and at different other times, and who was working with plaintiff on the day of the injury, testified that the north door was kept locked, the employees had no key, and that the custom and practice, when the west door of the freight room was found locked, was to get off the platform as plaintiff had done, and that he himself had got down from the platform in that manner. There were no steps to use to get off the platform. Another witness who had worked with the company for 16 years testified that he descended from the platform in the same place plaintiff did by stepping onto the stringer. Still another witness who had been a conductor with the company for 33 years and who had worked around the Azusa station "quite a lot," and one stretch for two years and two months, testified that it was his practice to alight from the platform by climbing down as plaintiff had done; that the north door was locked most of the time and he had no key. He also testified that the stringer where plaintiff alighted was "pretty badly worn and battered"; "it is worn here [indicating] by continuous use of the trainmen climbing down there." There was thus evidence that it was the common practice for trainmen to get down from the platform by stepping onto the stringer and from there to the ground, and that it was not the practice of those desiring to go from the platform to the south door to go down the ramp on the north side and around the east end of the building.

It was fairly to be inferred that the company knew of the described practice. In fact, learned counsel for defendant properly, we think, do not question the sufficiency of the evidence to support the implied findings that the practice existed as described, and that the company had knowledge of it.

The parties discuss at length the case of Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497, reversing the Supreme Court of Utah, 112 Utah 300, 187 P.2d 188. Wilkerson sued under the Federal Employers' Liability Act for injuries sustained when he fell into a repair pit maintained by a railroad beneath its tracks. The question was whether there was a practice among the employees to cross the pit on a board as Wilkerson attempted to cross. Guard chains around the pit were maintained by the defendants. In a thorough and forceful opinion the Supreme Court of Utah held there was insufficient evidence to prove the alleged practice, and that maintenance of the guard chains acquitted defendants of the charge of negligence. The United States Supreme Court, the Chief Justice and one Justice dissenting, held there was evidence sufficient to support a finding that the custom existed and that the adequacy of the precautions

taken was one of fact. The courts were in agreement as to the law. They disagreed only as to what constituted substantial evidence as distinguished from a scintilla of evidence. The Utah court said, 187 P.2d at page 195: "It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure." The reversing court quoted this passage and said, 336 U.S. 53, 69 S.Ct. 417, 93 L. Ed. at page 504: "We agree with this last quoted statement of the Utah court, and since there was evidence to support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to direct a verdict in favor of respondent."

It would serve no good purpose to expatiate upon settled principles of law which are not even in disagreement in the case. It cannot be said as a matter of law that the company fulfilled its duty by providing the ramp as a safe means for getting down from the platform when it was known that in common circumstances the employees climbed down by means of the stringer.

[2] Since defendant does not question that the law is as stated, and does not challenge the sufficiency of the evidence to prove the alleged customary practice of its employees, and its knowledge thereof, nothing remains to support a claim of error. Whether use of the stringer, as described, involved unreasonable risk, and the company with knowledge of the use was negligent in permitting the practice of the employees to continue, were questions for the jury.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; SPENCE, J., dissenting.

KOPASZ v. WYMER et al.

Civ. 19543.

District Court of Appeal, Second District, Division 2, California.

May 26, 1953.

Hearing Denied July 22, 1953.

Action for breach of contract. The Superior Court of Los Angeles County, Kurtz Kauffman, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, McComb, J., held that agreement between a beneficiary under will and executor of another beneficiary, the effect of which was to entitle executor to part of property listed as separate property of first beneficiary and to deprive third beneficiary of interest in disputed property, and to deprive Probate Court administering testator's estate from properly performing its duties, and to deprive state and federal government of taxes, was void as being against public policy.

Affirmed.

1. Contracts ⇐108(2)

A contract in which one or more parties agree for valuable consideration to extend or withhold affirmative action as aid in cutting off rights of a legatee or devisee or another not a party to agreement is against public policy and will not be enforced by courts.

2. Contracts ⇐108(2)

Agreement between a beneficiary under will and executor of another beneficiary, the effect of which was to entitle executor to part of property listed as separate property of first beneficiary and to deprive third beneficiary of interest in disputed property, and to prevent Probate Court administering testator's estate from properly performing its duties, and to deprive state and federal government of taxes, was void as against public policy.

Elmer Low, Los Angeles, for appellant.

Hahn & Hahn and David K. Robinson, Pasadena, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the sustaining of her de-

murrer to plaintiff's fourth amended complaint in an action to recover damages for breach of contract, plaintiff appeals.

The gist of the attempted cause of action alleged in the pleading is that by the last will of Lee Canfield, deceased, he left his entire estate, ⅓ to his wife, Alice F. Canfield, ⅓ to his daughter, Marvel, and ⅓ to his daughter, Dorothy. After his death various disputes had arisen between the plaintiff's testatrix, Marvel I. Kopasz, (hereinafter referred to as plaintiff) and Lee Canfield's widow, Alice respecting the ownership of certain property, as to whether it was the separate property of Alice Canfield or whether it was the property belonging to the estate of Lee Canfield. In settlement of such dispute the parties entered into an agreement reading as follows:

"It is hereby agreed by and between Alice F. Canfield and Marvel I. Kopasz, both of the City of Pasadena, County of Los Angeles, State of California, that in the distribution of the Estate of Lee Canfield, deceased, Marvel I. Kopasz shall receive an amount equal to one-third (⅓) of the net estate (wherever situate) available for distribution, together with one-third (⅓) of the property listed as the separate property of Alice F. Canfield, and one-sixth (⅙) of the net sums recovered by Alice F. Canfield predicated upon the theory of gifts of community funds by the deceased.

"Alice F. Canfield agrees to pay Marvel I. Kopasz one-sixth (⅙) of the net sums recovered by her, immediately upon receipt of same, and upon distribution or partial distribution in the estate proceedings to pay Marvel I. Kopasz a sum in an amount, which together with the sum distributed to Marvel I. Kopasz, equals (⅓) of the total estate distributed.

"The purpose of this agreement is to eliminate any possible conflict of interest which might arise concerning assets of the estate, or assets transferred by the decedent during his lifetime by reason of the fact that Alice F. Canfield is the widow of decedent and Marvel I. Kopasz is a daughter of decedent.

"Dated at Pasadena, California, this 13th day of September, 1949."

The complaint also states that during the lifetime of Alice F. Canfield plaintiff made demand on her for delivery of the ⅓ of the property referred to in the aforementioned agreement but that she refused to deliver said property to plaintiff to his damage in the sum of $43,833; that Alice F. Canfield died and a claim was filed with her estate which was duly rejected, whereupon plaintiff prays judgment against the estate of said Alice F. Canfield in the sum of $43,833.33 with interest.

Plaintiff's complaint having been amended four times the trial court sustained without leave to amend a general demurrer to the fourth amended complaint.

The sole issue necessary for us to determine is *whether the complaint stated a cause of action.*

This question must be answered in the negative and is governed by this pertinent rule:

[1] A contract in which one or more parties agree for a valuable consideration to extend or withhold affirmative action as an aid in cutting off the rights of a legatee or devisee or other party not a party to the agreement will not be enforced by the courts because it is against public policy and therefore void. (Gugolz v. Gehrkens, 164 Cal. 596, 603, 130 P. 8, 43 L.R.A. N.S., 575; Scott v. Beams, 10 Cir., 122 F. 2d 777, 784; Vol. II, Restatement of the Law of Contracts, 1932, p. 1082, sec. 577.)

[2] Applying the foregoing rule to the facts alleged in the amended complaint it is evident that the effect of the agreement between plaintiff and Alice Canfield was to provide that plaintiff would get ⅓ of the property listed as the separate property of Alice Canfield which was not actually inventoried in the estate of Lee Canfield and subject to distribution thereunder. The effect of this agreement would be to deprive Dorothy O. Eastman, one of the legatees under the will of Lee Canfield, and not a party to the agreement, of her interest in the disputed property and likewise to de-

prive the Probate Court administering Lee Canfield's estate from properly performing its duties, and deprive the State of California and the United States Government of taxes properly due on said property.

It is thus clear that the agreement was void as against public policy and the trial court properly sustained the demurrer to the pleading without leave to amend.

In view of our conclusions it is unnecessary to discuss other points raised by counsel.

Affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 300

In re MOODY'S ESTATE.

MOODY v. MOODY et al.

Civ. 19415.

District Court of Appeal, Second District, Division 3, California.

June 2, 1953.

Proceeding in the matter of the estate of a decedent. The Superior Court of Los Angeles County, Victor R. Hansen, J., entered an order admitting to probate an instrument offered for probate as a holographic will, and the widow of decedent appealed. The District Court of Appeal, Vallée, J., held that portion of instrument which preceded date carried on reverse side of first sheet, and which provided for devise of home to a beneficiary, a bequest of money to another beneficiary, and for creation of trust for benefit of decedent's children, constituted a component part of will and that such part was entitled to be admitted to probate along with part following such date, each part when taken together constituting entire will of decedent.

Affirmed.

1. Appeal and Error ⇐1008(3)

A reviewing court is not bound by a construction of a document based solely on terms of document without aid of extrinsic evidence.

2. Wills ⇐446

In ascertaining whether a will has been executed in conformity with statutory requirements, a construction favoring validity is preferred.

3. Wills ⇐130

An instrument fails of validity as a holographic will if it bears no date at all and holographic will, in order to comply with requirement that it be dated, must designate, in testator's hand, a certain day, month, and year.

4. Wills ⇐130

Date borne by holographic will need not be actual date of execution and such will need not be "truly dated," nor "correctly dated," but must be merely dated, and a wrong date will not vitiate it as a will.

5. Wills ⇐130

Date borne by holographic will need not be written at same time nor on same day that will or some part of it was written or signed.

6. Wills ⇐130

The use in holographic will of well-known abbreviations such as 11/21/51 or Nov. 10, '51, meaning November 10, 1951, constitutes compliance with requirement that holographic will be dated.

7. Wills ⇐130

In absence of statutory requirement that date borne by holographic will appear at a prescribed position on will, position of date is immaterial, and date may be placed at beginning or at foot or in margin, or in body of will, and need not precede signature.

8. Wills ⇐130

Where a holographic will consists of separate sheets of paper, insufficiency or absence of a date in one part may be remedied by presence of a complete date in another part.

9. Wills ⇐130

Omission of a date from an otherwise valid holographic will may not be supplied by a separate document where there is

nothing to indicate that undated writing is to be read or construed as part of dated writing.

10. Wills ⇐130

The date "Nov. 21," which appeared on obverse side of first sheet of instrument offered for probate as holographic will, was incomplete date in absence of insertion of year, but date "Dec. 3, 1951" which appeared on reverse side of first sheet was a complete date and met requirement that holographic will be dated.

11. Wills ⇐133

Where statute does not appoint where holographic will should be signed, a signing in any part, beginning, end, body or margin, is sufficient if it appears from face of will that signature was so placed with intent that it should serve as a token of execution.

12. Wills ⇐1

The "will" of a person is aggregate of his testamentary intentions, so far as they are manifested in writing, excluding nuncupative wills, duly executed according to statute.

See publication Words and Phrases, for other judicial constructions and definitions of "Will".

13. Wills ⇐97, 446

A will may consist of several sheets of paper, and it does not in and of itself matter that one of such sheets, standing alone would not constitute an executed will, and if it appears that writings were intended to be testamentary court will give effect to intention if it can be done consistently with requirements of statute.

14. Wills ⇐130

Several holographic writings of which one is dated and signed and the others are only signed by testator may be, in their entirety, a will.

15. Wills ⇐130, 133

If papers are all holographic and there is a dating and signing somewhere among them, it is immaterial when or where dating or signing was done so long as it may be reasonably inferred that testator meant all papers together to constitute his will and that signature was written with intent that it should there serve as token of execution.

16. Wills ⇐130

Entire holographic will need not be written on same date and its writing need not have been a single continuous performance.

17. Wills ⇐98

In law of wills integration as distinguished from incorporation by reference occurs when there is no reference to a distinctly extraneous document but it is clear that two or more separate writings are intended by testator to be his will.

18. Wills ⇐130

Portion of instrument offered for probate as holographic will, which preceded date carried on reverse side of first sheet, and which provided for devise of home to a beneficiary, a bequest of money to another beneficiary, and for creation of trust for benefit of testator's children, constituted component part of will as testator intended to execute will, and part preceding such date was entitled to be admitted to probate along with part following such date, each part when taken together constituting entire will of testator.

19. Wills ⇐130

A holographic will need not be written in its entirety with same ink.

Courtney A. Teel, East Pasadena, for appellant.

J. B. Tietz and Edward Raiden, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by the widow of Guy W. Moody, deceased, from that part of an order of the probate court wherein it was adjudged that an instrument offered for probate as a holographic will was entirely written, dated, and signed by the deceased, constituted his will, and that it be admitted to probate.

The instrument consisted of two sheets of paper and is as follows:

"[Obverse Side of First Sheet]

Nov 21
Thanksgiving Day

To Whom it May Concern:
I Guy W Moody, sober
but very lonely for my
family do hereby will
will to
and leave to the following
People.

Felix J Stansauk—The home in which they are now living—cancel the balance of their mortgage.

My Brother Homer Lee Moody
The Service Station Lease Equipment etc.

My Sister $10,000 Mrs. Ethel Lyons

Mrs. Viola Swanson CL 750991 $5000.00 a wonderful Christian and good friend
who deserves some happiness

[Base of Obverse Side of First Sheet]

[Reverse Side of First Sheet]

Set up a trust for my 3 children and make sure it goes for their college education my Insurance will probably take care of this.

Monday
Dec 3, 1951

Thomas J Moody—$ 5000.00
My Sister
Venora Smith—Hughes Springs
Texas
5000.00

The balance of the estate should go to my wife so she can have a luxurious life as she no doubt has in mind. I have many many regrets for my past, but no one can erase this now

Signed—Guy W Moody

[Base of Reverse Side of First Sheet]

[Second Sheet]
The rest of my
belongings are at the
Valley Motel Montrose

Life is too very lonely
without my wife and
family

Guy W Moody"

"A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed." Probate Code, § 53.

Appellant's contention is that the writing preceding the date December 3, 1951, is not part of the will. She says that Thanksgiving Day in 1951 did not fall on November 21st (it fell on November 22d); that the partial date and the complete December date demonstrate two wholly different operations, obviously written on different dates; that the writing preceding the December date fails as a will because it is neither dated nor signed; and it is only that part of the writing which follows the December date that is the will.

It is conceded that the instrument was entirely written by the hand of the deceased and that the signatures thereon are his.

[1, 2] The decision of the probate court was based solely on the writings. A reviewing court is not bound by a construction of a document based solely on the terms of the written instrument, without the aid of extrinsic evidence. In re Estate of Wunderle, 30 Cal.2d 274, 280, 181 P.2d 874. The validity of that part of the instrument in question must therefore be determined entirely by reference to the applicable statutes and principles of law. In ascertaining whether a will has been executed in conformity with statutory requirements, a construction favoring validity is preferred. In re Estate of Janes, 18 Cal.2d 512, 515, 116 P.2d 438.

[3–10] An instrument fails of validity as a holographic will if it bears no date at all. In re Estate of Martin, 58 Cal. 530,

532.[1] A holograph, in order to comply with the requirement that it be dated, must designate, in the testator's hand, a certain day, month, and year—the date must be complete. In re Estate of Price, 14 Cal. App. 462, 463–467, 112 P. 482.[2] The date need not be the actual date of the execution. The instrument need not be "truly dated," nor "correctly dated," it need be merely dated; a wrong date will not vitiate it as a will. In re Estate of Fay, 145 Cal. 82, 83–87, 78 P. 340.[3] The date need not be written at the same time nor on the same day that the will or some part of it was written or signed. In re Estate of Clisby, 145 Cal. 407, 78 P. 964.[4] The use of well-known abbreviations, such as 11/21/51 or Nov. 10, '51, meaning November 10, 1951, constitutes compliance with the requirement. In re Estate of Lakemeyer, 135 Cal. 28, 66 P. 961.[5] In the absence of a statutory requirement that the date appear at a prescribed position on the instrument—there is none in this state—the position of the date is immaterial. It may be placed at the beginning, or at the foot, or in the margin, or in the body of the instrument. Lagrave v. Merle, 5 La.Ann. 278, 52 Am. Dec. 589.[6] It need not precede the signature. Lagrave v. Merle, supra.[7] Where a holographic will consists of separate sheets of paper, the insufficiency or absence of a date in one part may be remedied by the presence of a complete date in another part. In re Estate of Plumel, 151 Cal. 77, 90 P. 192.[8] The omission of a date from an otherwise valid holographic will may not be supplied by a separate document where there is nothing to indicate that the undated writing is to be read or construed as a part of the dated writing. In re Estate of Wunderle, 30 Cal.2d 274, 283, 181 P.2d 874. It follows that "Nov 21" is an incomplete date, and that "Dec 3, 1951" is a complete date and meets the requirement that the instrument be dated.

[11] A holographic will is signed if the signature is written by the testator himself; and since the statute does not appoint where it should be signed, a signing in any part—beginning, end, body, or margin—is sufficient if it appears from the face of the instrument itself that the signature was so placed with the intent that it should serve as a token of execution. In re Estate of Manchester, 174 Cal. 417, 163 P. 358, 360, L.R.A. 1917D, 629.[9] In re Estate of Man-

1. Accord: In re Estate of Vance, 174 Cal. 122, 123, 162 P. 103, L.R.A.1917C, 479; 1 Page on Wills, Lifetime ed., 700, § 388.

2. Accord: In re Estate of Vance, 174 Cal. 122, 124–126, 162 P. 103, L.R.A.1917C, 479; In re Estate of Carpenter's Estate, 172 Cal. 268, 270, 156 P. 464, L.R.A. 1916E, 498; In re Estate of Maguire, 14 Cal.App.2d 388, 58 P.2d 209; 68 C.J. 720, § 403; 1 Page on Wills, Lifetime ed. 700, § 388. See annotations 104 Am. St.Rep. 28; 147 A.L.R. 903.

3. Accord: In re Estate of Vance, 174 Cal. 122, 124, 162 P. 103, L.R.A.1917C, 479; In re Estate of Wilkinson, 113 Cal.App. 645, 647, 298 P. 1037; In re Estate of Clark, 55 Cal.App.2d 85, 87, 129 P.2d 969; Jones v. Kyle, 168 La. 728, 123 So. 306, 307; 1 Page on Wills, Lifetime ed. 702, § 388. See Annotations 104 Am.St. Rep. 28; 147 A.L.R. 909.

4. Accord: Succession of Jones, La.App., 38 So.2d 797, 799; annotation 147 A.L. R. 913.

5. Accord: In re Estate of Chevallier, 159 Cal. 161, 170, 113 P. 130; In re Estate of Olssen, 42 Cal.App. 656, 658, 184 P. 22; 1 Page on Wills, Lifetime ed. 700, § § 388; 5 Cal.L.Rev. 266. See annotations 104 Am.St.Rep. 28; 6 A.L.R. 1455; 147 A.L.R. 906.

6. Accord: Succession of Fuqua, 27 La. Ann. 271, 273; Zerega v. Percival, 46 La. Ann. 590, 15 So. 476, 478–480; Jones v. Kyle, 168 La.Ann. 728, 123 So. 306, 307. See annotations L.R.A.1916E, 504; 147 A.L.R. 910.

7. Accord: 1 Page on Wills, Lifetime ed., 702, § 388. See Annotations 104 Am.St. Rep. 29; 147 A.L.R. 910.

8. Accord: Lagrave v. Merle, 5 La.Ann. 278, 52 Am.Dec. 589. See annotations L.R.A.1916E, 505; 147 A.L.R. 911.

9. Accord: In re Stratton, 112 Cal. 513, 518, 519, 44 P. 1028; In re Estate of Camp, 134 Cal. 233, 237, 66 P. 227; In re Estate of McMahon, 174 Cal. 423, 163 P. 669, L.R.A.1917D, 778; In re Estate of Henderson, 196 Cal. 623, 635, 238 P. 938; In re Estate of Button, 209 Cal. 325, 329, 287 P. 964; In re Estate of Brooks, 214 Cal. 138, 4 P.2d 148; In re Estate of Kinney, 16 Cal. 2d 50, 52–56, 104 P.2d 782; In re Es-

chester, supra, the court declared: "The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

[12, 13] The will of a person is the aggregate of his testamentary intentions, so far as they are manifested in writing (excluding noncupative wills), duly executed according to the statute;[10] it is the sum total of the testamentary writings intended by the testator to constitute his will. It may consist of several sheets of paper, and it does not in and of itself matter that one of such sheets standing alone would not constitute an executed will. Mitchell v. Donohue, 100 Cal. 202, 207–208, 34 P. 614.[11] If it appears that the writings were intended to be testamentary, the court will give effect to the intention if it can be done consistently with the requirements of the statute.[12]

[14–16] Several holographic writings of which one is dated and signed and the others are only signed, by the testator, may be, in their entirety, a will. In re Estate of Hartley, 181 Cal. 469, 184 P. 950.[13] If the papers are all holographic and there is a dating and signing somewhere among them, it is immaterial when or where the dating or signing was done so long as it may be reasonably inferred that the testator meant all the papers together to constitute his will and that the signature was written with the intent that it should there serve as a token of execution. In re Estate of Merryfield, 167 Cal. 729, 141 P. 259.[14] It is not essential that the entire will be written on the same date; its writing need not have been a single, continuous performance. In re Estate of Clisby, 145 Cal. 407, 409, 78 P. 964.[15] Sign-

tate of England, 85 Cal.App. 486, 259 P. 956; In re Estate of Sullivan, 94 Cal.App. 674, 676–677, 271 P. 753; In re Estate of Wallace, 100 Cal.App.2d 237, 233 P.2d 284; In re Estate of Bauman, 114 Cal.App. 551, 300 P. 62; In re Estate of Kaminski, 45 Cal.App.2d 779, 781, 115 P.2d 21; In re Estate of Gardener, 84 Cal.App.2d 394, 190 P.2d 629; In re Estate of Donoho, Myr.Prob. 140; In re Estate of Barker, Myr.Prob. 78; In re Estate of Johnson, Myr.Prob. 5; In re Harris' Estate, 38 Ariz. 1, 296 P. 267; Murguiondo v. Nowlan's Ex'r, 115 Va. 160, 78 S.E. 600; Forrest v. Turner, 146 Va. 734, 133 S.E. 69; Fenton v. Davis, 187 Va. 463, 47 S.E.2d 372, 375–376; Hall v. Brigstocke, 190 Va. 459, 58 S.E. 2d 529, 532–533, 19 A.L.R.2d 921; Weems v. Smith, 218 Ark. 554, 237 S.W. 2d 880, 883; In re Brandow's Estate, 59 S.D. 364, 240 N.W. 323; In re McNair's Estate, 72 S.D. 604, 38 N.W.2d 449; Reagan v. Stanley, 79 Tenn. 260; Lawson v. Dawson's Estate, 21 Tex.Civ.App. 361, 53 S.W. 64; 1 Page on Wills, Lifetime ed. 705, § 391; 5 Cal.L.Rev. 354; 17 Cal.L.Rev. 297, 301. See annotations 104 Am.St.Rep. 30; L.R.A.1916E., 499, 503; L.R.A.1917D, 632; 29 L.R.A.,N.S., 64; 46 L.R.A.,N.S., 552; Ann.Cas.1916E, 140; Ann.Cas.1918B, 230; 29 A.L.R. 891, 896; 19 A.L.R.2d 926.

10. Lord Penzance in Lemage v. Goodban, Law.Rep. 1 P. & M. 57.

11. Accord: In re Estate of Taylor, 126 Cal. 97, 98, 58 P. 454; In re Estate of Merryfield, 167 Cal. 729, 731, 141 P. 259; In re Estate of Henderson, 196 Cal. 623, 633, 238 P. 938; In re Estate of Johnston, 64 Cal.App. 197, 200, 221 P. 382; In re Estate of Morrison, 98 Cal.App.2d 380, 220 P.2d 413; Reagan v. Stanley, 79 Tenn. 316; Alexander v. Johnston, 171 N.C. 468, 88 S.E. 785, 786; 16 Cal.L. Rev. 154. See annotations 30 A.L.R. 424; 71 A.L.R. 530.

12. Annotation 1 Cof.Prob.Dec. 432.

13. Accord: In re Estate of Olssen, 42 Cal.App. 656, 184 P. 22.

14. Accord: In re Estate of Skerrett, 67 Cal. 585, 8 P. 181; In re Estate of Johnston, 64 Cal.App. 197, 221 P. 382.

15. Accord: In re Estate of Dumas, 34 Cal.2d 406, 210 P.2d 697; Jones v. Kyle,

ed but undated clauses added to a dated holograph have been admitted to probate as a part of the will on the theory that it is not essential that the entire will be written on the same date. In re Estate of Clisby, 145 Cal. 407, 78 P. 964.[16]

In Succession of Guiraud, 164 La. 620, 114 So. 489, 490, referred to with approval in Re Estate of Finkler, 3 Cal.2d 584, 601, 46 P.2d 149, it was said:

"It is not necessary for the validity of an olographic will that it be written on the same day, at one time, and in the same ink. It suffices that it be written entirely, dated, and signed by the hand of the testator."

Our statute comes from the Code Napoleon. The statute of Louisiana also from that Code is identical with ours. In Succession of Cunningham, 142 La. 701, 77 So. 506, 510, the court quoted from the commentators on article 970 of the Code Napoleon, the following:

"'"It must be remarked that the testator is not bound to write his dispositions in one context or in one day. Article 970 does not require for the olographic testament, as article 976 for the act of superscription of a mystic testament, that it be done without interruption or turning aside to other acts. * * * But when the testator has taken several days to make his testament, the accomplishment of the formality of the date and of the signature must be particularly ascertained. * * * The testator, even after having taken several days to write his dispositions can limit himself to one date; that is to say, to the date of the day on which he has completed them, and to a single signature for the whole. * * *"'"[17]

In Re Estate of Skerrett, 67 Cal. 585, 8 P. 181, a dated copy of a deed of gift and an undated letter, both in the handwriting of the testator, were attached and addressed to the testator's sister. The deed was invalid because it was not delivered. The court held that the letter and the copy of the deed together constituted a valid holographic will, saying, 67 Cal. at page 588, 8 P. at page 183: "Neither the copy of the deed nor the letter, taken by itself, constitutes a will; the one is not testamentary in its character, the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character." The holographic will in In re Stratton, 112 Cal. 513, 44 P. 1028, 1029, did not name a residuary legatee in the body of the instrument. Following the body there appeared the following:

"Mrs Georgiana Hanham Stratton
"my Husband
"Thomas Stratton."

The court held that the words "my husband Thomas Stratton" should be construed as part of the will, and that the husband was the residuary legatee, saying, 112 Cal. at page 518, 44 P. at page 1029: "There is no legatee named in the body of this concluding portion of the will, but underneath, and at the left hand thereof, are written the words, 'my husband Thomas Stratton.' Taken by themselves, these words have no apparent connection with the other portions of the will, but the testatrix must be deemed to have written them with the intention that some effect should be given them, and that intention, so far as it can be gathered from the will itself and the circumstances under which it was executed, is to be ascertained by the court, and effect given thereto accordingly. The order in which the words of a will are written is not determinative of the testator's intention, and, under a well-recognized rule, this order will be transposed, if thereby the intention of the testator can be ascertained."

In Re Estate of Merryfield, 167 Cal. 729, 141 P. 259, three sheets of paper torn from a writing pad were offered for probate as

168 La.Ann. 728, 123 So. 306, 307; Succession of Smart, 214 La. 63, 36 So.2d 639, 641. See annotation L.R.A.1916E, 504.

16. Accord: LaGrave v. Merle, 5 La.Ann. 278, 52 Am.Dec. 589.

17. See History of the Law of Holographic Wills in "The Will of George Washington Deceased", 5 Lawyer & Law Notes, No. 1, p. 24 (1951); 28 Yale L.J. 72.

the will of the deceased. The first sheet was neither dated nor signed; the second was signed but imperfectly dated; the third was dated and signed. The third sheet was complete as a holographic will but did not mention certain heirs named in the other sheets. The court held the three sheets constituted one instrument; that they were to be read and construed together as one harmonious, homogeneous will. In Re Estate of Henderson, 196 Cal. 623, 238 P. 938, the document consisted of a single sheet so folded as to make four pages. The first page contained a date, bequests, and the signature at the end of the page. The last page was in the form of a letter to the daughter of the deceased, requesting her to make a gift to the son of the deceased who had not been mentioned on the first page. The writings on the first and last page were held to constitute a harmonious holographic will. In Re Estate of Button, 209 Cal. 325, 287 P. 964, the document was in the form of a letter. It consisted of four pages written on both sides of two sheets of paper. It was not signed at the end. The signature was on the left margin of the last page. It was held that the signature was sufficient and that the two sheets constituted the will.

In Re Estate of Dumas, 34 Cal.2d 406, 210 P.2d 697, the instrument admitted to probate consisted of three papers all written by the testatrix. The first page was written on January 20, 1935, in a greenish-blue ink. It was dated at the top and headed "The Last Will and Testament of Nellie Dumas." There followed recitals, bequests, and the naming of executors. The document then stated "In testamony I set my name this 20th day of January, 1935", and was signed by the testatrix, giving her address. A blank space of several inches followed thereafter. The second and third pages were written nine years after the first page and were in black ink. Minute spots of greenish-blue ink appeared on the reverse side of the third sheet. The second page was completely filled with bequests of mentioned property to named persons. There as an interlineation on one item that was made by the testatrix some time after the second and third sheets were written. The second page was neither dated nor signed. The third page continued with the bequests and ended about three-fourths of the way down the paper with "signed Nellie Dumas" and her address. No date appeared thereon. When found, the three sheets were in an envelope; they were not mechanically fastened together but were folded in a unit. The court held the three papers considered together constituted one continuous and complete document—a valid holographic will—and that the continuity was not destroyed by the time interval between the writing of the first and second and third sheets.

In Re Estate of Swendsen, 43 Cal.App.2d 551, 111 P.2d 408, referred to with approval in Re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874, the holograph was written on two separate sheets of paper, but only one of them was dated. It was not apparent from looking at the papers that they were connected in any way. Both were admitted to probate on the testimony of two witnesses who stated the testator declared that the two pieces of paper constituted his will. In Re Estate of Morrison, 98 Cal.App.2d 380, 220 P.2d 413, the question was whether two sheets of paper constituted a holographic codicil to a witnessed will. The first sheet was dated and signed by the testator; it was testamentary in character but did not name any beneficiaries. The second sheet was neither dated nor signed; it named various persons with monetary sums set opposite their respective names. The court held the two sheets were integrated and constituted a valid holographic codicil.

[17] The real question here is whether the writing preceding the date "Dec. 3, 1951" constitutes a component part of the will of the testator as he intended to execute it. The problem is one of integration. Integration is the association of disconnected writings by their internal sense, their coherence, or adaptation of parts. "In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended

by the testator to be his will. [Citations] Thus several writings, connected by sequence of thought [citations], folded together [citation] or physically forming one document [citations], have been admitted to probate as constituting an holographic will." In re Estate of Wunderle, 30 Cal.2d 274, 281, 181 P.2d 874, 878.

[18, 19] Application of the stated principles to the sheet of paper under consideration leads unerringly to the conclusion that the writings preceding and following the date "Dec. 3, 1951" together constitute one single instrument expressive of the will of the testator. It is patent that from the standpoint of the testator the writing between the date December 3, 1951, and his signature did not constitute a complete will, but that he intended the part preceding the December date to constitute a part thereof. It is reasonably clear that had he not intended the writing preceding the date December 3, 1951, to be part of his will, he would not have written that date and the provisions immediately following it on the same sheet of paper. Both parts are wholly testamentary in character; they are integrated by their context; they are congruous, continuous, and make a consistent whole; they were obviously written for the single purpose of disposing of the testator's estate. The writing preceding the date "Dec. 3, 1951" appears to have been written with different ink from the writing following that date. This fact is not of material significance. A holographic will need not be written in its entirety with the same ink.[18] The face of the writings discloses that the name of the deceased, written by him at the base of the reverse side of the first sheet, was intended by him as an executing signature to all that preceded it on both sides of that sheet. The second sheet need not be considered since appellant makes no point with respect to its admission to probate.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

18. In re Estate of Dumas, 34 Cal.2d 406, 413–414, 210 P.2d 697; In re Estate of Taylor, 126 Cal. 97, 99, 58 P. 454; Succession of Smart, 214 La. 63, 36 So. 2d 639, 641.

HARRIGAN et al. v. CHAPERON.

Civ. 15358.

District Court of Appeal, First District, Division 2, California.

May 27, 1953.

Rehearing Denied June 26, 1953.

Hearing Denied July 22, 1953.

Action by lessors against lessee for damages caused by fire in leased building. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., rendered judgment for lessee on finding that lessors had failed to prove actionable negligence and lessors appealed. The District Court of Appeal, Nourse, P. J., held report of city fire inspector, who arrived after the fire was well under control, to effect that "evidence revealed" that fire was caused by lessee's employee while working on motor vehicle with welding torch thereby causing gasoline spilled on floor to become ignited was purely hearsay statement based on information from undisclosed source and was not properly admissible as entry in official book.

Judgment affirmed.

1. Landlord and Tenant ⇐55(3)

In action against lessee for damages caused by fire in leased building, burden of proof was on lessors to show negligence of lessee.

2. Evidence ⇐318(4), 333(1)

Report of city fire inspector who arrived after fire was well under control to effect that "evidence revealed" that fire was caused by lessee's employee while working on motor vehicle with welding torch, thereby causing gasoline spilled on floor to become ignited, was purely hearsay statement based on information from undisclosed source and was not admissible as entry in official book. Code Civ.Proc. § 1920.

Rettig & Dunn, San Francisco, for appellants.

Allan Sapiro, San Francisco, Warren Sapiro, South San Francisco, Leonard J. R. Davis, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued for damages caused by a fire in a portion of a building owned by them and leased in part to defendant. The theory of their action was that the fire was caused by an employee of defendant while working on a motor vehicle with a welding torch thereby causing gasoline spilled on the floor to become ignited. The fire occurred December 7, 1945; the complaint was filed July 1, 1948; the cause was tried September 20, 1951. Possibly because of this delay no witness to the fire was produced. The trial was held by the court without a jury. The defendant appeared without counsel. Judgment went for the defendant on findings that plaintiffs had failed to prove actionable negligence.

The appeal rests on the sufficiency of the evidence to support these findings. Appellants rest upon the testimony of a city fire inspector who arrived after the fire was "well under control" and "would not have been" in progress at the time. His testimony was based wholly on statements he had received from another member of the fire department and the report stated:

"Evidence reveals that Harry Price a welder had been working on the back of a Yellow Taxi Lic BE PC CC 709 with a welding torch when the sparks ignited some gasoline spilt on the floor from the cab which had been jacked up on the side opposite the gasoline intake allowing gasoline to spill on the floor causing a spark from the welders torch to ignite it and cause the fire."

[1] The evidence does not disclose and no testimony was offered tending to show what the "evidence" was that revealed these facts. It was purely a hearsay statement on the part of the inspector, and the trial court so construed it. The burden of proof was on appellants to show negligence and, if the fire was caused in the manner stated in the report it was the burden of appellants to prove it.

[2] Appellants cite section 1920, Code of Civil Procedure, providing that certain entries in official books are primary evidence of the facts stated therein. That section would be applicable here if the inspector's report contained any statement of facts. Here the statement contains nothing more than a hearsay rumor based on information from an undisclosed source.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.



MOSS ESTATE CO. v. ADLER.
In re RIESE'S WILL.*

Civ. 4636.

District Court of Appeal, Fourth District, California.

May 27, 1953.

Hearing Granted July 22, 1953.

Action brought by plaintiff to quiet title to water well located on plaintiff's property approximately fifty feet from common boundary line between property of plaintiff and defendant, wherein defendant answered with a general denial and alleged by way of cross complaint that well had been drilled by common lessee and that defendant claimed interest in well and water taken, and to be taken in future, from well. The Superior Court, Kern County, rendered judgment for plaintiff and denied defendant a new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that under circumstances it was error to refuse to permit defendant to file an amended answer, wherein it alleged that corporate plaintiff's secretary, while occupying fiduciary relationship to defendant, had procured execution of common lease by representing that well would be drilled upon common dividing line for joint benefit of adjoining parcels of land owned by plaintiff and defendant.

Reversed.

1. Quieting Title ⇐34(1, 5)

In action to quiet title brought for purposes of determining any adverse claim of defendant, plaintiff is not ordinarily required to set forth nature of defendant's claim, however where clear record title is

* Subsequent opinion 261 P.2d 732.

in defendant and plaintiff cannot show title in himself until he has successfully attacked his adversary's title, he must allege and plead pertinent facts relied upon to show fraud or other ground upon which he relies. Code Civ.Proc. § 738.

2. Quieting Title ⇐43

In action to quiet title, where complaint is silent as to source of plaintiff's title, general denial that plaintiff is owner or entitled to possession is sufficient to raise issue of fraudulent transfer, without specific allegation.

3. Equity ⇐66

A party who requests equitable relief must satisfy equitable claims interposed by opposing party.

4. Quieting Title ⇐42

Under circumstances of action, brought by plaintiff to quiet title to water well located on plaintiff's property approximately fifty feet from common boundary line between property of plaintiff and defendant, wherein defendant answered with a general denial and alleged by way of cross complaint that well had been drilled by common lessee and that defendant claimed interest in well and water taken, and to be taken in future, from well, it was error to refuse to permit defendant to file an amended answer, wherein it alleged that corporate plaintiff's secretary, while occupying fiduciary relationship to defendant, had procured execution of common lease by representing that well would be drilled upon common dividing line for joint benefit of adjoining parcels of land owned by plaintiff and defendant.

L. W. Wrixon, San Francisco, Joseph J. Yovino-Young, Oakland, and Deadrich, Gill & Bates, Bakersfield, for appellant.

West, Vizzard, Howden & Baker, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent, on December 4, 1950, brought this action to quiet title to a water well physically located approximately 50 feet from the common boundary line between the property of plaintiff and defendant and on property owned by plaintiff. The complaint is in the usual form. Defendant's answer, filed February 13, 1951, denies generally the allegations of the complaint and alleges by way of cross-complaint that plaintiff, on January 1st, 1947, leased, for a ten-year period, a portion of its property to Mesa Farms; that the lessee drilled a water well thereon and installed and maintained an extensive irrigation distributing system, not only on plaintiff's property but also on defendant's property, which land the lessee leased from defendant; that defendant therefore not only claimed an interest in the lands, well, and subterranean waters underlying plaintiff's land but sought an order declaring defendant's rights in and to *the water taken and to be taken in the future* from the well; and sought judgment against plaintiff for the fair value of subterranean waters taken by plaintiff from the lands of defendant since January 1, 1947.

On April 16, 1952, more than one year later, defendant moved for leave to file an amendment to the answer, alleging generally that in 1946, one W. M. Fisher, Secretary of the Moss Estate Co., acted as counsellor and financial advisor for defendant concerning her properties; that defendant reposed confidence in him; that in 1946, relying thereon, Fisher induced defendant to execute the lease of her lands to an unknown lessee but in the name of Fisher, who represented that the well and irrigating system would be drilled upon the common dividing line and for the joint benefit of the adjoining parcels of land owned by plaintiff and defendant, and that the sum of $10,000 should be paid by the lessors to Mesa Farms for such improvements upon termination of the two leases; that these representations were false; and that she did not discover their falsity until March 25, 1950. The claim is for damages for $15,000 for such false representations and by reason of the unjust enrichment of plaintiff due to the fact that the well was drilled 50 feet from the common dividing line and upon plaintiff's property. Defendant seeks an order declaring her rights *in and to the water taken and to be taken in the future,* for judgment against

the plaintiff, and for the fair value of the subterranean waters already taken.

In opposition to the motion, plaintiff's attorney filed an affidavit alleging that defendant unduly delayed any request for permission to file an amended answer; that on March 14, 1951, a request to set the cause for trial was made; that defendant demanded a jury trial on March 28, 1951; that the action was set for trial on April 28, 1952, and notice thereof was given defendant on January 24, 1952; that on February 29, 1952, counsel for defendant wrote counsel for plaintiff confirming an agreement that if defendant desired to amend the answer and cross-complaint such amendment would be forthcoming within sixty days of the date of the letter; that the cause had been at issue for 13 months and on April 16, 1952, defendant, for the first time, raised the issue of fraud in connection with the transaction; and that the filing of the amendment would require additional investigation by plaintiff to disprove the charges. Request for a denial of the motion was made. After a full hearing on April 21, 1952, the request to file the amended answer was denied. The matter came on for trial on April 29, 1952, without a jury. Evidence was taken on behalf of plaintiff. Defendant produced certain evidence, and again requested the court to file the amended answer, which request was denied. Defendant made an offer of proof generally in accordance with the allegations of the proposed amended answer, which offer was rejected. Judgment was entered in favor of plaintiff as prayed.

Two issues are presented on this appeal. (1) Under the state of the pleadings, did the trial court commit error in refusing to admit the evidence of fraud offered by appellant? (2) Did the trial court commit error in refusing to file the amended answer?

[1] Ordinarily, in an action to quiet title brought for the purpose of determining any adverse claim of the defendant the plaintiff is not required to set forth the nature of the defendant's claim. However, under sec. 738, Code Civ.Proc., where a clear record title is in the defendant and plaintiff cannot show title in himself until he has successfully attacked his adversary's title, he must allege and plead the pertinent facts relied upon to show the fraud or other ground upon which he relies. Kroeker v. Hurlbert, 38 Cal.App.2d 261, 267, 101 P.2d 101. Conversely, it has been held in United Land Association v. Pacific Improvement Co., 139 Cal. 370, 378, 69 P. 1064, 72 P. 988, affirmed in United Land Association v. Abrahams, 208 U.S. 614, 28 S.Ct. 569, 52 L.Ed. 645, that in a suit to quiet title the defendant could not be called upon to do any more than negative the plaintiff's cause of action unless he seeks to avail himself of an equitable title against the legal title of the plaintiff, which he must specifically plead.

[2] Certain exceptions to this general rule are indicated. See Banning v. Marleau, 121 Cal. 240, 53 P. 692; 12 Cal.Jur. 1056, sec. 95, and cases cited; and Bird v. Murphy, 72 Cal.App. 39, 236 P. 154, where it is said, quoting from syllabus No. 1:

> "In an action to quiet title to real property, where the complaint contains the simple allegations of a suit to quiet title but is silent as to the source of plaintiff's title, a general denial of plaintiff's allegations as to the ownership and possession of the property in question is sufficient to raise the issue of a fraudulent transfer to plaintiff, even though the allegations of defendant's cross-complaint are insufficient for that purpose, particularly where the sufficiency of such answer and cross-complaint are not attacked, by demurrer or otherwise."

In the instant case plaintiff's complaint was factually the same as there involved. Defendant's answer is a general denial of plaintiff's allegation of ownership of the well. The cross-complaint alleged certain facts pertaining to the two written leases involved. It alleged that the lessee drilled a well 50 feet from the common boundary line; that under the terms of plaintiff's lease the lessee was obligated to drill the well and install an extensive irrigating system on defendant's adjoining land; that water was pumped from said well and in so doing subterranean waters were taken

from defendant's land by plaintiff without the consent of defendant; that defendant claims a right and interest in the land, wells and subterranean waters underlying the lands of plaintiff so long as said well remains in use. Then follows a prayer for an order of the court declaring *defendant's rights therein,* for judgment for the fair value of the subterranean waters taken by plaintiff from defendant's lands since January 1, 1947, and for general relief. (At the trial, request for money damages was waived by counsel for defendant.) No demurrer was interposed to this cross-complaint. Plaintiff answered and denied generally these allegations and alleged that whatever water was taken from said well was withdrawn with the knowledge and consent of cross-complainant.

[3] It does appear that the pleadings in the instant case come well within the facts recited in the Bird case. See, also, Howe v. Brock, 86 Cal.App.2d 271, 272, 194 P.2d 762; Woodcock v. Petrol Corporation, 48 Cal.App.2d 652, 656, 120 P.2d 889; and District Bond Company v. Pollack, 19 Cal. 2d 304, 307, 121 P.2d 7, 9, where it is said: "A party who requests equitable relief must satisfy the equitable claims interposed by the opposing party. * * * The trial court could not quiet appellant's title to the property without protecting the interests of respondent therein." (Citing cases.) To the same effect are Richman v. Bank of Perris, 102 Cal.App. 71, 83, 282 P. 801; and Peterson v. Gibbs, 147 Cal. 1, 5, 81 P. 121.

Here, as in the Bird case, it may be questioned whether the cross-complaint, as such, would be sufficient to constitute a pleading alleging fraud on the part of plaintiff, but plaintiff was there informed as to the nature of defendant's claim to a right in and to the well, and to defendant's claimed proportionate share in the production of water therefrom by reason of some alleged leasehold agreement. Many of the facts submitted in the offer of proof, which would have been admissible and material under the pleadings, were stipulated to by the parties, but the evidence which might have afforded defendant any equitable relief, as suggested in the amended answer, was refused.

Having in mind the allegations of the proposed amended answer, we shall determine whether it was an abuse of discretion to deny defendant's motion under the circumstances related. It does appear that there was considerable delay on the part of defendant in making the motion and that counsel for defendant may, or should have had knowledge of the alleged facts at the time he filed the original answer. However, these facts are not conclusive.

In 21 Cal.Jur. p. 204, sec. 140, it is said:

> "A court is rarely justified in denying leave to amend so as to obviate an objection that the facts constituting a defense are not embraced within the issues or properly pleaded. A motion to amend may not be denied merely upon the ground that the amendment, if allowed, might defeat a recovery by plaintiff, or that the subject matter thereof was known to defendant at the time he filed his original answer." See, also, Woodcock v. Petrol Corporation, supra; and Tolbard v. Cline, 180 Cal. 240, 245, 180 P. 610.

In the instant case, by the answer and cross-complaint, it was clearly shown that defendant claimed some interest in the well by reason of the execution of the joint leases. Plaintiff apparently knew of these facts since plaintiff's complaint was verified by its secretary, Mr. Fisher, who defendant claims misrepresented the facts while acting as defendant's confidential advisor in the matter of the execution of the lease, and who was present in court at the trial. It would appear to us that plaintiff would suffer no great inconvenience or prejudice by the filing of the amended answer.

Since the real gist of plaintiff's action is to deny to defendant any right or interest in or to the well it does seem just that if defendant can establish some right under the amended answer by virtue of some fraud or misrepresentation of plaintiff's agent who, it is claimed, occupied a fiduciary relationship with defendant in making the representation, this alleged claim should

be fairly determined by the trial court before granting to plaintiff, in this equitable action, the relief prayed for by it.

On the motion for permission to amend the answer the proffered evidence of defendant was set forth in detail and, if true, it might call for a full consideration of defendant's claim as against plaintiff's claim before it would be entitled to have all of defendant's rights and interests in the well unconditionally and forever foreclosed.

Copies of letters between Fisher and defendant are attached as exhibits. They indicate that Fisher had, for many years, transacted for defendant practically all of the business affairs of the Riese estate in connection with the lease and property here involved; that he was at the same time secretary for plaintiff corporation. Witnesses stated that Fisher falsely represented to defendant that the well must be drilled upon plaintiff's property because of the elevation of the land; that Fisher demanded from defendant five to ten per cent commission for his services in negotiating the lease because defendant stood to make approximately $8,000 and receive other reversionary benefits from the lease; that defendant refused to pay a commission because Fisher was not a licensed real estate broker; that Fisher refused to divulge the name of the lessee and told defendant he would take the lease in his own name and would sublease it because that was the only way he could obtain his commission in the transaction; that in 1950 she learned from the lessee that it would have preferred drilling the well on defendant's land because it would have been more feasible; that she then accused Fisher of misrepresenting the facts and that in May, 1950, he endeavored to have defendant sign an agreement quitclaiming any interest which the estate might have in the well located on plaintiff's property, but that defendant refused to do so and that this action followed.

[4] Under the circumstances related, it appears to us that the trial court abused its discretion in refusing the motion to file the amended answer. The ends of justice would have been better met by allowing the amendment and considering defendant's evidence in connection with plaintiff's claim to the uninterrupted use of the well. It does not appear that any unreasonable delay or inconvenience would have been occasioned by so doing. The motion for new trial should have been granted.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.



118 Cal.App.2d 321

FORBES v. FORBES.

Civ. 15409.

District Court of Appeal, First District, Division 2, California.

June 4, 1953.

Divorce action by husband. Wife cross-complained for divorce on ground of extreme cruelty. The Superior Court, City and County of San Francisco, granted wife divorce, and wife appealed from that part of decree which settled some of the property rights between parties. The District Court of Appeal, Dooling, J., held that, where realty had been acquired by husband prior to marriage, but balance of purchase price was paid after marriage partly from funds which were community property and partly from account in which community and separate funds had been commingled, allowing wife an amount in money as her interest in such property without finding value of such property or extent of community property interest therein constituted prejudicial error.

Decree affirmed in part and reversed in part.

1. Husband and Wife ⇐248½

Community is not limited to right of reimbursement for payments made with community funds on purchase price of property purchased by one spouse before marriage, but community has pro tanto community property interest in such property in ratio that payments on purchase

price with community funds bear to payments made with separate funds.

2. Divorce ⇐253, 286

In divorce action, where realty had been acquired by husband prior to marriage, but balance of purchase price was paid after marriage partly from funds which were community property and partly from account in which community and separate funds had been commingled, allowing wife an amount in money as her interest in such property without finding value of such property or extent of community property interest therein constituted prejudicial error.

3. Divorce ⇐253

In divorce action, where trial judge took up disposition of community property item by item, and orally disposed of each item without objection from wife that accounting was complete only to certain date prior to trial, upon appeal, wife could not complain about incompleteness of accounting, nor was it error, after casting account, for trial court to determine that other monies in hands of each party were his or her separate property.

Henry B. Nathan, San Francisco, for appellant.

William Klein, James A. Himmel, San Francisco, for respondent.

DOOLING, Justice.

Defendant and cross-complainant Beulah Forbes was granted an interlocutory decree of divorce on the ground of extreme cruelty. She has appealed from certain portions of the decree only, insofar as they settled some of the property rights of the parties. For convenience of statement the respective parties will be referred to hereafter as the husband and the wife.

The husband has legal title to an apartment house referred to in the briefs as the Scott Street property. This was acquired by the husband prior to the marriage of the parties and the purchase price was partly paid by him before marriage. After the marriage the balance of the payments on the purchase price of this property were made partly from funds which were determined to be the community property of the parties and partly from an account in which community and separate funds had been commingled. The trial court decreed that the Scott Street property "is the separate property of Alexander V. Forbes, the plaintiff and cross-defendant herein * * * Provided, however, that Alexander V. Forbes * * * is to pay to the defendant and cross-plaintiff the sum of $2,209.55 as her interest in the said described real property."

The court ruled that the value of the Scott Street property was immaterial and its value was not found.

[1] Contrary to the rule adopted in most community property states, under which the community has only the right of reimbursement for payments made with community funds on the purchase price of property purchased by one spouse before marriage (1 de Funiak, Principles of Community Property, sec. 64, pp. 153–154; McKay, Community Property, 2d Ed., sec. 535, pp. 361–362), the rule developed through the decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds. Vieux v. Vieux, 80 Cal.App. 222, 251 P. 640; Maskuns v. Maskuns, 93 Cal.App. 27, 268 P. 1093; In re Estate of Caswell, 105 Cal.App. 475, 288 P. 102; In re Estate of Ball, 92 Cal.App.2d 93, 206 P.2d 1111; Giacomazzi v. Rowe, 109 Cal. App.2d 498, 240 P.2d 1020. The same rule has repeatedly been applied in the case of life insurance policies procured by the husband before marriage where community funds are used to pay the premiums after marriage. Modern Woodmen of America v. Gray, 113 Cal.App. 729, 299 P. 754; McBride v. McBride, 11 Cal.App.2d 521, 54 P. 2d 480; Gettman v. City of Los Angeles Dept. of W. & P., 87 Cal.App.2d 862, 197 P.2d 817; Field v. Bank of America, 100 Cal.App.2d 311, 223 P.2d 514; cf. Travelers Ins.Co. of Hartford, Conn. v. Fancher, 219 Cal. 351, 26 P.2d 482.

[2] To allow the wife, as was done here, an amount in money "as her inter-

est" in this property without finding the value of such property or the extent of the community property interest therein is clearly an error to her prejudice. Bailey v. Bailey, 60 Cal.App.2d 291, 140 P.2d 693.

Since this portion of the decree must be reversed it becomes immaterial that in the interlocutory decree the court disposed finally of the Scott Street property as of the date of the interlocutory decree. This error, Wilson v. Wilson, 76 Cal.App.2d 119, 172 P.2d 568, is not apt to recur since the time has now elapsed which entitles the parties to the entry of a final decree of divorce.

The decree ordered the wife to vacate her apartment in the Scott Street property on January 1, 1952. Without regard to any other question this was error because she had an undetermined community property interest in the Scott Street property as we have pointed out above and the order to vacate was based on the court's decision that the wife had no interest in the property. Whether the court would have made this order if it had correctly decided the other question cannot be determined.

[3] The wife also complains that the husband was only required to account for the community income up to a date sometime prior to the date of the interlocutory decree. The matter was referred to a referee and an accounting to a certain date was had before him. Thereafter when the referee's report was before the court, although the husband was placed on the witness stand and there was some discussion of a further accounting, none was actually rendered; and at the last hearing the judge took up the disposition of the community property item by item and orally disposed of each item without any objection from the wife's counsel that the accounting was not complete. In this state of the record the wife is in no position now to complain that the court decided the accounting from the evidence before her, nor was it error under these circumstances, after casting the account, to determine that any other monies in the hands of each party were his or her separate property.

After determining the community property interest in the Scott Street property an accounting of that portion of the profits, if any, of that property attributable to the community property interest therein as determined by the court should be had, but we see no reason to interfere with the court's disposition of community income from any other source.

That portion of the decree dealing with the Scott Street property is reversed with directions to the court to proceed to ascertain and dispose of the community property interest therein and the profits, if any, attributable to such community property interest in accordance with this opinion; that portion of the decree directing the wife to vacate the apartment on January 1, 1952 is likewise reversed, and the decree is affirmed in all other particulars. Appellant is allowed her costs on appeal.

NOURSE, P. J., and GOODELL, J., concur.



118 Cal.App.2d 279

VERDIER v. VERDIER et al.

No. 15713.

District Court of Appeal, First District, Division 1, California.

June 2, 1953.

Proceeding upon motion to dismiss appeal on ground that notice of appeal was filed one day too late. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment against appellant, and appellant appealed. The District Court of Appeal, Bray, J., held that, where it appeared that there was serious question of fact concerning actual date of entry of judgment, such controversy would be submitted to the Superior Court for its determination.

Motion continued and Superior Court directed to proceed in accordance with opinion.

1. Appeal and Error ⇐347(1)

Where time for appeal dates from entry of judgment, delay in entry correspond-

ingly prolongs time for appeal. Rules on Appeal, rule 2(a), (b) (1).

2. Judgment ⇐276

A judgment is considered to have been entered when it is actually entered in judgment book.

3. Appeal and Error ⇐653(1)

The District Court of Appeal does not have power to correct Superior Court's records.

4. Appeal and Error ⇐801(4)

It is accepted court policy to encourage hearings of appeal on their merits.

5. Appeal and Error ⇐801(1)

In proceeding upon motion to dismiss appeal on ground that notice of appeal had been filed one day too late, where it appeared that there was serious question of fact concerning actual date of entry of judgment, such controversy would be submitted to the Superior Court for its determination. Rules on Appeal, rules 2(a), (b) (1), 12(b, c); Code Civ.Proc. § 664.

6. Appeal and Error ⇐422

Mistake in notice of appeal concerning date of order or judgment appealed from would not invalidate appeal where there was a description of order or judgment referred to in other parts of notice, and such description was reasonably sufficient to identify it. Rules on Appeal, rules 2(a), (b) (1), 12(b, c); Code Civ.Proc. § 664.

7. Appeal and Error ⇐388

Where, upon motion to dismiss appeal on ground that notice of appeal had been filed one day too late, controversy concerning actual date of entry of judgment was remanded to the Superior Court for determination, appellant's time to comply with rules pertaining to deposit of cash for estimated cost of reporter's transcript or waiver of deposits by recorder would be extended until ten days after future decision on motion to dismiss became final.

Heller, Ehrman, White & McAuliffe, F. Whitney Tenney, San Francisco, John D. Martin, Oakland, for appellant.

Morgan J. Doyle and Paul C. Dana, San Francisco, for respondents.

BRAY, Justice.

Motion to dismiss appeal on the ground that the notice of appeal was filed one day too late.

Judgment against appellant was filed on October 16, 1952. The date of entry of judgment as shown in volume 919 of Judgments, San Francisco Superior Court, page 174, is October 16th. Appellant's notice of appeal from said judgment was filed December 16th, the 61st day thereafter, and therefore the appeal would have to be dismissed if October 16th is the date of entry. Levy v. Brill, 107 Cal.App.2d 204, 236 P.2d 603. Appellant contends that the judgment was not actually entered until October 17th.

[1] "Except as otherwise specifically provided by law, notice of appeal shall be filed within 60 days from the date of entry of the judgment * * *." Rule 2(a), Rules on Appeal. "For the purposes of this rule: (1) The date of entry of a judgment shall *be the date of its entry in the judgment book.* * * *" Rule 2(b). (Emphasis added.) "* * * where the time for appeal dates from the entry of judgment, delay in the entry correspondingly prolongs the time for appeal." (Freeman on Judgments, 5th ed., vol. 1, § 65, p. 117.)

[2] "It [a judgment] is entered when it is actually entered in the judgment book." Schurtz v. Romer and Kerkow, 81 Cal. 244, 247, 22 P. 657; see Security-First Nat. Bank v. Hauer, 47 Cal.App.2d 302, 307, 117 P.2d 952.

In Berman v. Blankenship Motors, 140 Cal.App. 134, 34 P.2d 1035, on the day the court denied a motion for new trial, the clerk "made a note thereof in his rough minutes, and the next day the court's ruling was duly entered in the regular minutes. The date of this entry, however, was of the date of the ruling." 140 Cal.App. at page 134, 34 P.2d at page 1036. The court stated, 140 Cal.App. at page 135, 34 P.2d at page 1036: "The appeal was not within time if the regular minutes are to be taken as of their face. But we think the plain provision of the statute is that the time runs *from the actual entry.* So calculated,

the appeal was in time." (Emphasis added.)

[3] It has been held that this court has no power to correct the records of the superior court. Boston v. Haynes, 31 Cal. 107; Boyd v. Burrel, 60 Cal. 280; Brush v. Pacific Electric Ry. Co., 58 Cal.App. 501, 208 P. 997. In Berman v. Blankenship Motors, supra, 140 Cal.App. 134, 34 P.2d 1035, and Beresford v. Pacific Gas & Elec. Co., 113 Cal.App.2d 622, 248 P.2d 773, the reviewing court permitted evidence to show that the actual date of entry in the trial court was different from the record date. However, neither case discussed the holding in the above-mentioned Supreme Court cases. Brush v. Pacific Electric R. Co., supra, 58 Cal.App. 501, 208 P. 997, held that the reviewing court could not consider affidavits as to the circumstances under which the trial court had entered an amended nunc pro tunc order denying a new trial.

Appellant contends that the actual date of entry of the judgment was later than shown on the record in the superior court. Affidavits have been filed from which it appears that there is a serious question of fact as to what was the actual date of entry. In such a situation rule 12(b) and (c) applies. Rule 12(b) states: "If any material part of the record is incorrect in any respect, * * * the reviewing court, on suggestion of any party or on its own motion, may direct that it be corrected or certified." Rule 12(c) states: "The reviewing court may submit to the superior court for settlement any differences of the parties with respect to alleged omissions or errors in the record, and the superior court shall make the record conform to the truth. * * *"

Witkin in his article "New Rules on Appeal," 17 So.Cal.Law Rev. 132, states that rule 75(h), Federal Rules of Civil Procedure, 28 U.S.C.A., is similar to rule 12(c). Rule 75(h) states: "* * * if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the *record made to conform to the truth.*" (Emphasis added.) In Reynolds v. Imlay, 73 App.D.C. 173, 118 F.2d 53, a motion was made in the United States Circuit Court of Appeals to dismiss an appeal on the ground that the notice of appeal was not filed in the district court within the requisite 20 day period. It appeared that although the notice was marked as filed September 6th, which was beyond the 20 day period, the attorney had presented it for filing to the clerk's office within that period, but the assistant clerk refused to file it because of nonpayment of a $5 deposit, although the action was being prosecuted in forma pauperis. The reviewing court after quoting the above-mentioned rule 75(h) stated, 118 F.2d at page 53: "We think the present controversy can best be determined by the District Court through the exercise of its power under this provision. The parties should be permitted, if they be so advised, to present evidence on the question whether any notice of appeal was tendered to the clerk of the District Court for filing within the period allowed by Rule 10 of this Court. If the court finds that such a notice was duly and timely offered for filing, it may then exercise its power to make the record conform to the truth with respect thereto." It then ordered the district court to proceed to make the determination and dismissed without prejudice the motion to dismiss.

[4] We think that the controversy here can best be determined by the superior court and that the principle that the courts should be liberal in protecting a litigant's right of appeal [1] requires that the true facts be ascertained. If the trial court finds that the true date of entry is other than the present record date it can so find and change the record accordingly. It can certify to this court whatever date it finds to be the true date.

[5] We have in mind that the superior court in Menzies v. Watson, 105 Cal. 109, 38 P. 641, entertained a proceeding to cor-

1. "It is the accepted policy of the courts to encourage hearings of appeals on their merits * * *." Peak v. Nicholson, 61 Cal.App.2d 355, 359, 143 P.2d 78, 80.

rect an alleged mistake as to the date of entry of the judgment, and held that the evidence failed to disclose any error in the record date, and that respondent contends the evidence in our case as shown by the affidavits is no stronger than the evidence was in that case. There may be additional evidence presented below, but whether there is or not, the sufficiency of the evidence is for the trial court to determine.

We feel called upon to condemn strongly the practice of any clerk's office in placing on the record any date of entry other than the actual date. Section 664, Code of Civil Procedure, provides that a judgment on a jury verdict must be entered within 24 hours after the rendition of the verdict and that where there is a court trial the judgment must be entered *immediately* upon the filing of the judgment. If because of pressure of business, shortage of clerks or otherwise, this mandate cannot be strictly complied with, there is no possible excuse for showing a different date of entry than the actual one. In the Menzies case, supra, it was pointed out that keeping records with a "disregard of truth as to dates. * * * is a violation of official duty" and is a "vicious practice." 105 Cal. at page 112, 38 P. at page 642.

[6] Respondent calls attention to the fact that in her notice of appeal appellant stated that she was appealing from the judgment "entered on the 16th day of October." This error in statement of the true date of entry, if that is not the true date, is not fatal to her appeal. "It is settled that a mistake in the notice of appeal, as to the date of the order or judgment appealed from, does not invalidate the appeal, where there is a description of the order or judgment referred to, in other parts of the notice, reasonably sufficient to identify it." Foss v. Johnstone, 158 Cal. 119, 123, 110 P. 294, 296.

Rules 4(c) and 5(c).

Rule 4(c), Rules on Appeal, requires appellant within a stated time after being notified by the clerk of the estimated cost of the reporter's transcript, to either deposit cash therefor or file a waiver of deposit by the reporter. Rule 5(c) requires payment of the estimated cost of the clerk's transcript. Admittedly appellant has not complied with these requirements. Lack of such compliance, however, is not jurisdictional. We have authority to relieve appellant from her default in this respect. See Rule 53(b) and Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119. Because of the question as to the timeliness of her appeal, appellant has asked for an extension of time to comply with these rules. Obviously it would be inadvisable to make such deposits until such time as it is determined whether she has an appeal pending or not.

Respondent contends that this appeal is under rule 2(b) (2) rather than rule 2(b) (1). Rule 2(b) (2) applies only to orders, as was the situation in Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279. This was a judgment and hence rule 2(b) (1) applies just as it did in Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182, 190. Because of the language in the Trubowitch case, supra, "It is settled that where findings are essential there is no rendition of final judgment until findings are signed and filed" and referred to in the Pessarra case, supra, 80 Cal.App.2d at page 968, 183 P.2d 279, respondent contends that the date from which the time to appeal starts is the date of *filing* rather than the date of *entry* of a judgment. In both of the cases above mentioned the court was not distinguishing between the filing and entry dates, as that question was not involved. Rules 2(a) and 2(b)1 give 60 days from the date of *entry* of judgment, not from date of *filing*. Nor is that fact changed because under modern practice judgments are photostated. They are still entered in a judgment book. In this case the judgment in question was entered in volume 919, Official Judgment Book, page 174. The clerk is required to keep such a book and to enter judgments therein. Code Civ.Proc. §§ 668, 664.

[7] In the interests of justice appellant's time to comply with rules 4(c) and 5(c) is hereby extended until 10 days after our decision upon the motion to dismiss becomes final.

The superior court is hereby directed to proceed in accordance with this decision.

It is further ordered that respondent's motion to dismiss the appeal be continued until the further order of the court.

PETERS, P. J., and FRED B. WOOD, JJ., concur.



118 Cal.App.2d 211

KNEELAND v. ETHICON SUTURE LABORATORIES, Inc. et al.

No. 15363.

District Court of Appeal, First District, Division 1, California.

May 29, 1953.

Action for injuries sustained by plaintiff when wire mesh screen installed by surgeon, to reinforce plaintiff's abdominal muscular wall, ruptured. The Superior Court, Alameda County, granted a motion to quash service upon one of the defendants, and plaintiff appealed. The District Court of Appeal, Wood, J., held that foreign corporation engaged in manufacture of surgical supplies, whose employees, engaged in sales promotion work within state, did just about everything that full-fledged sales agents might do except taking of orders, delivery of goods, and collection of sales price, could, without doing violence to due process requirements, be subjected to jurisdiction of court within state.

Reversed.

1. Constitutional Law ⇐309(3)
Corporations ⇐668(14)

Foreign corporation's business activities in state make it amenable to service of process upon statutory agent if those activities furnish a proper basis for jurisdiction under due process clause of Fourteenth Amendment. Code Civ.Proc. § 411; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐309(3)
Corporations ⇐665(1)

Foreign corporation engaged in manufacture of surgical supplies, whose employees, engaged in sales promotion work within state, did just about everything that full-fledged sales agents might do except taking of orders, delivery of goods, and collection of sales price, could, without doing violence to due process requirements, be subjected to jurisdiction of court within state. Corporations Code, §§ 6501, 6502; Code Civ.Proc. § 411; U.S.C.A.Const. Amend. 14.

3. Appeal and Error ⇐914(1)

In reviewing order granting defendant's motion to quash service, record would have to be viewed most favorably to defendant and all conflicts resolved in its favor, but uncontradicted and unimpeached testimony could not be arbitrarily disregarded.

David E. Adelson, Emeryville, for appellant.

Brown, Rosson & Berry, Oakland, for respondent.

FRED B. WOOD, Justice.

The sole question upon this appeal is whether or not defendant Ethicon Suture Laboratories, Inc., a foreign corporation, was "doing business in this State" § 411, Code of Civ.Proc., in such a manner and to such an extent as to make it amenable to service of process and to the jurisdiction of our superior court.[1]

This question has two aspects: (1) was this defendant "doing business" here within the meaning of that term as judicially interpreted by the courts of this state, and (2) If so, does that comport with the due process requirement of the Fourteenth Amendment to the Constitution of the United States? Bomze v. Nardis Sportswear, 2 Cir., 1948, 165 F.2d 33, 35; Rosen-

1. No question is raised concerning the service of process itself; i. e., whether or not it was served in accordance with the requirements of our statute (through our Secretary of State, by registered mail, etc.), or whether or not those requirements comport with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

thal v. Frankfort Distillers Corp., 5 Cir., 1951, 193 F.2d 137, 141.

Incident to an abdominal operation upon plaintiff, his surgeon installed a wire mesh screen for the reinforcement of the abdominal muscular wall. Later the screen ruptured, to plaintiff's injury. He filed suit for damages against Bischoff's (a copartnership), the local distributor from whom the surgeon, as plaintiff's agent, purchased the screen; also, against Ethicon Suture Laboratories, Inc., a corporation, the manufacturer of the screen, and Johnson and Johnson, a foreign corporation, for whom Ethicon allegedly is an agent, a subsidiary, or a division.

In the first count of his complaint plaintiff seeks to hold the defendants, including Ethicon, responsible upon the ground that they warranted the screen to be fit and proper for the indicated use. The theory of the second count of the complaint is that Ethicon and Johnson and Johnson were negligent in the manufacture of the screen and failed to use due care in its construction and in testing it and the materials of which it was made. The local distributor (Bischoff's) and Johnson and Johnson appeared and answered the complaint.

Upon plaintiff's application, the trial court ordered service of summons upon Ethicon as provided in §§ 6501 and 6502 of the Corporations Code.[2] Such service was made and thereupon Ethicon specially appeared and moved to quash service. The motion was heard and considered upon affidavits. No oral testimony was introduced. The trial court granted the motion, by an order signed and filed. From that order plaintiff has appealed.[3]

Ethicon supported its motion by two affidavits: one by A. J. Bee, its treasurer and assistant secretary; the other, by Jack Edmonson, its Pacific Coast Division Manager.

Bee states that Ethicon was created and exists under the laws of New Jersey; has had and now has its home office and principal place of business at Brunswick, N. J.: has never qualified to do business in California; "has been, and now is, engaged in selling a product referred to in the above entitled complaint as tantalum wire meshed screen to surgical supply houses for use in hospitals and by physicians and surgeons"; did not at any time, nor does it, "keep or maintain any stock of merchandise in" California, or "manufacture any of its products in" California; at no time has had, nor has it now, any officer or representative in California "authorized to contract on behalf of" Ethicon

2. Because the order for service of summons on Ethicon pursuant to §§ 6501 and 6502 was made in August, 1951, and service apparently was made during that month (on August 24, 1951, Ethicon filed its motion to quash), the provisions of those sections as amended by the statutes of 1949, ch. 1053, p. 1960, and of § 6500, as enacted by the statutes of 1947, ch. 1038, p. 2407, govern and apply. (The amendments of these sections made by chapters 628 and 1377 of the statutes of 1951 did not take effect until September 22, 1951.)

During August, 1951, § 6500 indicated the officers or agents of a foreign corporation to whom a copy of process directed to the corporation could be delivered, to effect service.

§ 6501 provided, under certain circumstances, for application to and order by the court for service by delivery of copies to our Secretary of State, setting forth the address to which such process should be sent by the Secretary of State.

In the case of a corporation which had not filed with the Secretary of State the statement required by § 6403, § 6502 required the Secretary of State, upon receipt of the process, the court order, the address, and his fee, to give notice by mailing (via registered mail, charges prepaid, with request for return receipt) copies of the process and of the order to the address specified in the order.

These sections must be read with that portion of § 411 of the Code of Civ. Proc., as amended by Stats.1947, ch. 1090, p. 2502, which states that "summons must be served by delivering a copy thereof as follows: * * *. 2. If the suit is against a *foreign corporation* * * * *doing business in this state;* in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code. * * *" (Emphasis added.)

3. The order is appealable, as determined by this court in Kneeland v. Ethicon Suture Laboratories, 113 Cal.App.2d 335, 248 P.2d 447.

"for the sale of any of its products or to make any warranties on its behalf, either express or implied"; that at all times "all sales by" Ethicon "of its products in * * * California were, and such sales now are, subject to confirmation at the principal office of said corporation in New Brunswick, New Jersey, and all orders for products are filled from New Jersey, and said products are shipped into the State of California by public carrier to the purchasers of said products"; at all times,[4] Ethicon "was not, and now is not, transacting a substantial part of its business in * * * California"; [5] neither of the causes of action set forth in the complaint "arose in * * * California, and the above entitled court has no jurisdiction either of the subject of said action or of" Ethicon; [5] that "said corporation at no time sold in the State of California tantalum wire mesh screen to plaintiff in the above entitled action or to any agent for or on behalf of said plaintiff".[5]

Edmonson states that he is "the Pacific Coast Division Manager of Ethicon * * *; that he resides at 12930 Greenleaf Street, North Hollywood, California; that * * * Ethicon * * * employes [sic] in California six (6) individuals, including himself; that * * * Ethicon * * * has no office in California; that all such employees of Ethicon * * * are engaged solely in sales promotion work; that the products of said Ethicon * * * are sold in California by supply house distributors; that said supply houses are independent business concerns; that sales of Ethicon * * * are consummated in New Jersey and not in California; and that no collections for sales of products to California supply houses are made in California."

From these two affidavits it appears that Ethicon's local activity in California consists of "sales promotion work" by and through six persons employed by it, one of whom, Jack Edmonson, describes himself as "Pacific Coast Division Manager" of Ethicon and resides in California. The statement in Bee's affidavit that Ethicon "was not and now is not transacting a substantial part of its business in * * * California" is consistent with the concept of transacting business in California to the extent at least of its "sales promotion work" mentioned but not in detail described by Edmonson. This, quite clearly, would not be enough to demonstrate that Ethicon was "doing business" within California under the earlier concept of that term. It might be within the purview of that concept as modified and developed in recent years. Before going into that, it will be well to ascertain to what extent, if at all, the affidavits furnished by plaintiff supply the details of the character and scope of Ethicon's "sales promotion work"; i. e., to the extent that they do so consistently with the statements appearing in Ethicon's affidavits.

In opposition to the motion to quash, plaintiff presented affidavits by David Adelson, attorney for plaintiff; John F. Wight, assistant administrator of Herrick Memorial Hospital, Berkeley, California, at which institution plaintiff's operation was performed; Paul Givant, purchasing agent for Herrick Memorial Hospital; and Dr. George C. Shipounoff, the surgeon who purchased the tantalum wire mesh screen and performed the operation upon plaintiff. We summarize those portions of their affidavits which do not appear to be in conflict with the facts stated in Ethicon's affidavits.

Adelson states that at all times Ethicon "has employed and is now employing Jack Edmonson as its Pacific Coast Manager and California Divisional Manager with offices at Suite 104, 444 North Bedford Drive, Beverly Hills, California," and said Jack Edmonson in his capacity as California divisional manager of said corporation has been and is now supervising the activities of the local California representa-

4. The expression "at all times" is used in this summary of the documentary testimony (unless otherwise indicated) as a short form of the expression "during all of the times mentioned in the complaint."

5. To the extent that these are statements of ultimate facts or of mixed facts and law, they, of course, represent conclusions or inferences which it is the function of the court to draw.

tives of said corporation"; at all times "Louis J. Pacelli, residing at 68 Shearer Drive, Atherton, California, has been and now is northern California representative of" Ethicon and "David Barry has been and was southern California representative of" Ethicon until August 1, 1951, since which date "Merle Jutkins has been and now is said southern California representative"; at all times said northern and southern California local representatives of Ethicon "have regularly contacted and visited, and are now contacting and visiting, California hospitals, surgical supply houses, physicians and surgeons for the purposes of (a) detailing them as to defendant's products, (b) generally soliciting their business, * * *, and (c) generally promoting good will and improving public relations of defendant corporation within the state of California"; at all times Louis J. Pacelli as northern California local representative of Ethicon "has solicited and is now soliciting as hereinbefore described sixteen (16) northern California distributors of said defendant corporation on a weekly, bi-weekly or monthly basis, including the following located in the San Francisco-Oakland-Berkeley area * * * [the names and addresses of four firms in San Francisco, two in Oakland and one in Berkeley] * * * That during all of the times mentioned in said complaint in the above entitled action, said Louis J. Pacelli has regularly and systematically solicited and detailed, and is now soliciting and detailing hospitals in northern California in behalf of" Ethicon; at all times "said Louis J. Pacelli has serviced and is now servicing physicians and surgeons in Northern California in behalf of" Ethicon and "has attended California conventions of medical, surgical and hospital associations, has exhibited and promoted defendant corporation's products at said conventions and has solicited business in defendant's behalf."

Wight states that at all times he "has been visited and contacted and is now being visited and contacted by local representatives of out of state manufacturers of medical, surgical and hospital supplies and equipment," and "has been frequently visited and contacted at said hospital by Louis J. Pacelli, the northern California representative of" Ethicon; that at the time of such visits Louis J. Pacelli "has discussed with affiant new products and new developments of * * * Ethicon * * *, has given trade literature of Ethicon * * * to affiant, and has solicited good will and has fostered sound public relations between said hospital and Ethicon * * *", that "Louis J. Pacelli is the northern California representative of" Ethicon; that at all times "said Louis J. Pacelli has contacted affiant at conventions of hospital associations in California and that said Ethicon * * * has had exhibits and displays at said conventions"; at all times "said Louis J. Pacelli has called upon and solicited the Purchasing Department of said Herrick Memorial Hospital."

Givant states that he has been purchasing agent for Herrick Memorial Hospital since November, 1950; that he "has been and is regularly called upon at said hospital by California representatives of out of state manufacturers of supplies and equipment purchased and used by said hospital"; that Ethicon is "an out of state manufacturer which has been and is regularly sending California representatives to call on affiant at said Herrick Memorial Hospital"; that Louis J. Pacelli "is the northern California representative of" Ethicon and "has regularly solicited and is now regularly soliciting affiant at said hospital"; that at all times Louis J. Pacelli "has represented and is now representing himself to be the northern California representative of Ethicon * * *"; at all times said Louis J. Pacelli "has pointed out to affiant and is now pointing out to affiant the technical advantages of products of Ethicon * * *, and has apprised affiant and is now apprising affiant of new products and improved products of Ethicon * * *"; at all times "when affiant has needed and now needs specific technical information concerning products manufactured by Ethicon * * *, affiant has secured and is now securing said information directly from Louis J. Pacelli at said Herrick Memorial Hospital"; that "price lists, trade literature and catalogs of Ethicon * * * have been and are now being supplied to

affiant by said Louis J. Pacelli"; that "affiant's decision to purchase for said Herrick Memorial Hospital supplies and equipment manufactured by Ethicon * * * has been and is now being determined by representations and descriptions made by said Louis J. Pacelli at said hospital"; that "affiant is now purchasing and said Herrick Memorial Hospital is using Bio-Sorb powder, umbilical tape, catgut sutures and silk sutures which are manufactured by Ethicon * * *," concerning which products "Louis J. Pacelli did detail and solicit affiant at said Herrick Memorial Hospital."

Dr. Shipounoff states that he is a physician and surgeon licensed to practice in California and maintains offices for the practice of medicine in Oakland, California; that Jack Edmonson is the California divisional manager of Ethicon and has offices at Beverly Hills, California; at all times "affiant was visited at his offices by said Jack Edmonson, and that said Jack Edmonson discussed with affiant certain surgical products manufactured by Ethicon * * *"; that "Louis J. Pacelli is the northern California representative of Ethicon * * *," and at all times Pacelli "came to affiant's offices and detailed affiant on certain products of Ethicon * * *, gave to affiant trade literature of said corporation, and discussed with affiant tantalum wire mesh screens manufactured by said corporation." [6]

Here we have a picture of Ethicon's "sales promotion work" in California. Ethicon's employees are doing just about everything full-fledged sales agents might do except the taking of orders, the delivery of goods, and the collection of the sales price. Ethicon's agents go up and down the state developing business by keeping in touch with Ethicon's supply houses (independent though they be, contractually); making and maintaining contacts with hospital officials and practitioners of the healing arts, describing to them Ethicon's products and keeping them apprised of new and improved Ethicon products; and attending conventions of physicians, surgeons and hospital officials, there carrying on the same type of business development and sales promotional work, including the display of Ethicon products at such conventions.

Did these activities render Ethicon amenable to process under the applicable state statutes as interpreted by the courts of this state, and in accordance with the due process clause of the federal Constitution as interpreted by the courts of the United States? We will consider, first, the trend of decision in the courts of this state.

In Milbank v. Standard Motor Const. Co., 1933, 132 Cal.App. 67, 22 P.2d 271, 272,[7] the defendant foreign corporation manufactured engines outside this state and was engaged in selling some of them to purchasers in this state. It sent an engineer into

6. It is desirable to note certain statements in Adelson's affidavit which conflict, in greater or lesser degree, with those in Ethicon's affidavits. We are not giving any consideration to statements by Adelson which appear in the area of conflict.

Adelson says that the California local representatives of Ethicon visit hospitals, surgical supply houses, physicians, and surgeons for the purpose of "adjusting and settling complaints" and "taking orders for defendant's products"; that at all times Ethicon "has been and is now 'doing business' in * * * California * * * as hereinafter stated so as to be amenable to service of summons," that "the affidavit of defendant Ethicon * * * does not deny that said defendant has a divisional office in California, a divisional manager in California, and local representatives permanently stationed in northern and southern California"; that the causes of action set forth in the complaint "are connected with business transacted within the state of California by" Ethicon "and did arise within the state of California, and that the instant court has jurisdiction over the subject matter of said cause of action"; that at all times Ethicon "was, and now is, transacting a substantial part of its ordinary business in the state of California and is exercising within the state of California some of the functions for which it was created"; there is "an agency relationship between defendants Bischoff's and" Ethicon; at all times Ethicon "was and is now 'doing business' in California within the judicially-construed meaning of that term so as to be amenable to process in California."

7. A petition for hearing by the Supreme Court was denied; 132 Cal.App. 72, 22 P.2d 271.

this state to aid local customers with the maintenance of the engines after purchase and delivery. The engineer was authorized to employ mechanics for this purpose but had no authority to execute contracts. Through magazine advertising the defendant urged the public to see this representative as to why they should own defendant's engines. In defining "doing business" as used in § 411, the court referred to the fact that the authorities, "both state and federal," have found it difficult to lay down any all-embracing definition. However, it was pointed out that under International Harvester Co. v. Com. of Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479, there "* * * must be the carrying on of business to such an extent by the corporation as to manifest its presence in the state * * *," and on the authority of other state and federal cases it was held necessary that a substantial part of its ordinary business be transacted with some continuity by local agents. 132 Cal.App. at page 70, 22 P.2d at page 272. Under these tests it was held the continuous endeavor to service the engines in this state subjected the defendant to local jurisdiction in an action by a local purchaser for breach of contract.

The court in Thew Shovel Co. v. Superior Court, 1939, 35 Cal.App.2d 183, 95 P.2d 149, also had occasion to consider the term "doing business" as used in § 411 of the Code of Civil Procedure. There the defendant foreign corporation operated in this state through two local "distributors." Under the contract with defendant the local distributor was not to be considered an agent of defendant but was to negotiate sales according to prices set by the manufacturer, all sales being subject to the approval of the manufacturer. The distributor had authority to collect sums due and remit to the manufacturer who held all purchase contracts as security. Title to all goods remained in the manufacturer. Under this arrangement the volume of defendant's business in this state ran as high as $300,000 a year. Under these circumstances it was held defendant was "doing business" locally within the meaning of § 411. In so holding the court cited the decisions of other state courts in addition to federal and local cases.

In Oro Navigation Co. v. Superior Court, 1947, 82 Cal.App.2d 884, 187 P.2d 444,[8] the court was concerned with the validity of service of process pursuant to the various sections of the Corporations Code pertaining to the service of process on foreign corporations doing business in this state pursuant to § 411(2) of the Code of Civil Procedure. Without mentioning the latter code section it was held that the "presence" of the foreign corporation is the test of valid service; "presence" meaning the transaction of business by the corporation within the state constituting more than an isolated transaction and having a relation to the purpose for which the corporation was formed. 82 Cal.App.2d at page 888, 187 P.2d 444. In support of this test of doing business the court relied upon International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.

In Boote's Hatcheries & Packing Co. v. Superior Ct., 1949, 91 Cal.App.2d 526, 205 P.2d 31, the court treated the question of "doing business" under § 411 as the quantum and quality of business activities required by the due process clause as a basis for jurisdiction of the courts of this state over foreign corporations. Relying upon West Publishing Co. v. Superior Court, 20 Cal.2d 720, 128 P.2d 777, and cases there cited, the court stated that "* * * if it can be said * * * that the corporation is carrying on business in such a manner and to such an extent as to warrant the inference that it is here, it is within the jurisdiction of the courts of this state and hence amenable to process of said courts." 91 Cal.App.2d at page 527, 205 P.2d at page 32. The court held that a foreign corporation which maintained a resident agent in this state who continuously solicited the business of local turkey raisers, entered into contracts for the purchase of eggs, and generally supervised the shipment thereof, was subject to process under § 411 pursuant to the applicable sections of the Corpo-

8. A petition for hearing by the Supreme Court was denied; 82 Cal.App.2d 893, 187 P.2d 444.

rations Code. We note that the court also based its holding upon the "fair play and substantial justice" test enunciated in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, in reference to service of process consistent with the due process requirements of the Fourteenth Amendment.

Later decisions reflect the same tendency to construe the words "doing business" as synonymous with those business activities required by the due process clause as the basis for jurisdiction. In Sales Affiliates, Inc., v. Superior Ct., 1950, 96 Cal.App. 2d 134, 214 P.2d 541, the trial court's holding that defendant foreign corporation was doing business within the meaning of § 411 was approved. It appeared that defendant's "jobbers" in this state solicited licensing agreements with local beauty shops for the use of certain of defendant's products in return for the payment of an annual licensing fee to defendant plus the local operator's promises to refrain from using any product which infringed any of defendant's patents and to respect prices fixed by defendant for its products. Each licensing agreement was signed by the licensee and forwarded by the jobber to the defendant for execution by it. It was held that the licensing methods used by the defendant gave it "substantially the same commercial advantages that would be available to it through an office or a force of employees maintained in the state devoted exclusively to this phase of its business." 96 Cal.App. 2d at page 137, 214 P.2d at page 543, hence it was "doing business" for the purpose of § 411.

In Koninklijke Luchtvaart Maatschappij v. Superior Court, 1951, 107 Cal.App.2d 495, 237 P.2d 297,[9] the court, without express mention of § 411, treated the problem as presenting a question of the extent of jurisdiction under the federal Constitution. 107 Cal.App.2d at page 500, 237 P.2d 297. Plaintiff in that case brought suit in California to recover damages for injuries received in an airplane crash in England allegedly due to defendant's negligent failure to properly maintain, repair and inspect the aircraft. The defendant maintained two offices in California; employed 27 persons within the state; made purchases locally of at least $1,000,000 a year; maintained a local bank account for its local payroll; and owned four automobiles.

The latest California cases we have found on this subject seem to consider the question of "doing business" within the meaning of § 411 as synonymous with the power of the state to subject foreign corporations to local process. We refer to Fielding v. Superior Court, 1952, 111 Cal.App.2d 490, 244 P.2d 968,[10] and Iowa Mfg. Co. v. Superior Court, 1952, 112 Cal.App.2d 503, 246 P.2d 681.[11]

In the Fielding case, plaintiff, a local resident, was injured by defendant's product after purchasing it at retail. The defendant was a New York corporation which manufactured pharmaceuticals. It operated locally by contract with a wholesaler in California who agreed to act as defendant's "distributor" here. Defendant reserved title to the goods until sold by the local distributor to the retailer. It set the prices at which the distributor was to sell; required a monthly report of stock on hand; provided all advertising costs. It maintained no local office and its officers came here only twice. The distributor managed his own sales force, distributed other manufacturers' products, collected all accounts, and was stated to be an independent contractor in the contract with the defendant.

On the basis of these facts the court considered the question to be whether the defendant was doing business "within the meaning of the Corporations Code and to the extent that assumption of jurisdiction over them is consistent with due process."

9. A petition for hearing by the Supreme Court was denied; 107 Cal.App.2d 501, 237 P.2d 297.

10. A petition for hearing by the Supreme Court was denied; 111 Cal.App.2d 497, 244 P.2d 968. A petition for review by the U. S. Supreme Court was denied, Westwood Pharmacal Corp. v. Fielding, 344 U.S. 277, 73 S.Ct. 277, 97 L.Ed. 693.

11. A petition for hearing by the Supreme Court was denied; 112 Cal.App.2d 507, 246 P.2d 681.

111 Cal.App.2d at page 494, 244 P.2d at page 970. In holding that the trial court erred in granting a motion by defendant to quash service, the reviewing court said "The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state." In the Iowa Mfg. Co. case, the same test was used. 112 Cal.App.2d 503, at page 506, 246 P.2d 681.

This review of the decisions of our courts indicates that the expression "doing business in this State", as used in § 411 of our Code of Civil Procedure (a term not defined by the statute), reflects the changing concept of "doing business" as it has evolved over the years, and as it continues to evolve, through the decisions of the federal courts interpreting the due process clause and applying it to new and developing situations from time to time. As one law writer expresses it, "although the decisions as to jurisdiction over foreign corporations depend in the first instance upon the construction of statutes providing for service of process, this statutory interpretation is usually keyed to constitutional interpretation. Thus, an extension of constitutional power may be reflected in the cases without the enactment of new legislation." (Growth of the International Shoe Doctrine, 16 Univ. of Chicago Law Rev. [1949] 523, at 525.) In other words, "doing business" enlarges to the extent that the federal Constitution permits it to enlarge.

This concept, it would appear, is reflected in West Publishing Co. v. Superior Court, supra, 20 Cal.2d 720, 128 P.2d 777, decided in 1942, prior to the rendition of the decision in the International Shoe case. The West Publishing Co. case involved an action which the state had brought against that company in our superior court for the recovery of taxes imposed by the California Use Tax Act. The company sought a writ of prohibition to restrain the superior court from proceeding in the action, claiming lack of jurisdiction over the company, a foreign corporation. In rejecting that claim our Supreme Court made the following significant observations concerning the concept of "doing business" in that connection: "Whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be 'doing business' in the jurisdiction where the service is made to sustain its validity. [Citations.] Formerly the theory upon which the courts of a state assumed jurisdiction of a foreign corporation carrying on business within its borders was that of implied consent to such jurisdiction. [Citations.] The abandonment of this 'consent theory' in favor of the 'corporate presence theory' was foreshadowed in St. Louis Southwestern R. Co. v. Alexander, 227 U.S. 218, 33 S.Ct. 245, 57 L.Ed. 486, Ann.Cas. 1915B, 77. The latter doctrine was summarized by Mr. Justice Brandeis in Philadelphia & Reading R. Co. v. McKibbin, 243 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710, as follows: 'A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent.' The determination of this jurisdictional question 'is often a matter of great difficulty and extreme nicety. No all-embracing rule as to what is doing business has been laid down.' [Citation.] In Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, 917, 918, the late Judge Cardozo commented upon the criterion of corporate presence in this connection as follows: 'If in fact it (the corporation) is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then whether its business is interstate or local, it is within the jurisdiction of our courts,' citing International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479. 'But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here.' As was said in Inter-

national Harvester Co. v. Kentucky, supra, each case must depend upon its own facts." 20 Cal.2d at pages 726–727, 128 P.2d at page 780.

Our Supreme Court, in effect, extended these observations to include the International Shoe Doctrine, in the later case of West Publishing Co. v. McColgan, 1946, 27 Cal.2d 705, 713–715, 166 P.2d 861. The court concluded that part of its discussion with this comment: "The court [in the International Shoe case] held that the State of Washington had constitutional power to impose the tax and to subject appellant to suit to recover it, and concluded its opinion with the statement quoted above that '* * The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax.'" At page 715 of 27 Cal.2d at page 867 of 166 P.2d.

[1] This review of the decisions of our Supreme and Appellate Courts persuades us that Ethicon's business activities in this state make it amenable to the process and jurisdiction of our superior court if those activities furnish a proper basis therefor under the due process clause of the Fourteenth Amendment.

The inquiry starts with a consideration of the "mere solicitation" rule enunciated, in 1906, in Green v. Chicago, Burlington & Quincy Railway Company, 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916. Green brought the action in the Circuit Court for the Eastern District of Pennsylvania, to recover damages for injuries allegedly incurred in Colorado through the negligence of the railway company, an Iowa corporation. Upon motion of the company, the Circuit Court held that service of process was insufficient because the defendant was not doing business in Pennsylvania. The Supreme Court affirmed. The defendant had no tracks east of Chicago. It rented an office and employed an agent, with several assistants, in the Pennsylvania district. "The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. * * He sold no tickets and received no payments for transportation of freight. When a prospective passenger desired a ticket, and applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington and Quincy Railroad a ticket over that road. Occasionally he sold to railroad employees, who already had tickets over intermediate lines, orders for reduced rates over the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's line. In these bills of lading it was recited that they should not be in force until the freight had been actually received by the defendant." 205 U.S. at page 533, 27 S.Ct. at page 596. This was deemed the conduct of business which was merely incidental and collateral to the carriage of freight and passengers and the operation of a railroad therefor, the main purposes for which the defendant was incorporated. "The business shown in this case was in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it." 205 U.S. at pages 533–534, 27 S. Ct. at page 596.

The "mere solicitation" rule announced in the Green case has been considerably modified, although not expressly withdrawn, by later decisions of the Supreme Court. This is pointedly reflected in various decisions of the Circuit Courts of Appeals in recent years. Among them are these: Frene v. Louisville Cement Co., 1943, 77 U.S.App.D.C. 129, 134 F.2d 511, 513–517, 146 A.L.R. 926, opinion by Justice Rutledge; Kilpatrick v. Texas & P. Ry. Co., 2 Cir., 1948, 166 F.2d 788, 790–791, opinion by Judge Learned Hand, certiorari denied in 335 U.S. 814, 69 S.Ct. 32, 93 L. Ed. 369.

In the Frene case, Justice Rutledge, after criticising the mere solicitation rule, said "But it is not necessary to take the final step in repudiation in this case, since the facts are sufficient to bring it within the 'solicitation plus' rule." Page 517 of 134 F.2d. A critical comment on the "mere solicitation" rule and a good exposition of the "solicitation plus" rule are given in Moore v. Atlantic Coast Line R. Co., D.C. E.D.Pa. 1951, 98 F.Supp. 375. The "solicitation plus" rule was used in Snyder v. J. G. White Engineering Corp., D.C.S.D.N.Y. 1945, 60 F.Supp. 789; Loken v. Diamond T, Motor Car Co., 1943, 216 Minn. 223, 12 N. W.2d 345; and Continental Convention & Show Management v. American Broadcasting Co., 1950, 230 Minn. 417, 41 N.W.2d 263.

A number of recent decisions applying the International Shoe Doctrine, have treated solicitation, plus very little else, as a sufficient business activity to satisfy the requirements of due process. See Lasky v. Norfolk & W. Ry. Co., 6 Cir., 1946, 157 F. 2d 674; French v. Gibbs Corporation, 2 Cir., 1951, 189 F.2d 787; Willett v. Union Pac. R. Co., D.C.N.D.Ohio 1948, 76 F. Supp. 903; Bonesteel v. Steelco Stainless Steel, D.C.N.D.Ohio 1950, 97 F.Supp. 985; Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co. D.C.E.D.Ky. 1951, 102 F. Supp. 258; Allegue v. Gulf & South American S. S. Co., Inc., D.C.S.D.N.Y. 1952, 103 F.Supp. 34; Ronson Art Metal Works v. Brown & Bigelow, Inc., D.C.S. D.N.Y. 1952, 104 F.Supp. 716, Id., D.C., 105 F.Supp. 169, affirmed in 2 Cir., 199 F. 2d 760; Ott v. Hudnut Sales Co., D.C. Colo. 1952, 107 F.Supp. 919; State v. Winstead, 1945, 66 Idaho 504, 162 P.2d 894; and McCaskell Filters, Inc., v. Goslin-Birmingham Mfg. Co., Sup. 1948, 81 N.Y.S.2d 309.

Concerning "solicitation," we deem the following dictum of the United States Supreme Court significant: "In view of the ruling in International Shoe Co. v. Washington, supra, we put aside any suggestion that 'solicitation,' when conducted regularly and continuously within the state, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable." Nippert v. Richmond, 1945, 327 U.S. 416, 426, 66 S.Ct. 586, 591, 90 L.Ed. 760.

Three recent decisions involved factual situations similar in many respects to those presented in our case.

Green v. Equitable Powder Mfg. Co., D. C.W.D.Ark.1951, 99 F.Supp. 237, was an action for injuries resulting from the sale by Equitable of a defective blasting cap manufactured by defendant Olin Industries, Inc., a foreign corporation. Olin's motion to quash the service of summons was denied. Olin regularly employed various representatives who called on distributors of its products in Arkansas but took no orders from the distributors. Their chief business was the promotion of sales by creating good will and confidence of the public in the value and worth of Olin's products. A Division Sales Manager had his office in Tennessee. His district included Arkansas. He often made trips to Arkansas and called upon persons and firms in an effort to promote the business of Olin. Some of Olin's representatives put on demonstrations of the power and velocity of firearms and ammunition. Olin was maintaining a recreational facility, having leased several hundred acres of land, using it as a place for the shooting of migratory game birds. During the duck season, present and prospective customers and personal friends were there entertained, to promote good will for Olin. No sales were attempted during the visit of any such persons. "Under these facts, it cannot be said that the sale of the alleged offending blasting cap * * * and its use by the plaintiff was not an incident to the activity and service of the defendant, its agents, servants and employees." 99 F. Supp. at page 245. The court considered the due process requirements as enunciated in the International Shoe case. In applying that test it said: "In the instant case, the activities of the defendant, Olin Industries, Inc., have not been merely casual or isolated. They have been systematic and carried on with one end in view, the promotion and increase of the sales of its products

to consumers in Arkansas and, while the sale of certain products may have been stressed more than others, yet all of the activities were conducted with one purpose in view. The Olin Industries, Inc., needs no advice from any court on how to successfully operate a business. Their business acumen has dictated their policy and their contacts in the State of Arkansas, and such contacts and conduct must have been profitable else they would have been abandoned and not continued. If it was not too inconvenient for the defendant to create and maintain these contacts in the state, it would seem logical that it would not be extraordinarily inconvenient for it to be required to defend the plaintiff's alleged cause of action since the use of its product allegedly produced the injury." 99 F.Supp. at page 246.

In Taylor v. Klenzade Products, 1952, 97 N.H. 517, 92 A.2d 910, the court found that the defendant's activities rendered it subject to the jurisdiction of the court and made it reasonable and just to require defendant to stand suit in New Hampshire. Defendant, a Wisconsin corporation, marketed its products in New England through distributors, but never made a direct sale to customers in New Hampshire. Goods purchased by the distributors were warehoused by them. Defendant employed a local representative, and was reimbursed by one of the distributors to the extent of one-half of the representative's compensation. The duties of this representative were to promote the sale of defendant's products; assist dealers in any problems relating thereto; establish new dealers; service the defendant's products in use by customers so that dissatisfaction would be avoided and demand encouraged; and generally to stimulate or create the demand for defendant's products in New Hampshire, Vermont and northern New York. He spent 60% of his time in New Hampshire. Half of this time he devoted to soliciting orders and half to the servicing of customers of local dealers. "Thus while the actual sales made in New Hampshire were not those of the defendant, the defendant was not content to leave to the distributors the creation of the demand which made them a profitable outlet. The defendant enjoyed the advantages of its own representative in the field. His efforts likewise benefited the distributors, but the defendant's motive is not to be considered wholly altruistic. Benefit to them was benefit to the defendant, and since they were exclusive distributors, unless sales could be made through them, no sales would be made." 92 A.2d at pages 912 and 913. The court concluded that "this activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state." 92 A.2d at page 913.

In Polizzi v. Cowles Magazines, 5 Cir., 1952, 197 F.2d 74, the defendant, a foreign corporation, was the publisher of a national magazine. The suit was brought in a Florida state court and transferred to the federal district court in that state. That court dismissed the action for want of jurisdiction on the ground that defendant was not doing business there. The Court of Appeals affirmed. The defendant had no office in Florida; had not qualified to do business there; had no bank account or books or records there, nor any telephone listing. The magazine was distributed to retailers by independent wholesalers. Deliveries to individual subscribers were made by mail. Half of such subscriptions were procured through direct mail. The other half of the subscriptions were obtained by solicitation, the greater number by employees of agencies which operated out of New York or Philadelphia. Defendant had one representative, Briardy, who covered an assigned area, including Florida. He traveled regularly, checked retail outlets to ascertain conditions, made sure that defendant received proper positions on the newsstands and in general obtained the most efficient sale possible. He was described as a promotion and complaint man, with no authority to commit the defendant to any expenses except his own travelling expenses. The court did not consider that the activities of Briardy were such as to subject the defendant to suit in Florida. Judge Russell dissented, saying: "I think the authorities relied upon for reversal require that result since, in my opinion, the facts present show that the activities of the de-

fendant (circulation and sale and the promotion thereof) amounted to 'doing business' within the State of Florida; the injury claimed, if existent, is connected with such activities * * *." 197 F.2d at page 77. October 20, 1952, the Supreme Court granted Polizzi's petition for a writ of certiorari. 344 U.S. 853, 73 S.Ct. 94, 97 L.Ed. 662.

[2] We conclude that Ethicon's activities constitute "doing business in this state" within the meaning of our statute and to the extent that assumption of jurisdiction over it is consistent with due process; that there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere; and that the order appealed from should be reversed.

[3] A few procedural points remain to be considered. Ethicon claims we should assume that the trial court rejected all statements appearing in the affidavits presented by the plaintiff and that we, therefore, must exclude those statements from our consideration upon this review. That is not the law. It is true that the record must be viewed most favorably to the respondent on conflicting affidavits. All conflicts must be resolved in favor of the respondent. However, uncontradicted and unimpeached testimony can not *arbitrarily* be disregarded. See Mantonya v. Bratlie, 33 Cal.2d 120, 199 P.2d 677; Dobson v. Dobson, 86 Cal.App.2d 13, 193 P.2d 794. The portions of plaintiff's affidavits which we have considered are quite consistent, indeed harmonious, with Ethicon's general description of its sales promotion work. It is more reasonable to assume that the trial judge did not reject those consistent statements but concluded they did not token activities of such a kind and extent as would satisfy the jurisdictional requirements of due process. He well may have done so. He made his decision in September, 1951, prior to the rendition of the decisions in Fielding v. Superior Court, supra, 111 Cal.App.2d 490, 244 P.2d 968, Iowa Mfg. Co. v. Superior Court, supra, 112 Cal. App.2d 503, 246 P.2d 681, and similar recent decisions in other jurisdictions.

Ethicon claims the record upon the motion to quash would justify a finding that Ethicon made no sale or warranty to plaintiff; hence, that Ethicon is not liable to plaintiff in warranty. That has reference to but one count of the complaint and to issues which may develop if and when Ethicon answers the complaint, not to the issues presented upon Ethicon's special appearance in its endeavor to quash service of summons. We can not assume that plaintiff understood he was trying the case on the merits when he submitted affidavits in opposition to the motion to quash. Nor is there any basis for assuming that the trial judge considered that he had any such issue before him.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.



118 Cal.App.2d 246

CORREA v. QUALITY MOTOR CO. et al.

Civ. 8202.

District Court of Appeal, Third District, California.

May 29, 1953.

Action against consignor of automobiles for sale to recover value of truck delivered by plaintiff to a consignee for sale and application of proceeds to purchase price of new vehicle. The Superior Court, Placer County, Lowell L. Sparks, J., entered judgment from which defendant appealed. The District Court of Appeal, Jones, J. pro tem., held that in view of fact that it is common knowledge that in ordinary course of automobile business, seller usually accepts used vehicles as part payment on purchase price of new vehicles, and that great bulk of automobile business is done on sales contracts, such usages and customs of trade became a part of the agency contract between the consignor and consignee, and consignee was armed with at least apparent authority to

take truck in on purchase of Jeep, with result that consignor must bear the loss as the one of two innocent persons who made the injury possible.

Judgment affirmed.

1. Appeal and Error ⇐110

An order denying a motion for new trial is nonappealable. Code Civ.Proc. § 963.

2. Principal and Agent ⇐24, 124(3)

Where plaintiff brought action against consignor of automobiles for sale to recover amount of truck delivered to consignee for sale and application of proceeds to purchase price of a new vehicle, the extent of the authority of the consignee to accept "trade in" on purchase price of new automobiles, and the existence of his agency, were questions of fact.

3. Customs and Usages ⇐10

Generally, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears, and that usage will form a part of the contract.

4. Evidence ⇐20(1)

It is a matter of common knowledge that in ordinary course of automobile business, seller usually accepts used vehicles as part payment on purchase price of new vehicles, and that great bulk of automobile business is done on sales contracts.

5. Customs and Usages ⇐10
Principal and Agent ⇐103(10)

In view of fact that it is common knowledge that great bulk of automobile business is done on sales contracts, and that used vehicles are usually accepted by seller as part payment of purchase price of new automobiles, such usages and customs of the trade were as much a part of contract between defendant and his consignee for sale as if expressly set forth in the agency contract, and consignee acted with actual authority when he accepted truck from plaintiff on the purchase of a new vehicle.

6. Principal and Agent ⇐137(1)

Where principal makes it possible, through his acts, for his own agent to inflict injury, result of such injury is not to be passed on to innocent persons who have dealt with agent in good faith under his apparent authority, but principal is bound, under such circumstances, by the agent's acts and is estopped by his own conduct from denying the authority of the agent to act.

7. Principal and Agent ⇐14(1), 137(1)

Agency may be implied from facts of a particular case, and if principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot thereafter be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power.

8. Principal and Agent ⇐103(10)

Where consignor of motor vehicles for sale had clothed his consignee with apparent authority to accept "trade ins" on purchase of new vehicles, and consignee accepted truck of plaintiff but absconded before giving plaintiff credit on new vehicle, loss was to be borne by consignor as the innocent party who armed his consignee agent with apparent authority, thereby enabling him to obtain such advantage over plaintiff with whom consignee traded.

9. Appeal and Error ⇐931(1)

Evidence must be considered by reviewing court in light which is most favorable to party successful below when the insufficiency of evidence to support a finding is urged as ground for reversal, and all legitimate and reasonable inferences are to be indulged to uphold the finding, if possible.

10. Appeal and Error ⇐996

If two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

D. R. Robinson, Auburn, for appellant.

Daniel J. Higgins, Auburn, for respondent.

JONES, Justice pro tem.

At the time of the transaction out of which this case arose, the defendant Phil-

lip S. Snyder was engaged in the motor sales business in the City of Alameda under the firm name and style of Quality Motor Company. This business consisted of an agency for Willys Overland products, and was acquired by Mr. Snyder in January of 1948. At that time it was operated under the name of Quvale Motor Company. One John W. Flint was then selling the products handled by the Quvale Company in Auburn, California. After the purchase of the business and on or about the 14th day of April, 1948, Snyder entered into a written agreement with Flint whereby the latter undertook to sell the products being handled by Snyder on a consignment basis. In this agreement it was provided among other things that, "When a sale is made, it is agreed that the transaction will be immediately reported to the Quality Motor Co. and all necessary papers and details, *including credit information,* will be provided promptly to Quality Motor Co. Until other arrangements have been made, it is agreed that all Department of Motor Vehicle Report of Sale forms shall be completed by Quality Motor Co. in Alameda and that John W. Flint will provide a Power of Attorney form made out to P. S. Snyder and signed by the buyer." (Emphasis added.) Under this agreement vehicles were delivered by Snyder to Flint for sale by the latter.

On the 3d day of August, 1948, the respondent, John Correa, made a down payment of $1,000 to Flint at his place of business in Auburn on the purchase price of a Willys one-ton pickup truck. The balance of the purchase price, with sales tax, license fee, and time price differential, amounted to $1,224.42. A sales contract was made by Flint in the name of the Quality Motor Company with Correa to pay this balance in twelve monthly installments of $102.44 each. On the same day, August 3d, the contract was assigned by the Quality Motor Company through Flint to the Placer County Bank at Auburn. On the 28th of August, Correa paid the bank the outstanding balance on the contract, clearing up all indebtedness against the truck.

After Correa had been in possession of the truck for about three weeks and after the balance on the contract had been paid he approached Flint to take it in on payment for a Willys jeep. Correa's testimony as to what occurred between Flint and himself is: "So I drove this truck home, sold my little jeep, and had this truck, and finally decided that I would rather have had the small jeep or another small jeep than the truck. So I saw John shortly after I took the truck and told him about it; he says, 'Well, I'll tell you,' he says, 'These trucks are hard to get. We don't get them readily, and if you bring it back, *I will take it in* and, on the company, and resell it.' [Emphasis added.] He says, 'You haven't put on but about fifty miles on it,' which I drove it from here down to Lincoln from Auburn, to Lincoln, I think I went once from Lincoln down to Roseville and back to the house, and up here. He says, 'You bring the truck back and leave it here and I'll sell it.' He says, 'If you want a small jeep,' he says, 'I'll sell, and you can go ahead and when you get the money back,' he says, 'I will let you have a small one.' * * * I says, 'It is brand new, I haven't put on fifty miles on it.' He says, 'In fact the price has went up, I'll sell it as a new truck'. * * * Q. When you gave the car back to him to resell for you, did you get a receipt of any kind for the car? A. No, I didn't, no, I didn't. I just drove it up into his yard there and gave him the keys."

On December 2, 1948, Flint sold the truck to one Followell for $2,180, receiving as a down payment a jeep valued at $1,495.23, against which there was an indebtedness of $1,110.23, together with cash in the sum of $735, leaving an unpaid balance of $1,114.50, including sales tax of $54.50, and time price differential of $100.31. This balance was covered by a sales contract executed by the Quality Motor Co. as seller by John Flint, and Followell as purchaser. This contract, payable in 18 monthly installments of $67.44, was also assigned to the Placer County Bank with re-

course on December 2, 1948, by the Quality Motor Co. through Flint.

Toward the end of December, 1948, Correa, not having been able to get delivery of a jeep as promised, demanded the return of his money. Flint paid him $600 in small amounts over a period of time. In the early part of 1949 Flint disappeared and was next heard from in the armed forces. Correa then filed this suit to recover $1,580, which he claims is the balance due him on the transaction. As defendants, he named the Quality Motor Company, a corporation, John Flint, First Doe, and other fictitious persons. Flint was never served with summons and has not appeared. The Quality Motor Company, a corporation, and P. S. Snyder, doing business under the firm name and style of Quality Motor Company appearing as First Doe, answered. Judgment went for the plaintiff against the Quality Motor Company, a corporation, and Snyder. After the appeal was taken the judgment was amended by a stipulation and order augmenting the record and omitting the Quality Motor Company, a corporation. As the judgment now stands, it is against Snyder alone.

[1] Snyder has not only appealed from the judgment but also from the order denying his motion for a new trial. As an order denying a motion for a new trial is nonappealable, this portion of the appeal should be dismissed. Code Civ.Proc. sec. 963; Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550.

[2] The trial court found that in his dealings with Correa, Flint was acting as the agent of Snyder and within the scope of his authority. This finding is challenged by appellant as being without support in the evidence and appellant urges that for this reason the judgment should be reversed. He makes the argument that the proof conclusively shows that in taking the truck back and disposing of it to Followell Flint acted not for him, but for Correa and at Correa's instance and suggestion. Particular stress is laid upon the agency contract, Snyder claiming that by this agreement the authority of Flint was limited to the sales of vehicles for cash and not upon credit. He also vigorously contends that Flint's authority under the agency contract did not extend to the acceptance of "trade ins" on the purchase price of new cars. Under rules which are well established the extent of the authority of Flint in this respect, like the existence of his agency, is a question of fact. Vol. 1 Cal.Jur. p. 716.

[3–5] There is no dispute by Snyder that he contracted with Flint to sell Willys automobile products in the Auburn territory and that Flint undertook the engagement. He takes the position, however, that the agency contract did not empower Flint to sell on credit, or to accept "trade ins" on the purchase price of the consigned vehicles. As is said in Hind v. Oriental Products Co., Inc., 195 Cal. 655, 667, 235 P. 438, 443, "It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; *that the usage forms a part of the contract* * * *." (Emphasis added.) This rule is also supported by the decision in Isenberg v. California Employment Stabilization Comm., 30 Cal.2d 34, 37, 180 P.2d 11, where it is held that an employment contract may be proven by usages and customs. In Covely v. C. A. B. Construction Co., 110 Cal.App. 2d 30, 33, 242 P.2d 87, 89, it is said: "Knowledge of the custom on the part of the contracting parties is presumed from the fact that they are in the business or trade in which the custom exists." It is a matter of common knowledge that in the ordinary course of the automobile business the seller usually accepts used vehicles as part payment on the purchase price of new cars, and that the great bulk of the automobile business is done on sales contracts. These usages and customs of the trade become as much a part of the agency contract as if they were expressly set forth therein. Hind v. Oriental Products Co., supra. Flint's authority to sell on credit and to accept "trade ins" stemmed as much from the contract as from the position in which he was placed by Snyder to sell the Willys vehicles. Actual authority is defined by Civil Code, Section 2316 to be "such as a principal intentionally confers upon the

agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." By virtue of the terms of his agency contract, and the position in the trade in which he was placed by Snyder, Flint had ample reason to assume and believe that he possessed the authority to accept Correa's truck on the purchase of a jeep, and to dispose of the truck as he did. In this respect he acted with actual authority.

[6, 7] "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civ.Code, Sec. 2317. In Safeway Stores v. King Lumber Co., 45 Cal.App.2d 17, 23, 113 P.2d 483, 486, it is said that, "Where a principal makes it possible, through his acts, for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent where his own conduct has invited those dealing with him to assume that the agent possessed such authority. In such a case, a principal is bound by his acts and is estopped by his own conduct from denying the authority of the agent to act." And as this Court said in Gaine v. Austin, 58 Cal.App.2d 250, 260, 136 P.2d 584, 589, "Agency may be implied from the facts of a particular case, and if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power."

[8] Correa testified that he and Flint went to the Placer County Bank before he bought the truck. This visit was followed by his execution of the sales contract which was immediately purchased by the bank. This purchase of the sales contract by the Placer County Bank is a strong circumstance tending to negative any inference that Flint was not authorized to follow the usage of the trade and to accept his truck as a "trade in" on the purchase price of a new jeep. It was Snyder who armed Flint with apparent authority to take the truck in on the purchase of the jeep. Correa's loss, therefore, should fall upon Snyder, for as is said in Carter v. Rowley, 59 Cal.App. 486, 489, 211 P. 267, 268: "As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus has enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority and there is nothing in the transaction to put the purchaser on notice that the agent is exceeding his authority." Siegel v. Bayless, 113 Cal.App.2d 661, 248 P.2d 968, and Freitas v. Marsh, 70 Cal.App.2d 711, 161 P.2d 565, support this rule.

[9, 10] The evidence must be considered by the reviewing court in the light which is most favorable to the respondent when the insufficiency of the evidence to support a finding is urged as the ground for reversal, Cavero v. Franklin, etc., Benevolent Society, 36 Cal.2d 301, 223 P.2d 471, and all legitimate and reasonable inferences are to be indulged in to uphold the findings if possible. Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593. If two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. It has also been held that the reviewing court is bound to accept the determination of the trial court if it cannot be said that as a matter of law the evidence is insufficient to support a finding either way. Vaughn v. Jonas, 31 Cal.2d 586, 593, 191 P.2d 432. In our opinion the evidence here amply sustains the findings. Our conclusion in this respect disposes of the other points mentioned in appellant's briefs, and renders further notice of them unnecessary.

The appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

SCHOTTKY, J., and VAN DYKE, P. J., concur.

118 Cal.App.2d 276

Ex parte MACEDO et al.

Cr. 2446.

District Court of Appeal, Third District, California.

June 1, 1953.

Original proceeding for writ of habeas corpus by father seeking restoration to him of care, custody and control of minor child. The District Court of Appeal, Schottky, J., held that where testimony given at hearing in previous proceeding which resulted in order awarding custody of child to probation officer was not before District Court of Appeal, court would assume that such testimony supported findings.

Petition for writ of habeas corpus denied.

1. Habeas Corpus ⇐85(1)

In habeas corpus proceeding by father for custody of child, where testimony given at hearing in previous proceeding which resulted in order awarding custody to probation officer was not before District Court of Appeal, court would assume that such testimony supported findings.

2. Habeas Corpus ⇐3

Where Superior Court having jurisdiction rendered order, in custody proceeding subsequent to divorce, placing custody of child in probation officer and such order was still in effect, if probation officer improperly permitted child to remain with mother, father's remedy would not be by habeas corpus but by application in the Superior Court in divorce proceedings to have order modified.

Aye & Meader, Rio Vista, for petitioner.

George I. Lewis, Sacramento, for respondent.

SCHOTTKY, Justice.

Petitioner, the father of Madera Macedo, a minor of the age of four years, filed in this court a petition for a writ of habeas corpus praying that the care, custody and control of said minor child be restored to him.

The petition alleged that petitioner and his wife, Bonnie Macedo, were divorced by an interlocutory decree entered in the Superior Court of Solano County on October 6, 1952, and that the care, custody and control of the minor was awarded to the mother, with visitation rights in petitioner. The petition alleged further that on February 2, 1953, the same Superior Court made an order taking the custody from said mother upon the ground that she was not a fit and proper person to have the care, custody and control of said child and giving the care, custody and control of said child to the Probation Officer of Solano County.

The petition then alleged that the mother still had the care, custody and control of said child and that since the order of the Superior Court had made no finding that petitioner was not a fit and proper person to have the care and custody of said child, the court was without jurisdiction to grant its care and custody to the Probation Officer and that the said child was unlawfully kept in the custody of the said Probation Officer.

This court issued an order to show cause why a writ of habeas corpus should not be issued, said order to show to be served upon Bonnie Macedo, the mother, and Jule O. Pritchard, the Probation Officer.

An opposition and answer to the petition was filed by Bonnie Macedo, the mother, stating:

> "* * * that she is now residing at Sacramento, California and that said child is now with her and that she has said child in the custody of another person during her working hours; but alleges, that she has said child in her custody by reason of the fact, that when said child was placed in the custody and control of the Probation Officer of the County of Solano, by an Order of the Superior Court of the State of California, in and for the County of Solano, made and granted and entered by the Honorable Harlow V. Greenwood on the 2nd day of February, 1953 it was stipulated and stated that she

was to retain custody of said child until demand was made by said Probation Officer upon her to surrender the custody of said child. That demand has never been made upon her to surrender said child by the Probation Officer although he has at all times been advised by her of the whereabouts of said child; that further said Bonnie Macedo has also advised the said petitioner herein, Joseph A. Macedo, of the whereabouts of said child."

Said answer further stated that "petitioner is not entitled to relief as prayed for herein, for the reason that petitioner has the right to appeal from the order complained of, together with the further remedy of modification upon the showing of a change of circumstances justifying same."

[1] At the hearing before this court counsel for petitioner argued that habeas corpus is a proper means of determining the right to custody of minor children, and contended that petitioner as a parent could not be deprived of the care and custody of the minor child because it was not shown that he was unfit to have said care and custody. While these statements are correct as abstract propositions of law, there are a number of reasons why we would not be justified in granting a writ of habeas corpus in the instant proceeding.

In the first place the said order of February 2, 1953, made the following findings:

"3. The court finds that the defendant Joseph A. Macedo does not have an adequate place to take care of said minor child.

"4. The court finds that the plan of Joseph A. Macedo to have the care, custody and control of said minor child and the physical custody of said minor child placed with the sister of the said Joseph A. Macedo would create difficulty between the parents of the said child.

"5. The court finds that it is for the best interest and welfare of the minor child that the sole care, custody and control of said minor child be given to the Probation Officer of the County of Solano."

The testimony given at the hearing which resulted in the order of February 2nd not being before us, we must assume that it supports said findings. As was said in Prouty v. Prouty, 16 Cal.2d 190, at page 194, 105 P.2d 295, 297: "The question as to whether a parent is a fit or proper person to have the custody of a minor child refers, however, to his or her fitness at the time of the hearing * * *." See, also, Hamilton v. Hamilton, 104 Cal.App. 2d 111, 231 P.2d 69.

[2] Secondly, it appears that preceding the order of February 2, 1953, a hearing was had before the court at which petitioner was personally present and was also represented by counsel. It appears further that no appeal was taken from said order and that no application has been made to the court to modify its said order because of changed circumstances. There can be no doubt that the court had jurisdiction to make the order and that said order is still in effect. If, as petitioner asserts, the Probation Officer has improperly permitted the minor child to remain with the mother, his remedy is not a writ of habeas corpus but is more properly an application in the Superior Court in the divorce proceedings to have the order modified.

In view of the foregoing the petition for a writ of habeas corpus is denied.

VAN DYKE, P. J., and PEEK, J., concur.

118 Cal.App.2d 204

PEOPLE v. BURKETT.

Cr. 2416.

District Court of Appeal, Third District, California.

May 28, 1953.

Defendant was convicted of forcible rape. The Superior Court, Yolo County, Warren Steel, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Schottky, J., held that trial court did not abuse discretion in refusing to allow plea of guilty to be withdrawn.

Judgment affirmed.

1. Criminal Law ⇐274

In proceeding on application of a defendant to withdraw plea of guilty, whether there has been showing of good cause and whether permission to withdraw plea should be granted, is question solely within sound discretion of trial judge, to be decided upon facts of particular matter before such judge. Pen.Code, § 1018.

2. Criminal Law ⇐274

While a plea of guilty may be withdrawn for mistake, ignorance, inadvertence or for any other factor overreaching a defendant's free and clear judgment, the fact of such mistake must be established by clear and convincing evidence. Pen. Code, § 1018.

3. Criminal Law ⇐274

Discretion vested in trial court to permit withdrawal of plea of guilty should be liberally exercised and permission should be granted if it fairly appears that defendant was in ignorance of his rights and the consequences of his act or was unduly and improperly influenced by hope or fear. Pen.Code, § 1018.

4. Criminal Law ⇐274

Where 24 year old defendant who was represented by counsel withdrew plea of not guilty to two counts charged and entered plea of guilty as to one count only, charges against defendant's brother were dismissed, and defendant thereafter sought to withdraw plea of guilty, trial court did not abuse discretion in refusing to allow plea to be withdrawn. Pen.Code, § 1018.

Robert M. Cole, Davis, for appellant.

Edmund G. Brown, Atty. Gen., and Gail A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

By an information filed by the District Attorney of Yolo County, appellant, Dee Willie Burkett, and his brother, Earl H. Burkett, were charged with two counts: Count One, forcible rape, and Count Two, intent to commit rape. On August 22, 1952, a preliminary examination was held and both defendants were held to answer. On September 2, 1952, the defendants were arraigned in the Superior Court and each entered a plea of not guilty and demanded a trial by jury.

On September 22, 1952, the said defendants and their counsel appeared in court, and defendant and appellant, Dee Willie Burkett, through his attorney, made application for permission to withdraw his plea of not guilty to Count One for the purpose of entering a plea of guilty to said Count One. The court, after questioning the appellant, granted the application and set aside the appellant's plea of not guilty. On motion of the attorney for appellant, with the consent of the district attorney, Count Two of the information was dismissed as to appellant. Appellant was then rearraigned on Count One and entered a plea of guilty to the crime of rape. Thereupon on motion of the District Attorney the court ordered Counts One and Two of the information dismissed as to defendant Earl H. Burkett.

On October 13, 1952, appellant's present counsel was substituted as counsel for appellant, and filed a motion to allow appellant to withdraw his plea of guilty and enter a plea of not guilty. On October 20, 1952, a hearing was had upon this motion,

and also for the purpose of considering appellant's application for probation and the passing of judgment and sentence upon appellant. The court denied the motion to set aside the appellant's plea of guilty and also denied appellant's application for probation. Judgment was pronounced and appellant was sentenced to imprisonment in the state prison. This appeal is from said judgment.

Appellant's sole ground of appeal is that the trial court abused its discretion in refusing to grant appellant's motion to withdraw his plea of guilty and enter a plea of not guilty.

Section 1018 of the Penal Code provides in part as follows:

"* * * On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

* * * * * *

"This section shall be liberally construed to effect these objects and to promote justice."

In People v. Tidwell, 108 Cal.App.2d 60, at page 63, 238 P.2d 21, at page 22, this court said:

"A defendant desiring to change his plea must show good cause therefor; and the granting of such an application is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal except for an abuse of discretion. People v. Morgan, supra, 9 Cal.App.2d [612] at page 615, 50 P.2d 1061; People v. Dabner, supra, 153 Cal. [398] at page 403, 95 P. 880; People v. Price, supra, 51 Cal.App.2d [716] at page 718, 125 P.2d 529."

In People v. Griffin, 100 Cal.App.2d 546, at page 548, 224 P.2d 47, 49, the court said:

"* * * While a plea of guilty may be withdrawn for mistake, ignorance, inadvertence or for any other factor overreaching a defendant's free and clear judgment, the fact of such mistake, fraud, duress or overreaching must be established by clear and convincing evidence, and an appellate court may conclude that the motion was properly denied where the defendant acted with knowledge of the facts and on advice of his counsel. People v. Butler, 70 Cal.App.2d 553, 561, 161 P.2d 401; In re Hough, 24 Cal.2d 522, 531 ff., 150 P.2d 448; People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489.

* * * * * *

"Since there is no evidence of duress, fraud, threats, promises or other facts overreaching the free will and judgment of the defendants the cases cited by them, People v. Schwarz, 201 Cal. 309, 257 P. 71, and People v. Grant, 97 Cal.App. 60, 274 P. 1005, 275 P. 838, are not applicable."

In People v. Outcault, 90 Cal.App.2d 25, at pages 29–30, 202 P.2d 602 at page 604 the court said:

"* * * The plea of guilty constitutes an admission of every element entering into the offense charged, and constitutes a conclusive admission of defendant's guilt. (People v. Brown, supra [140 Cal.App. 616], 36 P.2d 194.)

"A motion to withdraw a plea of guilty, pursuant to the provisions of section 1018 of the Penal Code, is addressed to the sound discretion of the trial court, and in considering such a motion the doctrines of 'presumptive innocence' and 'proof beyond a reasonable doubt' are inapplicable, since defendant has already admitted his guilt by his plea of guilty. The question before the trial court was: Was the plea of guilty entered because of (a) duress, (b) fraud, (c) other forces overreaching the free will of defendant, or (d) was there a strong and convincing showing that defendant has been deprived of any legal right by an extrinsic cause? (People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489; People v. Lamb, 64 Cal.App.2d 409, 411, 148 P.2d 873; People v. Price, 51 Cal.App.2d 716, 718, 125 P.2d 529.)"

Applying the foregoing legal principles of law to the facts of the instant case we find that appellant and his brother were charged with the crime of rape and also the crime of intent to commit rape. They were represented by counsel at the preliminary examination and were held to answer. Upon being arraigned in the Superior Court and while represented by counsel they entered pleas of not guilty. Three weeks later appellant appeared in court with his counsel and made application for permission to withdraw his plea of not guilty to Count One, the charge of rape, and to enter a plea of guilty thereto. The court, before granting the application, questioned appellant and advised him as to just what he was doing in withdrawing his plea of not guilty and entering a plea of guilty. Count Two against appellant was then dismissed and both counts were dismissed as to his brother, Earl H. Burkett. Then three weeks later a new counsel was substituted for appellant and filed a motion to withdraw appellant's plea of guilty. In support of such motion is appellant's affidavit that he pleaded guilty by mistake and under duress; that he is not guilty of the crime of rape; that he pleaded guilty under the mistaken belief that it was necessary for him to do so in order to have the charges against his brother dismissed; that his former attorney was so informed by the District Attorney of Yolo County.

The motion was heard before the same trial judge who granted appellant's application to withdraw his plea of guilty. Appellant testified at said hearing that he had had no sexual relations with the complaining witness; that he changed his plea to guilty because "they told me if I would plead guilty my brother would be cut loose"; that when he pleaded guilty he thought he was pleading guilty to statutory rape; that he could not read or write.

Counsel for appellant referred to the transcript of the testimony at the preliminary examination and called the attention of the court to certain portions thereof, contending that the proxecutrix' testimony was beyond reasonable credulity. The transcript itself was not introduced in evidence but it was referred to throughout the hearing and was before the court, and it is included in the Reporter's Transcript on this appeal. The transcript of the testimony at the preliminary examination shows that the prosecutrix testified at some length and that her testimony was to the effect that appellant forcibly accomplished an act of sexual intercourse with her, and that his brother Earl H. Burkett attempted by force to accomplish an act of sexual intercourse with her but was unsuccessful. A reading of the testimony given at the preliminary examination reveals nothing inherently improbable about the testimony.

The court, before denying appellant's application to withdraw his plea of guilty, stated:

> "I don't just follow the basis for the motion here. The defendant has testified, of course, that he is illiterate, and so forth. That is neither here nor there. But he was represented by counsel. As I recall now, they hired him. This very case came before me on motion for permission to withdraw plea of not guilty and enter a plea of guilty. I think I was presiding here at that time some month or so ago. He says here, today, on the stand, that he thought he was pleading guilty to statutory rape. Of course, there is a little difference in punishment between statutory rape and rape by force and violence; and that he did it primarily for the sake of helping his brother, who, I presume, he understood that the action would be dismissed as to him; but this defendant admitted the offense, himself. Now, having, may we say, gained certain concessions there, and come back into Court today and say that he thought he was pleading guilty to statutory rape in one breath, and, in the next breath, say he didn't have, never had had any intercourse with the complaining witness, doesn't seem to match up here, you know. It is a kind of a weak alibi, if it may be so expressed. I am satisfied that the record will bear me out that the Court fully advised him of the situation when he was withdrawing his plea from not guilty and entering a plea of guilty, at

the time. I don't know; the Court Reporter probably has the notes on that; and he was represented by counsel and presumably did it knowingly and unconditionally; and, having done so, I feel that the Court, under the circumstances, would not be justified in backing up again and trying this case after the record appears as it does appear."

[1, 2] By the terms of section 1018 of the Penal Code hereinbefore quoted, the court may, for good cause shown, permit a plea of guilty to be withdrawn. Whether or not there is such a showing, and whether or not permission to withdraw the plea should be granted, is a question solely within the sound discretion of the trial judge, to be decided by him upon the facts of the particular matter before him. While a plea of guilty may be withdrawn for mistake, ignorance, inadvertence or for any other factor overreaching a defendant's free and clear judgment, the fact of such mistake must be established by clear and convincing evidence before an appellate court may conclude that the defendant acted with knowledge of the facts and on the advice of his counsel.

In 7 Cal.Jur., Criminal Law, sec. 136, page 1000, it is stated:

"Whether to allow the withdrawal of a plea of guilty, under section 1018 of the Penal Code, is a matter within the sound discretion of the trial court, and its action must be upheld unless an abuse of discretion is clearly shown. A court should be indulgent in permitting the substitution of a plea of not guilty where it properly appears that the plea of guilty was ignorantly induced, or was made through inadvertence or without due deliberation, or was made through motives of hope or fear unduly and improperly operating upon the defendant's volition. But the mere fact that the defendant, knowing his rights and the consequences of his act, entered the plea under a hope of leniency presents no ground for the exercise of the discretion of the court."

[3, 4] While it is true that the discretion vested in the trial court by section 1018 of the Penal Code should be liberally exercised, and that permission to withdraw a plea of guilty should be granted if it fairly appears that the defendant was in ignorance of his rights and the consequences of his act or was unduly and improperly influenced by hope or fear in the making of it. People v. Miller, 114 Cal. 10, 45 P. 986, we do not believe that appellant's showing in the instant case is such as to justify us in holding that the trial court abused its discretion in denying appellant's motion. Even though appellant was uneducated, it appears that he was 24 years old and had the advice of counsel at all stages of the proceedings. At the time the plea of not guilty was withdrawn the court advised him as to what he was doing. His statement that he thought he was pleading guilty to statutory rape is difficult to believe when he must have heard the prosecutrix testify at the preliminary examination that she was 18 years old. Then after making that statement he testified that he never had sexual relations with the prosecutrix. It is significant also that there was no affidavit or testimony by his former counsel that his plea was elicited by any promises. There is no evidence in the record that would justify, much less, compel, the conclusion that appellant in withdrawing his plea of not guilty and entering a plea of guilty was either ignorant of his rights and the consequences of his act or was unduly influenced by fraud, hope or fear.

The judgment is affirmed.

PEEK, J., and VAN DYKE, P. J., concur.

118 Cal.App.2d 238

PEOPLE v. SIMMONS et al.

Cr. 4964.

District Court of Appeal, Second District, Division 3, California.

May 29, 1953.

Rehearing Denied June 9, 1953.

A defendant was convicted of possessing flowering tops and leaves of marijuana. The Superior Court, William B. Neeley, J., entered a judgment and defendant appealed from the judgment and from an order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1159(2)

On appeal from conviction for possessing flowering tops and leaves of marijuana, District Court of Appeal could not reweigh evidence and could only decide as to its legal sufficiency. Health and Safety Code, § 11500.

2. Poisons ⇐9

Evidence sustained conviction for possessing flowering tops and leaves of marijuana. Health and Safety Code, § 11500.

David Silverton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Nathaniel Crawford appeals from a judgment convicting him of violation of § 11500 of the Health & Safety Code, in that he had in his possession flowering tops and leaves of marijuana. Others jointly charged with him were one Simmons and one Edward. Each defendant made a motion for dismissal under § 995 of the Penal Code. The motion was granted as to Simmons and denied as to Edward and Crawford. Trial by jury having been waived, it was stipulated that the People's case be submitted on the transcript of the testimony taken at the preliminary hearing and an exhibit referred to therein. No other evidence was introduced. Edward was found not guilty. Appellant's application for probation was denied and he was sentenced to the county jail for a term of 90 days. The sole contention on the appeal is that the evidence was insufficient to justify a finding of guilt.

Two Los Angeles City police officers, Conrad and Lamberty, made the arrest at about 1:50 a. m. Their testimony was that they stopped the car in which appellant and the others were riding and ordered it to the curb. The car did not belong to either of the occupants. Conrad approached the car on the left side, Lamberty on the right. Lamberty testified that as he approached the rear of the car be observed a small brown envelope being tossed out of the right rear window; he picked it up, handed it to Conrad, and they found that it contained two brown paper-wrapped cigarettes which, according to the testimony of a police department chemist, contained marijuana; the right rear window of the car was lowered from the top about half an inch and appellant was sitting next to the window; other windows on the right side of the car were closed. Lamberty did not actually see Crawford throw the envelope out of the window, but he saw it from the time it left the window until it struck the ground. The three occupants of the car were ordered to leave it and upon investigation Officer Conrad found a tobacco can containing 14 brown paper-wrapped cigarettes under the front seat. These cigarettes, also, according to the evidence, contained marijuana.

Appellant's argument is that the envelope could have been thrown out of the window by Edward, who was in the front seat, but this supposition ignores the testimony of the officers that the right front window was closed, while that at the rear was open. Of course, Edward could have reached back to the rear window and dropped the envelope through the opening, but this was a question for the trier of the facts. Either one or the other threw away the cigarettes and the trial court, after due deliberation, determined that the probabilities were greater that they were thrown away by appellant. If so, he, of

course, had had them in his possession, and was guilty of the act charged. We note that appellant was shown to be of good reputation, employed by Lockheed Aircraft, had not previously been in trouble, and that he had recently been released from service in the army. It is clear that the court, in reaching its decision, took these facts into consideration and gave appellant the full benefit of the presumption of innocence.

[1, 2] We cannot reweigh the evidence, but only decide as to its legal sufficiency. Since appellant gave no testimony he cannot justly criticize the court for believing the testimony of the officers.

The judgment and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 254

EDWARDS v. DEITRICH.

Civ. 15465.

District Court of Appeal, First District, Division 1, California.

June 1, 1953.

Hearing Denied July 28, 1953.

Action by executrix of estate of deceased mother against surviving husband for declaratory relief and to quiet title to realty purchased with community funds and conveyed to husband and wife in joint tenancy. The Superior Court, County of Alameda, found that the realty involved was community property and entered judgment accordingly, and defendant appealed. The District Court of Appeal, Peters, P. J., held that findings that despite the form of deeds, such realty was considered and treated by husband and wife as community property and that they had agreed to dispose of all their property by will as community property were unsupported by the evidence.

Judgment reversed.

1. Husband and Wife ⇐264

In action by executrix of estate of deceased mother against decedent's surviving husband for declaratory relief and to quiet title to realty, finding that despite form of deeds by which realty purchased with community funds was conveyed to husband and wife as joint tenants by their express direction, such realty remained and was treated by the parties as community property was unsupported by any substantial evidence.

2. Husband and Wife ⇐262(1)

The statutory presumption that property acquired after marriage except by gift, will, devise or descent is community property is rebutted by evidence that such property was taken in joint tenancy.

3. Husband and Wife ⇐262(1, 2)

Form of deed by which property is conveyed to husband and wife in joint tenancy raises a rebuttable presumption that the property is as described in deed and places burden on party claiming that such property is community property to prove such fact.

4. Husband and Wife ⇐262(1), 266

Husband and wife by oral agreement can convert community property into separate property or separate property into community, and evidence of such agreement will rebut the presumption created by form of the deed by which such property was acquired by husband and wife.

5. Husband and Wife ⇐262(1), 266

In order to convert community property into separate property or separate property into community property by oral agreement between husband and wife, there must be relevant evidence of an agreement to that effect and mere fact that one of the parties had a mistaken belief about the nature of the property, or an intent communicated to the other spouse about converting the property from one form to another, or expressed such an intent by will, will not rebut the presumption raised by the form of deed by which such property was acquired by husband and wife.

6. Husband and Wife ⇐266

Where husband and wife, in addition to realty purchased with community funds and conveyed to them in joint tenancy pursuant to express direction by wife, held personal property and deed of trust as community property, expression of wife's desire shortly before death, allegedly acquiesced in by husband, that one-third of all their property should go to each of wife's two daughters by a former marriage and one-third to husband, execution by wife of holographic will bequeathing all her share of community property to daughters and subsequent execution of will by husband at wife's request were insufficient to evidence agreement to convert realty held in joint tenancy to community property.

John M. Hoffmann, Howard C. Erickson, Robert V. Winkler and Hoffmann & Erickson, Oakland, for appellant.

Houlihan & Brown, Oakland, for respondent.

PETERS, Presiding Justice.

Does the evidence support the findings that real property purchased with community funds but deeded to a husband and wife in joint tenancy in fact was at all times or by subsequent oral agreement held by the parties as community property? That is the basic question presented on this appeal. This is the type of question that is always difficult for a trial court to answer, and that has been the fertile source of much litigation.

This is an action for declaratory relief, to quiet title and to recover possession of certain property brought by the executrix of the will of Della Deitrich against her surviving husband, it being claimed that the two parcels of realty involved were community property of defendant and his deceased wife. The trial court found that the property involved was community, and entered its judgment accordingly. Defendant husband appeals, contending that there is no substantial evidence to support the findings, or to rebut the presumption arising out of the form of the deeds. We agree with this contention.

The challenged findings read as follows:

"That on the 17th day of September, 1950, the decedent and the defendant orally agreed that all of their real and personal property was community property; that, on said date, the decedent and the defendant orally agreed to dispose of all of their real and personal property, by will, as community property;

"That notwithstanding the form of deed in which the decedent and the defendant took title to the real properties * * *, the decedent and the defendant at the time of the acquisition of said properties did not know nor understand the legal effect of the joint tenancy form; that, notwithstanding the form of deed by which the decedent and the defendant took title to the real properties * * *, the decedent and the defendant, on and after the respective dates when said properties were acquired, continued to consider their said properties as community property and dealt with and treated the same as such."

The Deitrichs were married in Oklahoma in 1928. They came to California in 1931. Mrs. Deitrich had two children by a previous marriage, Edna Edwards, the plaintiff, and Sue Nelson, both of whom are devisees under their mother's will. From the time of their marriage in 1928 to October 1, 1950, the date of Mrs. Deitrich's death, the parties lived together as husband and wife. The husband first worked as a waiter and subsequently as a restaurant proprietor, while Mrs. Deitrich worked as a teacher and saleslady, and occasionally worked in her husband's restaurant. Their earnings, at least after they came to California, were placed in a joint bank account. In California, the parties purchased, with funds jointly earned after marriage, a chicken ranch in San Leandro. This chicken ranch was thereafter sold, the husband and wife taking as security a deed of trust valued, at the time of trial, at about $9,500. Admittedly, this deed of trust is community property, and, admittedly, Edna and Sue, under the will of decedent, is each entitled to one-quarter of

its value. Title to this ranch, until its sale, was taken in the name of decedent alone, defendant explaining that his wife was opposed to the possibility of his relatives inheriting from him, and that he consented to this form of the deed to avoid arguments. Profits from this ranch, and money received upon its sale, were used by the Deitrichs to buy the two parcels here involved—the Hays Street property in San Leandro and the Fairview property in Hayward. Titles to these two parcels were taken in joint tenancy at the time of each purchase, and so remained at the time of Mrs. Deitrich's death.

The first parcel purchased was the Hays Street property, which was purchased in 1947. It should here be mentioned that the evidence shows that Mrs. Deitrich was the dominant spouse in this marriage, and handled the financial transactions of the parties.

Before the parcel was purchased defendant asked his wife how the deed was to be made out, to which she replied "joint tenancy * * *. For the simple reason that you have a lot of brothers and sisters, you and I never had any children of our own, and I don't want any of the brothers and sisters to come in for any part of it; therefore, we have a joint tenancy." Defendant agreed. This property was a fourplex. The deposit receipt and the buyers' instructions provided that the property should be conveyed to them as "husband and wife in joint tenancy." The money for this property came from the joint bank account of the parties. This parcel is valued at $20,000, subject to a mortgage of about $4,600.

The parties lived on this property until they purchased the home or Fairview property in Hayward in 1949. This, too, was taken in joint tenancy. The real estate saleswoman who consummated the deal testified that she was directed by the Deitrichs to make the deed in joint tenancy, and when she started to explain the legal effect of such a deed she was interrupted by Mrs. Deitrich who said: "That is all right; I know what joint tenancy is." The deposit receipt was signed by both Deitrichs in her presence, and it and the buyers' instructions directed that the deed be taken in joint tenancy. This property was sold in September, 1950, for $14,000, subject to a balance owing of $5,600 and the money impounded to await the outcome of this lawsuit.

Defendant, on cross-examination, was asked about his understanding of joint tenancy. He testified that he understood the meaning of the term at the time the conveyances were made, such understanding being that: "Joint tenancy is for the protection of both parties, and the survivor automatically inherits the other half."

In September of 1950 Mrs. Deitrich was quite ill. Plaintiff had been taking care of her mother in the Fairview home. On the morning of September 17, 1950, plaintiff and defendant were preparing to arrange for hospital care for Mrs. Deitrich when an important conversation took place between plaintiff and Mr. and Mrs. Deitrich. Mrs. Deitrich, according to plaintiff, stated: "George, if anything happens to me I would like, I think—I would like that one-third of all the property we have—one-third would go to Edna, one-third to Sue and one-third to you." Defendant replied: "I think that is all right." Mr. Deitrich denied that any conversation took place before the wills were executed.

After the plaintiff and defendant came back from making arrangements at the hospital Mrs. Deitrich asked for a pencil and stationery, stating that she wanted to draft a will. These were brought to her and she was left alone for over an hour. Then a conversation took place in the bedroom. Present, besides Mrs. Deitrich, were her husband, the plaintiff, and a notary public who had arrived to supervise the execution of the deed to the Fairview property. Plaintiff testified that Mrs. Deitrich had her, and then defendant, read the olographic will she had prepared; that she then asked them if its provisions were all right; that plaintiff asked her mother about provision for the grandchildren, and that Mrs. Deitrich stated that she would trust her daughters to take care of them. Defendant admitted that he glanced over the will and stated that it was "O.K." Plaintiff then testified that her mother then

told defendant he should make a will and gave him a pencil and piece of paper; that defendant sat beside the bed and wrote out his will and handed it to his wife; that she read it and handed both wills to plaintiff and directed her to "file" them. Defendant corroborated this portion of plaintiff's testimony, stating that when his wife asked him to make a will he replied: "If it will please you, yes."

Both wills were admitted into evidence, over objection, counsel for plaintiff stating that they were not being offered as joint wills or as evidence of any written agreement between the parties. Mrs. Deitrich's will has been admitted to probate, and plaintiff appointed executrix.

The olographic will of Mrs. Deitrich reads as follows:

"Sun. Sept. 17–1950

"This is my last will and testimony.

"I hereby bequieth my share of all community property to my 2 daughters. Edna C. Edwards and Sue Callie Nelson to be divided equally. Sue's share to purchase a home for her and boys Personal things to do with as they like.

"I appoint Edna Edwards as the administor.

/a/ Della Deitrich"

The unprobated olographic will of defendant reads as follows:

"Sept 17–50.

"This is my last Will

"I hear by Authorize my Wife Della Deitrich sole heir to all my Estate

"Or her 2 Daughters
"Mrs. Edna Edwards } To be Divided Equally
"Mrs. Sue Nelson.

Geo H Deitrich"

Plaintiff, on cross-examination, testified that when her mother handed her the two wills, she stated: "I want my share of my property—my share of our property to go to my—to you and to your sister, Sue."

A cousin of plaintiff who was in the house that day testified that when defendant came out of his wife's room he stated that they had just made wills. He was asked how he had made his. He stated that his wife had left her "share" to the "girls," and "What the hell, when I am gone the girls can have mine—the girls and the grandchildren."

The notary was not called as a witness.

Defendant testified that the only conversation about the wills he had with his wife after she had drafted her will, had to do with where he intended to live if she should die. Then his wife stated that in her will: "I leave my half of the community property" and had appointed Edna "to be executionist." Defendant asked "Not over me?", to which she said "No, just over Sue," that is "over Sue's half."

Plaintiff also testified that later that same day defendant told her that if his wife should die "we will have to dispose of the Four-Plex as Sue will probably want her share of it when the time comes." Defendant denied this conversation. Plaintiff also testified that in May of 1951, defendant stated to her: "Edna, to tell you the truth I thought all the property was community property." This too was denied by defendant.

[1] This is a fair summary of the relevant testimony. What does it disclose, and what are the rules of law applicable to it? The trial court has found, as one of its two alternative theories, that in spite of the form of the deeds to the two parcels, the property remained and the parties treated it as community property. That finding is totally unsupported. The evidence shows that the two parcels were purchased by funds acquired after marriage, that the deeds were intentionally taken in joint tenancy, and that Mrs. Deitrich declared she knew what that meant. There is not one word of evidence that at the time of purchase the parties orally agreed or understood that the property should remain community, nor is there one word of evidence that thereafter the parties treated the property as community property. In fact, the evidence is to the contrary. If this judgment can be sustained, it must be sustained on the other alternative finding that on the 17th of September, 1950, the decedent and her husband orally agreed

that all of their property should be community property.

[2, 3] The law applicable to this problem is reasonably clear. The statutory presumption that property acquired after marriage except by gift, will, devise, or descent is community is rebutted by evidence that the property was taken in joint tenancy. That form of conveyance not only rebuts the community property presumption, but itself raises the rebuttable presumption that the property is as described in the deed, and places the burden on the party claiming the property to be community to prove that fact. King v. King, 107 Cal.App.2d 257, 236 P.2d 912; Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Walker v. Walker, 108 Cal.App.2d 605, 239 P.2d 106; In re Rauer's Collection Co., 87 Cal. App.2d 248, 196 P.2d 803.

[4] It is also the law that by oral agreement a husband and wife can convert community property into separate, and vice versa, and that evidence of such agreement will rebut the presumption created by the form of the deed. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Title Insurance & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Vieux v. Vieux, 80 Cal.App. 222, 251 P. 640; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214; In re Estate of Raphael, 91 Cal.App.2d 931, 206 P.2d 391; Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; Stice v. Stice, 81 Cal.App.2d 792, 185 P.2d 402; In re Estate of Sill, 121 Cal. App. 202, 9 P.2d 243; Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443.

[5] But it is the rule that in order that property may be converted from one form to another there must be relevant evidence of an agreement to that effect. The mere fact one of the parties has a mistaken belief about the nature of the property, or has an intent uncommunicated to the other spouse about converting the property from one form to another, or expresses such an intent by will, will not rebut the presumption raised by the form of the deed. Socol v. King, 36 Cal.2d 342, 223 P.2d 627; Cash v. Cash, 110 Cal.App.2d 534, 243 P.2d 115; Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906.

[6] In the instant case, as already pointed out, at least until September 17, 1950, there is not one word of testimony that either party intended, and certainly no evidence that the parties had agreed, that the two pieces of property were to be held in any other way than was described in the deeds of conveyance, that is, in joint tenancy. What happened on September 17, 1950, did not amount to a consummated agreement to convert the property from joint tenancy to community. Certainly the fact that Mrs. Deitrich stated in her will that she bequeathed "my share of the community property" to her two daughters, is no evidence at all that the parties had agreed that these two parcels were part of the estate to be bequeathed under this provision. These parties owned not only personal effects, etc., as community property, but also owned a deed of trust worth $9,500 as community property, and one-half of the wife's share is admittedly bequeathed to the plaintiff and her sister by the will. Mrs. Deitrich knew that these two parcels were held in joint tenancy and not as community property, had directed that the two deeds should so provide, and had declared that she knew the effect of taking title in joint tenancy. She was the business manager of this marriage. In the absence of any testimony to the contrary we must assume that the reference in the will to "community property" meant just that, and did not include joint tenancy property.

Nor do the conversations held on September 17, 1950, assist plaintiff. In the first conversation Mrs. Deitrich expressed a wish that if "anything happened" to her she would like one-third of "all the property we have" to go to Edna, one-third to Sue, and one-third to her husband. Defendant is supposed to have said: "I think that is all right." That falls far short of an agreement to convert joint tenancy property into community. Not one word was said about converting property from one form to another. The conversation simply amounted to a proposition to her

husband as to how she would like the property to be willed. But if the property were converted to community, she could only will away one-half, that is, one-quarter to each daughter. Plaintiff admits, as seems obvious, that this was not an agreement to execute joint wills. That being so, it amounted to no more than a hope expressed by the dying Mrs. Deitrich as to how she would like the property to go. It is no evidence at all of an agreement to convert the property into community property.

The same can be said about the conversation after Mrs. Deitrich's will was executed. Her husband read the will and said it was "O.K." Certainly that does not prove an agreement that what the decedent referred to as "community property" should include the two parcels here involved. Then at Mrs. Deitrich's request defendant made a will. By that will defendant left his entire estate to his wife, or (apparently if she died first) then equally to the two daughters. By no stretch of the imagination does that document evidence any agreement that the two daughters were ever to have any rights during defendant's lifetime.

This evidence falls far short of supporting the finding that on September 17, 1950, the parties "orally agreed that all of their real and personal property was community property." When property is placed in joint tenancy it is no longer held as community property. The presumption arising out of the form of the deed can be rebutted, but it can only be rebutted so far as a subsequent conversion is concerned by evidence that the parties agreed upon a present conversion of the property from one form to another. The mere fact that one of the parties would like to will away more than her share, and the other party orally acquiesces, is not sufficient to convert the property from joint tenancy to community. That is all that exists here.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

117 Cal.App.2d 441

SECURITY TRUCK LINE v. CITY OF MONTEREY et al.

Civ. Nos. 15230, 15367 and 15704.

District Court of Appeal, First District, Division 1, California.

May 28, 1953.

Action by truck company against city and its officers to have declared unconstitutional municipal ordinance which imposes license tax upon business of fish hauling in municipality and which bases tax on weight of trucks used, and to have enforcement of such ordinance enjoined. The Superior Court, County of Monterey, Anthony Brazil, J., granted preliminary injunction, denied motion of city and its officers to set aside default judgment obtained against them, and city and its officers appealed. The District Court of Appeal, Peters, P. J., 256 P.2d 366, affirmed judgments and orders, and, upon petition for rehearing, held that city tax for revenue purposes cannot be upheld where classification is unreasonable and is not based upon natural, intrinsic or fundamental distinctions.

Petition denied.

Taxation ⚖42(1)

City tax for revenue purposes cannot be upheld where classification is unreasonable and is not based on natural, intrinsic, or fundamental distinctions.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for appellants, City of Monterey and others.

Russell Zaches, Monterey, for respondent Security Truck Line.

PETERS, Presiding Judge.

In denying this petition for rehearing we reiterate that the reason why we have held that the challenged portion of the statute is invalid is that it is unconstitutionally discriminatory, in that the classification contained therein is not based on any valid or constitutional distinction, and is arbitrary. What is said in the opinion as to the "fairness" of the tax or as to "public policy" relates only to the constitutional question of

the reasonableness of the classification. While a city has wide discretion in making classifications for tax purposes, Fox etc. Corp. v. City of Bakersfield, 36 Cal.2d 136, 222 P.2d 879, a tax for revenue purposes cannot be upheld where the classification is unreasonable and is not based upon natural, intrinsic or fundamental distinctions. In such event, the tax violates constitutional limitations. This, in our opinion, is such a tax.

The petition for a rehearing is denied.



118 Cal.App.2d 284

DEES v. PACE.

Civ. 15274.

District Court of Appeal, First District, Division 2, California.

June 2, 1953.

Rehearing Denied July 2, 1953.

Hearing Denied July 28, 1953.

Medical malpractice action. The Superior Court, County of Santa Clara, entered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal, Patterson, J. pro tem., held, inter alia, that doctrine of res ipsa loquitur was not applicable in malpractice action against doctor, who had performed total hysterectomy operation, for hole in patient's bladder, in view of fact that hysterectomy is so complicated as to lie beyond realm of common knowledge and experience of layman as to whether such result would ordinarily occur in absence of negligence.

Reversed.

Nourse, P. J., dissented.

1. Physicians and Surgeons ⇐18(6)

The doctrine of res ipsa loquitur applies in medical malpractice cases only where layman is able to say as matter of common knowledge and observation, or from evidence can draw an inference, that consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.

2. Physicians and Surgeons ⇐18(6)

Doctrine of res ipsa loquitur was not applicable in malpractice action against doctor, who had performed total hysterectomy operation, for hole in patient's bladder, in view of fact that hysterectomy is so complicated as to lie beyond realm of common knowledge and experience of layman as to whether such result would ordinarily occur in absence of negligence.

3. Physicians and Surgeons ⇐18(6)

The mere fact in itself that an unfavorable result of an operation is somewhat rare does not give rise to inference of negligence on part of doctor such as will make doctrine of res ipsa loquitur applicable in malpractice action.

4. Evidence ⇐265(2)
Physicians and Surgeons ⇐18(6)

Alleged statement of doctor that he had made a mistake in performance of surgical operation, if considered an admission of negligence, would be evidence of specific act of negligence and would not afford basis for application of doctrine of res ipsa loquitur in malpractice action.

5. Negligence ⇐138(2)

There is no impropriety in giving res ipsa loquitur instructions together with instructions concerning presumption of care where both are applicable.

Rankin, Oneal, Luckhardt, Center & Hall, Duncan Oneal, San Jose, for appellant.

O. Vincent Bruno and Michael Di Leonardo, San Jose, for respondent.

PATTERSON, Justice pro tem.

This is an appeal from a judgment against defendant, a physician and surgeon, for the sum of $20,000 entered pursuant to a jury's verdict awarding the plaintiff that sum in damages for malpractice.

The defendant performed a total hysterectomy operation upon the plaintiff. After the operation plaintiff developed a leakage of urine. Plaintiff testified that this first occurred while she was in the hospital three days after the operation. It was reported to the doctor ten days after the operation. She reported from time to time to the doctor

and received some treatment without effect. She was examined by another physician, a Dr. Lamb, with the consent of the defendant. Dr. Lamb discovered a fistula or hole in plaintiff's bladder. The plaintiff returned to the defendant who made an examination and also found the fistula. Plaintiff entered the hospital again, and another operation was performed to repair the bladder. This operation was performed by an urologist, Dr. McElligott, who was assisted by the defendant. The condition was no better after this operation. Another repair operation was performed, this time by Dr. Picksworth and Dr. McElligott. This operation was successful and plaintiff no longer had any leakage.

Three doctors testified on behalf of the plaintiff. Dr. Lamb testified as to his examination of the plaintiff, the finding of the fistula, and that he informed the defendant of his findings. He further testified that a fistula of this kind could have been caused by a cut from a scalpel during an hysterectomy operation, from the use of scissors, from clamps improperly placed, or by infection which had cut off the blood supply from that portion of the bladder. He stated that a fistula had never followed any of the approximately three hundred hysterectomies he had performed. The doctor also testified that if the fistula had been caused by cutting the wall of the bladder during the operation, leakage would be expected to appear almost immediately and in any event sooner than ten days. He expressed no opinion as to how the fistula in the present case was caused.

Dr. E. B. McElligott, who performed the first repair operation and who assisted in the final repair operation, testified he found no disease or anything unusual in the bladder which would cause it to break down but stated he had no opinion as to the cause of the fistula. He testified that a fistula could be caused by a suture in the bladder, by cutting, by clamping, by poor blood supply, by infection, by childbirth, or that it could result from pressure against the bladder by an enlarged uterus. He also testified that in performing an hysterectomy you separate the bladder from the uterus by use of your fingers and a sponge which is considered good procedure; that it is possible that a bruise could result to the bladder during the course of that phase of the operation which in turn could develop a fistula. He stated that a fistula developing from an hysterectomy is not too uncommon.

Dr. Harry Luke Harrison, Jr., testified that he is a specialist in the field of obstetrics and gynecology; that in his entire practice he had observed approximately two dozen fistulas; that only in one-tenth to two-tenths of one per cent of all hysterectomies does a fistula follow. He examined the plaintiff and observed the fistula but expressed no opinion as to its cause.

The plaintiff, in rebuttal, called Dr. Max E. Picksworth who testified that he performed the second repair operation with Dr. McElligott and that plaintiff's fistula was about one to one and one-half centimeters in diameter. The fistula in his opinion was possibly of traumatic origin. He further testified that in his opinion it could not be due to a condition of chronic cervicitis. There was also testimony by the doctor that fistulas sometimes result from cancer and in inflammatory disease in other organs that extend to the bladder.

None of the doctors called by the plaintiff criticized in any manner the operative procedure followed by the defendant. None of them expressed a view that the facts evidenced any failure by the defendant to possess the degree of learning and skill ordinarily possessed by physicians in good standing practicing in the locality. Neither did any of them suggest that the facts indicated any failure to exercise due care in applying that knowledge and skill in the treatment of the plaintiff.

The defendant called three doctors as witnesses. The first was Dr. John Hunt Shephard who testified he had examined the operative records of the hospital concerning the procedure followed by the defendant in performance of the operation and that there was nothing which would have been done differently by any prudent surgeon of general practice and that the defendant had not failed to do anything which should have been done by a reasonably practical and skillful surgeon in the area. He further testified that a possible fistula is a recog-

nized hazard in hysterectomies and that a fistula may develop from the performance of an hysterectomy without negligence on the part of the doctor. A fistula had never followed any of the hysterectomies that he had performed although he stated that they sometimes follow such an operation and one sees many of them in medical centers. In his opinion the incidence would be less than one per cent. Dr. Shephard also stated the causes of vesicle vaginal fistulas following a total abdominal hysterectomy are congenital defects in the bladder, the use of instruments, suturing, infections or tumor formations.

Dr. Thomas L. Blanchard testified that he had examined the operative routine and there was nothing in the record which differed from the manner in which such an operation would be performed by a reasonably prudent and skillful surgeon. He further testified that a fistula in the bladder might follow an hysterectomy performed under ideal conditions and by the most skillful surgeon.

Dr. Pace, the defendant, after describing his treatment and operative procedure, stated that so far as he could ascertain he did not cause any injury to the plaintiff's bladder by the use of scalpel, scissors, clamps or in suturing. He stated that removal of the uterus disclosed the presence of two cysts, a fibroid and chronic cervicitis. The uterus was found to be enlarged. The causes of fistula following hysterectomy were stated to be: lacerations of the bladder with a knife, scissors or needle; undue pressure or extension on the bladder during the operation; infections, present or previous; poor blood supply and causes inexplainable to the surgeon. He stated that a fistula was a calculated risk in this type of operation and further stated he did not know its cause in the present case. His testimony also disclosed that the upper portion of the uterus is about one inch from the wall of the bladder and the lower portion is next to the wall of the bladder.

[1] The defendant complains first that the court erred in giving instructions on the doctrine of res ipsa loquitur. The court gave an instruction which explained the essentials of the doctrine of res ipsa loquitur and further instructed that from the happening of the injury involved in this case there arose an inference that there was some negligent conduct on the part of the defendant.

The facts here are similar to those in Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520, and Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695. In the Farber case, decided since this case was submitted, the Supreme Court had occasion to state again the rule regarding the doctrine of res ipsa loquitur in malpractice cases. In that case the plaintiff suffered a fracture of both femur bones in the course of shock treatment in a mental institution. From the expert testimony it appeared that this result was one of the hazards of such a treatment although the overall incidence of fractures in such cases was only from one-half to three and one-half per cent. In holding that res ipsa loquitur did not apply the Court said [254 P.2d 524], "That doctrine applies in medical malpractice cases only where a layman is able to say as a matter of common knowledge and observation, or from the evidence can draw an inference, that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised". In Engelking v. Carlson, supra, the defendant in the performance of a knee operation severed the paroneal nerve resulting in a disability to the plaintiff. The defendant testified that although the nerve is not difficult to locate and identify a surgeon may miss it and thereby cause injury. He also testified that although severance of this nerve did not ordinarily occur it was one of the hazards of this kind of an operation. Other medical testimony was to the effect that in ordinary surgical practice it occurred in from five to nine per cent of the cases. The Court held that the doctrine of res ipsa loquitur did not apply.

[2, 3] An hysterectomy operation as disclosed by the medical testimony is a complicated one and it would lie beyond the realm of the common knowledge and experience of laymen as to whether or not this result would ordinarily occur in the absence of negligence. None of the doctors testi-

fied that in the small number of cases in which a fistula occurs that they are probably the result of negligence. On the contrary the undisputed expert testimony shows that a fistula is a recognized hazard in all hysterectomies, one of the calculated risks; and while it does not occur very often from any cause, it may occur where the operation is performed under ideal conditions by the most skillful surgeon without negligence on his part.

The plaintiff contends that the doctrine of res ipsa loquitur is applicable in this case in view of the testimony of Dr. Lamb and Dr. Shephard that in the many hysterectomies performed by them no fistulas had resulted, and also in the testimony of Dr. Harrison and Dr. Shephard that the incidence of the fistulas in such cases is small. The mere fact in itself that an unfavorable result is somewhat rare does not give rise to such an inference. The Court refused to invoke the doctrine in Farber v. Olkon, supra, and Engelking v. Carlson, supra, where the incidence was small.

Plaintiff next contends that the instructions are within the spirit of the holding of Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 690, 162 A.L.R. 1258. In that case a patient in a hospital undergoing an appendectomy received injuries to his shoulder due to trauma. The court there pointed out that the patient received a "distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation." The court stated that the injury was obviously the result of some one's negligence. In the present case, however, the area affected was within the operating field and was a recognized hazard of such an operation.

Plaintiff also contends that under the authority of Milias v. Wheeler Hospital, 109 Cal.App.2d 759, 241 P.2d 684, the question of whether or not the doctrine of res ipsa loquitur should be applied is one which should be submitted to the jury. The court there, however, pointed out, 109 Cal.App.2d at page 764, 241 P.2d at page 687, that "one of the basic facts that the plaintiff must prove before the doctrine is applicable is that the occurrence is one that ordinarily does not happen unless there was negligence." There is no testimony in the record here, either expert or otherwise, that would support the submission of such an issue to the jury.

[4] The plaintiff also relies upon testimony given by her regarding a conversation with the defendant following the discovery of the fistula. She testified that the doctor stated "we all make mistakes" and said he had made a mistake. She further testified that the defendant said that "most probably" the needle went through a portion of the bladder in sewing the incision between the bladder and the uterus and that subsequently it broke out tearing a hole in the bladder. The defendant denied that any such conversation occurred. If this could be construed as an admission of negligence it would be evidence of a specific act of negligence and would not afford a basis for the giving of instructions on res ipsa loquitur.

[5] Defendant complains that the court erred in giving res ipsa loquitur instructions together with instructions concerning presumption of care. It was held in Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313, that there is no impropriety in giving both of these instructions where both are applicable.

For the reasons above stated the judgment is reversed.

DOOLING, J., concurs.

NOURSE, Presiding Justice.

I dissent.

The evidence of defendant's negligence is irrefutable and the jury's verdict rests on that evidence, uninfluenced, I believe, by any hypercritical theories of judicial platitudes. Hence this court cannot say that the instruction on the res ipsa doctrine was prejudicial.

But I am not satisfied that it was error. All the medical testimony showed that a fistula in the bladder caused by an hysterectomy operation was a very, very rare occurrence. One expert testified that in only one-tenth to two-tenths of one per cent did it happen. One testified that the incidence would be less than one per cent. One testified that a fistula had never happened in the

approximately three hundred hysterectomy operations performed by him. It is not reasonable in view of this evidence for this court to say that such injury was an assumed risk, or one that would have ordinarily occurred.

Furthermore I believe that the res ipsa instruction was properly given. Both Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258, and Farber v. Olkon, 40 A.C. 506, 513, adhere to the rule that the instruction is properly given where, from the facts in evidence, the jury could draw the inference that the injuries "were not such as ordinarily would have followed if due care had been exercised. * * *" Where the undisputed testimony shows that a fistula would not be expected in more than one-tenth of one per cent of such operations and, in the practice of one of the witnesses, had not occurred in more than three hundred of such operations, the jury might well have concluded that the injury here was one that would not have *ordinarily* followed if due care had been exercised.



118 Cal.App.2d 149

SOLOMON v. SOLOMON.

Civ. 15332, 15319, 15428.

District Court of Appeal, First District, Division 2, California.

May 27, 1953.

Rehearing Denied June 26, 1953.

Hearing Denied July 22, 1953.

Suit by husband against wife for separate maintenance thereafter amended to state cause of action to quiet title to real and personal property. From separate orders of the Superior Court, City and County of San Francisco, and the Superior Court, County of San Mateo, relating to alimony pendente lite, the defendant appealed. The District Court of Appeal, Nourse, P. J., held inter alia, that entry of order for alimony pendente lite without affording defendant an opportunity to show either needs of the plaintiff or ability of defendant to pay was an abuse of discretion, and would be reversed.

Order in Appeal No. 15332 reversed, with directions; order in No. 15319 affirmed; order in No. 15428 reversed.

See also, 110 Cal.App.2d 660, 243 P.2d 556.

1. Appeal and Error ⇐542

Affidavits not shown to have been used on hearing in trial court could not be used on appeal to support order pendente lite awarding plaintiff alimony, counsel fees, and costs, especially where record disclosed that trial court would not permit the reading of the affidavit or deposition.

2. Husband and Wife ⇐295

Order pendente lite for alimony, counsel fees and costs, entered against defendant without giving her an opportunity to show either the needs of the plaintiff or the ability of defendant to pay, was an abuse of discretion and could not be sustained.

3. Husband and Wife ⇐298¾

In suit against wife for separate maintenance, evidence warranted finding that the real and personal property standing of record in the name of wife was the separate property of the wife. Civ.Code, §§ 137, 176.

4. Husband and Wife ⇐285½

A decree for separate maintenance cannot be entered independent of any need for support.

5. Husband and Wife ⇐295

Fact that demurrer was sustained to husband's complaint for separate maintenance did not prevent the granting of alimony pendente lite, when complaint was susceptible of amendment.

6. Appeal and Error ⇐837(9)

Ordinarily, the appellate court reviews case only as to time of judgment below in so far as matters have been before the lower court, and pleadings filed after ruling complained of will generally be disregarded.

7. Husband and Wife ⇐295

The termination of a right of plaintiff to temporary alimony pursuant to order pendente lite by dismissal of action for separate maintenance does not prevent col-

lection of alimony already accrued, notwithstanding fact that action for separate maintenance has been abandoned by amendment of the original complaint, since where abandonment of action does not relate back to original complaint, such as in case of temporary alimony, amendment of complaint does not have that effect.

8. Appeal and Error ⇐991

Where husband brought action against wife for separate maintenance, and then filed amended complaint alleging sole ownership of property asking for equitable relief, followed by a second amended complaint omitting prayer for maintenance and pleading a straight cause for equitable relief as to the property, question of bad faith of husband in bringing the action was for trial court on full hearing, and not for appellate court on appeal from award of alimony pendente lite.

9. Husband and Wife ⇐295

Where husband brought action against wife for separate maintenance, amended after sustaining of demurrer to state simple action in equity to quiet title to real and personal property, without any reference to separate maintenance, or divorce and court costs, order awarding husband costs and counsel fees in resisting appeals from two orders for alimony pendente lite would be reversed with directions to rehear application for counsel fees in view of all circumstances relating to good or bad faith of plaintiff in the preliminary action leading to awards of maintenance, counsel fees and costs.

Henry C. Clausen and Richard G. Burns, San Francisco, for appellant.

Mueller & McLeod, San Francisco, Charles N. Douglas, San Francisco, for respondent.

NOURSE, Presiding Justice.

Three appeals are presented in a consolidated record. One is from an order pendente lite of the San Francisco superior court awarding plaintiff $250 alimony, $2,000 counsel fees, and $500 for costs. Another is an appeal from a similar order of the San Mateo superior court awarding plaintiff $75 a month alimony. When the defendant appealed from this second order the San Mateo court ordered her to pay $2,000 as counsel fees and $250 for costs to resist both the appeals. The defendant appealed from that order and this is the third appeal presented here. Plaintiff's cause of action at the beginning of these proceedings was named by him as an action for separate maintenance. During the course of these proceedings the cause was changed, as will hereinafter appear.

To give an overall picture of the litigation we will sketch the facts as stated in appellant's brief, some of which are corroborated and some are not. However there is no issue of fact involved in any one of the appeals and it is not necessary for us to weigh any of the evidence.

The parties formerly lived in China where the defendant wife acquired some property of her own and raised six children. The plaintiff husband had little or nothing. The defendant then came into possession of considerable funds from her mother's estate. The parties all moved from China to this state where the parents made their home in San Mateo county and the wife, with the funds brought from China, acquired some real estate in her own name. Four years before this action was commenced the plaintiff left his wife and home and made his residence in San Francisco.

On the hearing in the San Francisco court for the pendente order the defendant sought to make proof of these facts: She endeavored to prove the husband's desertion in support of her contention that he had no cause of action for separate maintenance out of the wife's separate property because of section 176 of the Civil Code. She also endeavored to prove the financial condition of both parties, and that all the property standing in her name was her separate property. She was denied that right in every instance. The court then stated that it did not have the time nor the inclination to go into the question of the property rights, that it would "assume that counsel fees would have to be awarded the petitioner", that, if the parties could not agree, "then the court will make an arbitrary order" as requested by plaintiff.

[1] Respondent seeks to defend the order by the statement that counsel had in his possession an affidavit and a deposition, neither of which were offered in evidence, read to the court, or considered in making the order. The early case of Pardy v. Montgomery, 77 Cal. 326, 19 P. 530, is authority for the rule that affidavits not shown to have been used on the hearing in the trial court can not be used on appeal to support the order. Furthermore, the record discloses that the trial court would not permit plaintiff's counsel to read the affidavit or the deposition, and this emphasizes the soundness of the rule of the Pardy case.

[2] In Sweeley v. Sweeley, 28 Cal.2d 389, 390, 170 P.2d 469, 470, which involved an order for temporary alimony and counsel fees, the court said that to support an award "there must be a prima facie showing of three things: The existence of the marriage, the needs of the wife, and the ability of the husband to pay." Because of the failure to prove the two last mentioned factors the court held that the award of counsel fees and support was an abuse of discretion. The rule of that case is controlling here since the defendant was denied the right to show either the needs of the plaintiff or the ability of the defendant to pay.

We conclude that the order of the San Francisco court was an abuse of discretion —made without any evidence to support it and upon the persistent denial of defendant's right to contest the motion or to offer any evidence in opposition. None of the essential factors in a case of this kind was shown and the order was contrary to the basic principles announced and approved in Sweeley v. Sweeley, supra.

The order in appeal No. 15332 is reversed with directions to the San Francisco court to dismiss the application since it has no further jurisdiction to entertain the proceedings.

The second appeal.

After the cause was transferred to San Mateo County a judge of the superior court therein, on motion of the plaintiff, awarded him $75 a month alimony pendente lite.

[3] The motion was based on an amended complaint filed October 29, 1951. Unlike the original complaint this one alleged that all the property, valued at $500,000, was acquired by plaintiff and belonged to him exclusively. Because of this amendment the interpretation of sections 176 and 137 of the Civil Code is no longer necessary. The former relates solely to applications for maintenance by the husband seeking to charge the separate property of the wife. If she has no separate property (as alleged in the amended complaint) the application is to be heard under section 137. It then states facts purporting to plead a simple case in equity to quiet title to this property, for delivery of possession to plaintiff and for declaratory relief. A demurrer to this complaint was sustained on the same day the order for support was made. This latter order was based on the allegation that plaintiff was without income, but on the hearing of that motion the defendant tendered proof that plaintiff had deserted the defendant approximately four years prior to the commencement of the action; that all the property held in the name and in the possession of the defendant was her separate property; that on January 6, 1947, the plaintiff herein executed his will, paragraph III of which reads as follows: "I hereby declare that all real and personal property, both in the State of California and elsewhere, standing of record in the name of my beloved wife, Rachel Solomon, together with the furniture and furnishings in San Carlos, is the separate property of my said beloved wife." It is conceded that all the property in litigation was acquired by the wife long before the date of this will. At the time of the hearing of the second application the only evidence of ownership showed that the San Carlos property was the separate property of the wife. It would serve no purpose to detail the evidence covering any of these statements. Respondent does not controvert any one of them.

[4] After the change of venue, plaintiff on October 29, 1951, filed an amended complaint in which he alleged that he has property worth $500,000 with a monthly in-

come of $3,000, which is in the hands of defendant. The prayer is not for any certain amount of maintenance but that the court "grant a decree of separate maintenance" and further asks determination of right in the property and an accounting. This complaint seems predicated on the idea that there can be a "decree of separate maintenance" independent of any need for support, in the manner of a decree for separation from bed and board. However such a limited divorce is unknown in California, O'Connor v. O'Connor, 91 Cal.App.2d 147, 149, 204 P.2d 916; Monroe v. Superior Court, 28 Cal.2d 427, 431, 170 P.2d 473; 35 Cal.L.Rev. 153, and although there is some resemblance between separate maintenance and separation from bed and board, no cases have been found indicating that an action for separate maintenance without any need of support is permitted in California.

[5] However the fact that the action at least in that respect might be demurrable and that a demurrer to this complaint was sustained does not necessarily prevent the granting of temporary alimony. On December 27 a minute order at the same time sustained the demurrer to the amended complaint and granted $75 a month temporary alimony after a hearing on December 14. McClurg v. McClurg, 212 Cal. 15, 297 P. 27, upholds the granting of pendente lite orders notwithstanding sustaining of demurrer to the complaint, so long as the complaint can be amended.

At the hearing the evidence related to need and ability to pay, but the questions as to ownership of the real property and of desertion were mainly eliminated. An objection was sustained to the question whether the wife had inherited the money with which she bought the property and the husband was prevented from going into the reason for his leaving his home.

[6] At the hearing in the superior court there was no mention of the question whether plaintiff's action was brought in good faith notwithstanding his allegation that he owned all the property and the pendency of the demurrer. This question the appellant now raises on appeal and asks us to rule on it. At the close of the argument on appeal an order was made permitting the parties to file supplemental briefs on this point and such briefs were filed. The appellant cited in support of the argument Heller v. Heller, 88 Cal.App.2d 603, 606, 199 P.2d 44 and Bancroft v. Bancroft, 9 Cal.App.2d 464, 471, 50 P.2d 465, both of which relate to the power of the trial court to make such determination. Appellant bases her argument on the chronology of the changes in plaintiff's pleadings of his causes of action: first, an action for maintenance; then an amended complaint alleging sole ownership of the property and asking equitable relief; then a second amended complaint omitting all prayer for maintenance and pleading a straight cause for equitable relief as to the property. Appellant asks us to review these pleadings to the end that we should hold that the original application for maintenance, costs and attorneys fees and the renewal of that application before the San Mateo court were presented in bad faith and in fraud upon the court for the purpose of procuring suit money to finance respondent's action for a partition of real and personal property. Ordinarily the appellate court reviews the case only as of the time of the judgment below in so far as matters have been before the lower court. 4 Cal.Jur.2d 403, § 544. "Pleadings filed after the ruling complained of will likewise be disregarded on appeal." 5 C.J.S., Appeal and Error, § 1487, p. 134. The few exceptions, 4 Cal.Jur.2d 528, § 641; 2 McKinney's Digest 645, § 972, have little resemblance to the case before us. In Sewell v. Johnson, 165 Cal. 762, 134 P. 704, the Supreme Court to prevent injustice to appellant took notice of the fact that since the judgment below a prior judgment on which it was based was reversed. In International Ass'n of Cleaning and Dye House Workers v. Landowitz, 20 Cal.2d 418, 126 P.2d 609, the court in support of the judgment took notice of the fact that since the judgment below the statute authorizing an action as instituted had been repealed. In American Fruit Growers v. Parker, 22 Cal.2d 513, 515, 140 P.2d 23, 24, it is said: "Relief by injunction operates in futuro, and the right to it must be determined as of the date of decision by an

appellate court." It was recently quoted in Cal-Dak Co. v. Sav-On Drugs, Inc., 40 Cal.2d 492, 254 P.2d 497. In Gay v. Gay, 146 Cal. 237, 241, 79 P. 885, the court with respect to the question of good faith in taking an appeal in a divorce action, took notice of appellant's endeavors in a parallel action before the same appellate court. However this was done to uphold the lower court's conclusion of good faith and "in passing."

[7, 8] When plaintiff decided to drop the prayer for a decree of separate maintenance from the complaint, he may well have abandoned the action for separate maintenance and have terminated his right to temporary alimony, 27 C.J.S., Divorce, § 210, p. 905. However, the termination of the right to temporary alimony by dismissal of the action or otherwise does not prevent collection of the alimony already accrued. 1 Cal.Jur. 981, § 34; Biltmore Drug Store v. Superior Court, 101 Cal.App. 363, 281 P. 710; Rilcoff v. Rilcoff, 57 Cal. App.2d 888, 891, 135 P.2d 687; Lavaysse v. Superior Court, 63 Cal.App.2d 223, 226, 146 P.2d 686; In re Larrabee, 29 Cal.App. 2d 240, 242, 84 P.2d 224. Appellant argues that an amended complaint refers back to the time of the original complaint, Hibernia Savings & Loan Soc. v. De Ryana, 210 Cal. 532, 292 P. 632, and that the original complaint should no longer be considered. However this rule is not without exceptions, 21 Cal.Jur. 215, § 147, and where abandonment of the action does not relate back as to temporary alimony, amendment of the complaint should not have that effect either. It would seem that appellant's right could be sufficiently protected by a motion in the court below to terminate the temporary alimony because of abandonment of the action for separate maintenance and bad faith in the maintenance proceedings. Our affirmance of the order is made without prejudice to the right of appellant to move to set aside the order for temporary maintenance for the reasons herein outlined.

Order affirmed.

The third appeal.

[9] The same court, on an application of plaintiff's counsel for costs and counsel fees in resisting the two previous appeals, awarded him $250 costs and $2,000 as attorney's fees on February 13, 1952. The defendant is thus charged by the several orders with $4,000 for attorney's fees, $750 for costs and an indefinite amount of alimony. Plaintiff's counsel filed a brief of seventeen pages covering all three appeals and a supplemental brief. The sum of $4,000 for the work performed was excessive.

And now that the first award has been annulled the sum of $2,000 is likewise excessive. Before this award was made and on December 27, 1951, the San Mateo County court sustained defendant's demurrer to the amended complaint filed on October 29, 1951. When this order of February 13, 1952, was made no amended complaint was on file. On March 4, 1952, and following all the orders theretofore made, plaintiff filed a second amended complaint which is a simple action in equity to quiet title to real and personal property, for an accounting of the profits thereof while in the possession of defendant and for a distribution to plaintiff of his share of such portion of that property which may be determined to be community. This amended complaint in its prayer omits all reference to separate maintenance, divorce and court costs, but does repeat some of the allegations for separate maintenance, states grounds for a divorce and prays for counsel fees.

The picture of the litigation now presented is that a plaintiff who is suing to quiet title to real and personal property enjoys orders to pay counsel fees, costs, and maintenance as incident to a cause of action in which such awards are not permissible. The chronology of events may be repeated: On October 29, 1951, after the award was made by the San Francisco court in Appeal No. 15332, plaintiff filed an amended complaint alleging that he was sole owner of property valued at $500,000 and that his wife owned nothing. On December 27, 1951, the San Mateo court sustained a demurrer to this complaint. Thereafter the award of $75 a month maintenance pendente lite was made. Following the appeal from that award, and on March 4,

1952, plaintiff filed his second amended complaint again alleging that he was the sole owner of all the real and personal property and asking that his title be quieted and omitting prayer for maintenance.

Reference is made to these procedural matters to illustrate appellant's final contention that they show that all the preliminary actions of the respondent leading to awards of maintenance, counsel fees and costs were made in bad faith for the sole purpose of obtaining money from the appellant to enable respondent to prosecute an action relating to the title to property. But as we have said, this is a matter for the trial court to determine upon a full hearing.

The order must be reversed with directions to rehear the application on the basis of all the circumstances relating to the good faith of plaintiff and of his right to an award of counsel fees and costs of appeal.

Order reversed.

DOOLING, Justice.

I concur in the order reversing the order made by the San Francisco Superior Court on the ground that no showing of necessity and ability to pay was made by respondent and appellant was not permitted to introduce evidence on those questions. I am satisfied that on an application for temporary maintenance, counsel fees and costs the court should not require into the question of whether or not the husband deserted his wife, Civ.Code, sec. 176, since that goes to the merits of the action and the merits are not in issue on an application for an allowance pendente lite, Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715; Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877; Storke v. Storke, 99 Cal. 621, 34 P. 339. The reason for this rule is tersely stated in the Storke Case, 99 Cal. at page 622, 34 P. at page 340: "If the court were compelled to try and determine the issues in the case before it could allow alimony, the entire purpose of allowing alimony 'during the pendency of such action' would be defeated."

I concur in the order affirming the award of $75 per month for temporary maintenance. An impecunious husband's right to support by his wife is completely correlative with that of an impecunious wife to support by her husband, Civ.Code, sec. 137, as are his right to pendente lite orders for support, counsel fees and costs. Civ. Code, secs. 137.2, 137.3.

I concur in the reversal of the order allowing counsel fees and costs for opposing the two appeals on the sole ground that the amount awarded was excessive. We have affirmed the order attacked in the second appeal. The reasonable counsel fees and costs of respondent should be allowed for successfully opposing an appeal which his counsel has satisfied us should be affirmed. The trial court can now find the value of the services actually rendered by counsel in opposing the appeals and the costs actually incurred. The amounts so found should be allowed by the trial court as counsel fees and costs. Kohn v. Kohn, 95 Cal.App.2d 722, 724, 214 P.2d 80.

GOODELL, J., concurs.



118 Cal.App.2d Supp. 883

HAYES v. FINANCIAL INDEMNITY CO.

Civ. 6.

Appellate Department, Superior Court, San Bernardino County, California.

May 25, 1953.

Insured brought action against insurer to recover for damage to automobile. The Municipal Court of San Bernardino Judicial District entered judgment for insured, and insurer appealed. The Appellate Department of the Superior Court of the County of San Bernardino, Mitchell, J., held that there was no theft of automobile, within meaning of insurance policy, when automobile was taken by insured's minor son without insured's knowledge or consent, and that therefore there could be no recovery under policy.

Judgment reversed.

1. Appeal and Error ⇐991

Ordinarily, question whether automobile was used by third person with permission of owner, or whether there has been a theft of automobile within meaning of policy insuring against theft, is a fact question to be determined by trial court as trier of the facts.

2. Appeal and Error ⇐994(3)

Trial court, as trier of facts, is sole judge of credibility of witnesses.

3. Appeal and Error ⇐1010(1)

If there is any substantial support for finding of trial court, as trier of facts, such finding will not be disturbed on appeal.

4. Insurance ⇐425

To steal an automobile is to commit "theft" within meaning of insurance policy covering theft of automobile. Vehicle Code, § 503; Pen.Code, §§ 484, 487, subd. 3.

5. Insurance ⇐425

Where minor son of owner of automobile took the automobile without the owner's permission or consent, but without intention of permanently depriving owner of automobile, and while driving the automobile it was upset and damaged, there was no "theft" of the automobile within meaning of insurance policy insuring automobile against theft and owner could not recover from insurer for damage to automobile. Vehicle Code, § 503; Pen.Code, §§ 484, 487, subd. 3.

Taylor F. Peterson, San Bernardino, for plaintiff and respondent.

Wright, Wright, Green & Wright by Dudley Wright, Los Angeles, for defendant and appellant.

MITCHELL, Judge.

This is an appeal from the judgment of the Municipal Court of San Bernardino Judicial District in an action brought to recover from an insurance carrier the loss sustained by the plaintiff when her automobile was damaged by being upset.

The automobile was upset while being operated by plaintiff's minor son who had no driver's license.

The main question presented on this appeal is this:

"Did the unauthorized use of the plaintiff's automobile by the plaintiff's minor son constitute theft?"

The plaintiff was the owner of an automobile, upon which she purchased from the defendant a policy of insurance.

In this policy the defendant agreed to reimburse the plaintiff for

"Loss of or damage to the automobile —except by collision or upset—but including fire, theft and windstorm."

Other than this the plaintiff had no upset or collision insurance.

Accordingly plaintiff could recover from the company for loss due to upset only if this loss was caused by theft of the car.

In the Complaint, Par. IX, it is alleged that the automobile described in the insurance contract

"was stolen and while so stolen was involved in a collision and wrecked."

Finding of Trial Court

On this subject the trial court found as follows:

"9. That on the 21st day of September, 1952, the said Roy Hayes, minor son of the plaintiff, took and operated the said automobile of the plaintiff without the permission and/or consent of the plaintiff, either expressed or implied.

"10. That at the time and place of taking the said automobile the said Roy Hayes had no intention of permanently depriving his mother, the plaintiff herein, of the possession of or title to said automobile but did intend temporarily to deprive her of the possession thereof, and that while so driving and operating said motor vehicle without the consent, permission, authorization and/or approval of the plaintiff, either expressed or implied, the said automobile was wrecked as aforesaid."

As its Conclusion of Law the trial court found that

"The taking of said automobile by the said minor * * * constituted

a theft within the meaning of the policy of insurance * * *."

The trial court then awarded plaintiff the sum of $1545.

[1] Ordinarily the question as to whether or not a vehicle was used with the permission of the owner is one of fact, to be determined by the trial court. Mize v. Jorden, 116 Cal.App.2d 301, 253 P.2d 702; Casey v. Fortune, 78 Cal.App.2d 922, 179 P.2d 99.

[2, 3] The trial court is the sole judge of the credibility of the witnesses, and if there is any substantial support for a finding such finding will not be disturbed on appeal. Flemmer v. Monckton, 73 Cal.App. 2d 271, 166 P.2d 380.

Appellant here makes no attack on the findings of fact with respect to the unauthorized use of the plaintiff's automobile by her minor son. However, appellant does attack the trial court's conclusion that the son's unauthorized use of his mother's automobile constituted a theft thereof.

Definition of Theft

"Every person who shall feloniously steal, take, carry, lead, or *drive away* the personal property of another * * is guilty of theft. * * *" Penal Code, § 484.

"Grand theft is theft committed in any of the following cases:

"1. * * *

"2. * * *

"3. When the property taken is an automobile * * *". Penal Code, § 487.

Webster's Dictionary

"Theft, 1. Act of stealing; the felonious taking and removing of personal property, with intent to deprive the rightful owner of it; 2. Larceny.

"Larceny, The unlawful taking and carrying away * * * of personal property with intent to deprive the rightful owner of it; Theft.

"Steal 1. To take * * * feloniously; to take without right and with intent to keep wrongfully; 2. To appropriate to one's self furtively."

"The present statute of this state in its definition of theft includes * * * the several crimes of larceny and embezzlement." Granger v. New Jersey Ins. Co., 108 Cal.App. 290, 291, 293, 291 P. 698, 699.

Joy-Riding

"Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether *with or without intent to steal* the same * * * is guilty of a felony * * *." Vehicle Code, § 503.

This section makes felonious the taking of an automobile with intent to steal it.

[4] To steal an automobile is to commit theft.

This section also makes felonious the taking of an automobile without the intent to steal, i. e., without the intent to commit theft.

Finding No. 10

The trial court found that plaintiff's son "had no intention of permanently depriving his mother of the possession of or title to said automobile * * *."

Does not this mean that the trial court found that the boy drove the automobile without the intent to steal or to commit theft?

If the boy drove the car without the intent to commit theft—can we legally conclude that he did commit theft?

If he merely borrowed it, without permission, intending to return it reasonably soon, can it be said that he stole it?

Review of Decisions

A review of the reported decisions discloses that the great majority of the courts hold that to warrant a recovery by an insured owner under coverage such as we have here, there must be proof of an intent to steal on the part of the user.

The excerpts in the following pages will disclose the opinions of the several jurisdictions which have been called upon to consider the question.

New York

A garage owner, without permission, used a car of another for his own purposes and while so engaged was involved in a collision. The owner sued his insurer under the "theft clause" in his policy.

In deciding that the mere use of an automobile without the consent of the owner did not constitute "theft" the New York Court of Appeals said:

"By Penal Law (Consol.Laws, c. 40) § 1293-a 'Any * * * person who without the consent of the owner shall take * * * an automobile * * * and * * * drive * * * the same * * * for his own * * * use * * * steals the same and is guilty of larceny * * *.'"

"Apart from this statute, the misuse of plaintiff's car * * * would not constitute a larceny, since there was lacking the felonious intent to appropriate another's property permanently and wholly. Parr v. Loder, 97 App.Div. 218, 220, 89 N.Y.S. 823; Ledvinka v. Home Ins. Co. of New York, 139 Md. 434, 115 A. 596, 19 A.L.R. 167; Michigan Commercial Ins. Co. of Lansing, Mich. v. Wills, 57 Ind.App. 256, 106 N.E. 725; Phoenix Assur. Co., Limited, of London, v. Eppstein, 73 Fla. 991, 75 So. 537, L.R.A.1917F, 540; Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co., 49 Mont. 430, 143 P. 559, L.R.A.1915B, 327, Ann.Cas.1916A, 1126; State v. South, 28 N.J.L. 28, 75 Am.Dec. 250; Regina v. Trebilcock, 7 Cox Cr.Cas. 408; Pollock & Wright on Possession, p. 225. * * *

"The courts below have held that * * * what is now larceny under the statute is also theft under the policy. We hold another view.

"The problem before us is not one of statutory construction. It is one of the meaning of a contract."

"'Unauthorized Use of Motor Vehicles' [the heading of the statute], prefigures an offense that is something less than theft as theft has commonly been known."

"Theft under this contract is theft as common thought and common speech would now image and describe it."

"One other consideration emphasizes the need for uniformity of meaning. The policy does not limit its protection to casualties suffered while the car is in New York. Theft * * * in any other state are equally within its terms. This, without more, is sufficient to forbid a reading that would cause the risks to vary with the accidents of local laws. Neither insured nor insurer can have believed that the same act would be theft * * * if committed in New York, and a mere trespass or conversion if committed in Massachusetts or New Jersey. They spoke in terms so common * * * as to have a meaning everywhere. * * *

"The judgment of the * * * Trial Term should be reversed, and the complaint dismissed". Van Vechten v. American Eagle Fire Ins. Co., 239 N.Y. 303, 146 N.E. 432, 433, 38 A.L.R. 1115.

"It is equally the settled law of this State that a policy of insurance covering 'theft, robbery or pilferage' does not include within those terms a violation of section 1293-a." (Unauthorized use.) Block v. Standard Ins. Co. of New York, 292 N.Y. 270, 54 N.E.2d 821, 822, 152 A.L.R. 1097.

Alabama

"Clearly, under the great weight of authority, a temporary taking of the car * * * with intent to return it, not an intent to permanently deprive the owner of his property, is not 'theft' within this policy." (Loss from theft, robbery or pilferage) (Recovery denied) Home Ins. Co. of New York v. Trammell, 230 Ala. 278, 160 So. 897, 900.

"This is a suit to recover on a policy of insurance wherein the defendant insured the plaintiff's automobile against loss or damage by theft, etc.

"* * * Terry [the owner], took the insured automobile to Willie Jenkins' garage for repairs * * * an employee * * * took * * * the car * * * [for his own use, and while using it] Mr. East ran into the back of the automobile and damaged it.

"The collision was investigated by a highway patrolman. * * * No arrests were made".

"It is our considered conclusion that the evidence * * * in its most favorable light for the appellee [owner], only establishes an unauthorized use * * * [and] does not afford any basis for a legitimate inference that there was any intent * * * to steal the car * * *. Reversed." Bankers Fire & Marine Ins. Co. v. Terry, 35 Ala.App. 233, 45 So.2d 324, 325, 327.

Kansas

"'A felonious intent means to deprive the owner, not temporarily, but permanently, of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner'". In re Mutchler, 55 Kan. 164, 40 P. 283, 284.

Kentucky

"* * * the term 'theft' in a contract of insurance has no different meaning to 'theft' as usually defined. To constitute theft, it is necessary that there be a taking of the property * * * without the consent of the owner, coupled with an intention on the part of the taker to convert it to his own use and to deprive the owner of his property rights therein." McKenzie v. Travelers' Fire Ins. Co., 239 Ky. 227, 39 S.W.2d 239, 240.

Maine

The Supreme Court of Maine similarly said:

"This is a case where the definite word 'theft', with meaning well understood for generations under our law, is opposed by the idea that its meaning should be here broadened to 'unauthorized use.'

"The referee having found no intent to steal, we are of opinion that he was in error in holding that 'unauthorized use' was equivalent to *'theft'*." Wheeler v. Phoenix Indemnity Co., 144 Me. 105, 65 A. 2d 10, 13.

Minnesota

"There is no testimony to warrant the conclusion that Murphy intended to appropriate the machine to his own use, or to deprive the owner of his property therein; but, on the contrary, it appears that * * * the most that was done, aside from its * * * injury, was to use it in the course of a drunken escapade". Travelers' Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N.W. 703, 705, 45 L.R.A., N.S., 331.

Missouri

"It is the established law of this state that where an insurance policy is open to different constructions, it is the duty of the court to give it that construction which is most favorable to the insured."

"However, we do not regard the word 'theft' as used in the policy herein as an ambiguous word. It is a word generally and commonly used and understood to convey the same meaning as the word 'steal.' To 'steal' is to commit a 'theft' in the usual and ordinary acceptation of the words.

"In order to have a 'theft' something must be stolen by a thief. The technical legal name for the act of 'stealing' or the commission of 'theft' is 'larceny,' but there can be no 'stealing' or 'theft' or 'larceny' unless the person committing the act shows an intention permanently to deprive the owner of the property * *."

'A consideration of the reasoning in many cases holding that there can be no 'theft' within the meaning of such a policy as we have before us without evidence showing an intent to deprive the owner permanently of his property, as well as the few cases * * * to the contrary, leads us to the conclusion that the element of such felonious intent by Norton is absent * * * and we cannot properly hold there was a 'theft' * * *. A holding that there was a theft in this case would be equivalent to branding Norton as a thief. We would not be justified in so holding in the absence of evidence from which it could reasonably be inferred that he entertained a criminal intent to deprive his employer of its truck permanently." Eiswirth Const. & Equipment Co. v. Glenn Falls Ins. Co., Mo.App., 240 S.W.2d 973, 977.

In the Eiswirth case, above, the insuring agreement was as follows:

"Coverage D—Theft (Broad Form): Loss of or damage * * * caused by theft, larceny, robbery or pilferage."

"The insurance contract only covered a felonious asportation, and it is manifest that the taking shown was, at most, a trespass against which there was no insurance." Bigus v. Pacific Coast Casualty Co., 145 Mo.App. 170, 129 S.W. 982.

Montana

"The fact that the taking [of an automobile] was altogether wrongful, and that it was the intention of Le Vasseur and Ellis to appropriate the car to their own use during the ride, and to that extent to deprive the owners of the use of their property, are not sufficient to constitute their acts larceny.

"They must have had a criminal intent—the intention to steal the car, without which the act of taking, however reprehensible and wrongful, amounted * * * to a trespass or a civil wrong."

"Many other cases holding to this same view are collected in the notes in 25 Cyc. 45."

"Considered in the light of these rules, the facts stated do not warrant the inference that the car in question was taken by Le Vasseur and Ellis with the criminal intent to deprive the owners of it permanently, and therefore the car was not stolen, and this case does not come within the provision of the insurance policy * *." Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co., 49 Mont. 430, 143 P. 559, 560, 561, L.R.A.1915B, 327.

Oklahoma

"The evidence is, in substance, without conflict. The plaintiff owned a delivery truck * * *. The defendant * * * insured plaintiff against larceny, theft and pilferage. * * * a young employee * * * took the truck * * * went on a joy ride. * * * The truck was driven off the road and overturned * * the truck was delivered by the highway patrol * * * he took the truck without the permission of plaintiff and against the specific instructions of plaintiff."

"In an action to recover for loss alleged to have been sustained under the theft provision of an automobile insurance policy, the burden is upon the plaintiff to establish by a preponderance of the evidence a taking and an asportation of the vehicle with the intent to deprive the true owner thereof.

"If no such intent existed but on the other hand there existed an intent on the part of the taker to return the property after a temporary use there can be no recovery." Hanover Fire Insurance Co. of New York v. Western Bank & Office Supply Co., 198 Okl. 377, 178 P.2d 883.

Texas

"* * * appellant * * * broke in, and took * * * automobile * * * ran the automobile * * * some 50 or 60 miles. * * * took the machine, on the same night, back near the owner's house and left it in an alley * * *."

"* * * the taking did not in law constitute theft * * *." Smith v. State, 66 Tex.Cr.R. 246, 146 S.W. 547.

"* * * in the absence of any felonious intent to steal, we are of the opinion that the loss complained of was not caused by theft, larceny, robbery or pilferage within the meaning of the policy sued upon." Royal Ins. Co. v. Wm. Cameron & Co., Tex.Civ.App., 184 S.W.2d 936, 937.

Vermont

The Supreme Court of Vermont, in a similar situation held as follows:

"The rule in the great majority of states may be stated in this manner. To warrant a recovery on a policy insuring an automobile against theft there must be more than a wrongful taking; the taking must be with the *intent to steal.*

"The intent to steal is a necessary ingredient of the offense, and may be inferred from the facts and circumstances of the case." Rainville v. Farm Bureau Mut. Auto. Ins. Co., 117 Vt. 37, 83 A.2d 599.

California

Our District Court of Appeal, in 1930, said:

"* * * it has been generally held that the words 'theft,' 'robbery,' and 'pilferage' are words that are well understood, and that they are used in insurance policies in their common and ordinary meaning. Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N.E. 923, 46 A.L.R. 529.

"Theft involves the idea of a knowingly unlawful acquisition of property; that is, a felonious taking of it from one who has both the actual possession and the apparent right of possession. Stewart v. Home Fire & Marine Ins. Co., 124 A. 773, 2 N.J.Misc. 515."

"The words * * * must be deemed to have been used in their general and popular sense rather than with specific reference to the precise definition of a criminal statute. Hill-Howard Motor Co. v. North River Ins. Co., 111 Kan. 225, 207 P. 205, 24 A.L.R. 736."

"The present statute of this state in its definition of theft includes * * * the several crimes of larceny and embezzlement." Granger v. New Jersey Ins. Co., 108 Cal.App. 290, 291, 291 P. 698, 700.

"* * * the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is, did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass." People v. Brown, 105 Cal. 66, 69, 38 P. 518, 519.

Minority View

District of Columbia, Municipal Court of Appeals.

"* * * a youth [sic] of the age of three and one-half years entered the * * * car so parked and caused it to start down the hill * * *"

"child under seven years of age is held incapable of forming a criminal intent".

"Here * * * there is nothing from which we may infer a specific intent to deprive the owner of the automobile".

"To one who is a scholar and familiar with the history of the barbaric tribe whose depredations perpetuated its name in our dictionaries, to one 'skilled in the niceties of language,' the point [no evidence of intentional injury] may have weight." Unkelsbee v. Homestead Fire Ins. Co., D.C. Mun.App., 41 A.2d 168, 169.

Two of the judges of this court held that the owner should recover from the insurance company because the child's "acts were the proximate cause" of the injury.

The only discussion of the subject of theft is found in the dissenting opinion in which the following appears:

"I am unable to agree with the majority."

"The word 'theft' when used in a policy of this type is not to be confined in its meaning to the common-law definition of larceny, but * * * it is not to be given a meaning contrary to the understanding of the word in common speech and thought.

"No one, in my opinion, would say or think that the action of the child * * * was even akin to the common conception of theft."

"I see no reasonable basis for holding that the collision was caused by theft within any meaning of the word, and I understand the majority to agree with me in this view." Id., 41 A.2d 168, 172;

District of Columbia, Court of Appeals.

"The reasoning of this New York case, and of others so holding [against theft], is based upon the theory that in common thought and common speech theft means a taking and carrying away of the property of another with intent permanently to deprive the owner of his property and nothing more. This is at best a legalistic misconception. The common thought and common speech meaning of theft is that which prevails, not among lawyers and judges, but among people [who] * * * have never heard of this old common-law definition."

"It is true * * * that the numerical weight of authority is opposed to the position which we take." Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App.D.C. 161, 117 F.2d 774, 778, 133 A.L.R. 914.

Colorado

"It should be observed that the title of the law of 1919 is an act relating to and concerning 'the theft of automobiles' ".

"We do not regard the law of 1919 [taking an automobile for temporary use] as making an essential change in the offense."

"The word 'theft' has a very general meaning, and we are of the opinion that

* * * the act in question should be held to have been a theft for the purposes of this suit." James v. Phoenix Assur. Co., 75 Colo. 209, 225 P. 213.

Kansas

"When we reflect that * * * the means of * * * recovering stolen automobiles are so efficient, the likelihood of the owner of it permanently deprived of it through trespass, theft, larceny or otherwise is so remote that it would scarcely be worth an owner's while to insure his car against 'theft' if the policy would only cover a case where he is permanently deprived of it. * * * in the common practice of automobile thieves there is no intention of depriving the owner of it permanently. * * * [but to] abandon it before the peril of his incriminating possession of it leads to his undoing." Baker v. Continental Ins. Co., 155 Kan. 26, 122 P.2d 710, 712.

New York, County Court

This is an opinion of the trial court in Erie County, New York, in which the trial court took cognizance of the rule established by the New York Supreme Court but, because the jury found that the taking of the automobile was a theft, this trial court said:

"Seven years have elapsed since that pronouncement. (Van Vechten v. American Eagle Fire Ins. Co., 239 N.Y. 303, 146 N.E. 432, 38 A.L.R. 1115)."

"Jurymen are * * * in a better position than a court to divine common thought and define common speech. * * *"

"The decision of the court [trial] in this case is grounded in the belief that the future possibility indicated in the Van Vechten Case has fructified into a prognosticated frumentary." DeLong v. Massachusetts Fire & Marine Ins. Co., 142 Misc. 654, 256 N.Y.S. 300, 301, 303.

[5] Manifestly the great weight of authority is in support of the holding that a mere temporary use, although unauthorized, where there is no intent permanently to deprive the owner of his property, does not constitute theft.

Since plaintiff may recover only if her automobile were damaged as a result of theft we need not consider any of the other points discussed in the briefs.

The judgment is reversed.

COUGHLIN, P. J., and HILLIARD, J., concur.

41 Cal.2d 138

BRITSCHGI v. McCALL et al.

THOMAS et al. v. McCALL et al.

LIEBMAN et al. v. McCALL et al.

S. F. 18578–18580.

Supreme Court of California, in Bank.

May 29, 1953.

Rehearing Denied June 18, 1953.

Consolidated actions for breach of exclusive broker's contract, reasonable value of services of realty brokers and specific performance of contract for sale of realty. The Superior Court, Santa Clara County, John D. Foley, J., entered judgments for vendors, and plaintiffs appealed. The Supreme Court, Shenk, J., held, inter alia, that where realty was subject to lease and option, vendors agreed to sell realty contingent upon their being able to eliminate interest of lease and option holder for certain amount, condition precedent thus created was for purpose of protecting vendors from claim of liability on part of option holder and such condition could not be waived by purchasers.

Judgments affirmed.

Prior opinion, 252 P.2d 767.

1. Brokers ⇐11, 86(1)

Specific Performance ⇐121(11)

In actions for breach of exclusive broker's contract, reasonable value of services of realty brokers and specific performance of contract for sale of realty, evidence supported finding that neither purchasers nor brokers had tendered to vendors any portion of the purchase price.

2. Vendor and Purchaser ⇐170

Where vendors agreed to sell realty for $205,000 contingent upon their being able to eliminate interest of lease and option holder for sum not to exceed $5,000, option holder informed purchaser that he would accept $40,000 for his interest and gave purchaser five or six days to act, about one month later purchaser offered vendors' attorney check for $235,000 but such attorney no longer represented vendors, tender to attorney was insufficient. Civ.Code, § 1488; Code Civ.Proc. § 283.

3. Vendor and Purchaser ⇐170

Where vendors agreed to sell realty for $205,000 contingent upon their being able to eliminate interest of lease and option holder for sum not to exceed $5,000, such holder stated to purchaser that he would accept $40,000 for his interest and holder gave purchaser five or six days to act, tender to vendors' attorney made about a month later and after action for specific performance had been commenced was insufficient. Civ.Code, § 1488; Code Civ. Proc. § 283.

4. Evidence ⇐450(8)

In actions involving realty contract providing that vendors would sell realty for $205,000 contingent upon their being able to eliminate interest of lease and option holder, trial court properly admitted parol evidence in aid of its interpretation of provision requiring elimination of interest of lease and option holder.

5. Vendor and Purchaser ⇐80

In actions involving realty contract providing that vendors would sell realty for $205,000 contingent upon their being able to eliminate interest of lease and option holder and for other relief, evidence sustained trial court's conclusion that elimination of option holder's interest was condition precedent to vendors' duty to convey.

6. Vendor and Purchaser ⇐143

Where a vendor agrees to convey title subject to interest held by third party in nature of defect in vendor's title, vendor does not necessarily incur personal liability to third party by conveying title without eliminating defect, especially when right of third party is one not created by personal covenant of vendor and in such cases elimination of defect is deemed for sole benefit of purchaser who may waive it.

7. Landlord and Tenant ⇐92(1)

Where realty was subject to lease and option to purchase held by third party and vendors agreed to sell realty contingent upon their being able to eliminate interest of third party, the burden of vendors' obligation to third party under option could be transferred to purchasers only with consent of third party. Civ.Code, § 1457.

8. Vendor and Purchaser ⇐143

Where realty was subject to lease and option and vendors agreed to sell realty contingent upon their being able to elimi-

nate interest of option holder for certain amount, condition precedent thus created was for purpose of protecting vendors from claim of liability on part of option holder and such condition could not be waived by purchasers. Civ.Code, § 1457.

9. Vendor and Purchaser ⇐79

Where realty was subject to lease and option in third party and vendors agreed to sell realty contingent upon their being able to eliminate interest of third party for sum not to exceed $5,000, no fault could be ascribed to vendors because of unfulfillment of condition precedent, in view of fact that vendors had made no promise to eliminate encumbrance or convey in any event.

10. Vendor and Purchaser ⇐79

An express condition precedent to performance by vendor under contract for sale of realty cannot be construed as imposing duty on vendor to fulfill condition, where language employed does not constitute an undertaking to do so.

11. Brokers ⇐11, 60

Where vendors agreed to sell realty contingent upon their being able to eliminate interest of lease and option holder for sum not to exceed $5,000, but interest of lease and option holder had not been eliminated, recovery could not be had for breach of exclusive broker's contract or for reasonable value of services of brokers.

Cosgrove, Molinari & Tinney, San Francisco, Campbell, Hayes & Custer, San Jose and Herbert Chamberlin, San Francisco, for appellants.

Crist, Stafford & Peters and Elton F. Martin, Palo Alto, for respondents.

SHENK, Justice.

These appeals are from judgments for the defendants in three consolidated actions arising out of the failure to perform a contract for the sale of real property in Santa Clara County. William and Betty McCall are the defendants in each action and are the owners of the real property. The plaintiff in S.F. No. 18578, Francis Britschgi, is a real estate broker who seeks damages for the asserted breach by the defendants of an agreement by which the broker was granted the exclusive right to sell the realty. The plaintiffs in S.F. No. 18579 are Britschgi and Thomas, a second real estate broker. They seek to recover the reasonable value of services rendered to the defendants. The plaintiffs in S.F. No. 18580 are a copartnership doing business under the firm name of Brentwood Company. They seek specific performance of the contract for the sale of the realty wherein they are the vendees.

The material facts are not in dispute. In March of 1950 Britschgi was authorized to sell the realty for a price which would net the defendants $200,000. There was no provision for a broker's commission. Britschgi was informed by the defendants that an existing lease with an option to purchase most of the property was held by George E. Santana. Britschgi and Thomas thereafter procured an offer of $205,000 from the Brentwood Company for the property. The offer contained a provision for the payment of a brokers' commission of 5%. The defendants did not accept the offer because of the outstanding interest of Santana, and refused to proceed with negotiations until a settlement could be made with Santana. However the defendants later converted the offer into a counteroffer by adding the following language to it: "This acceptance is contingent upon the seller being able to eliminate the interest of George E. Santana, if any, in the above-described property, for a sum not to exceed $5,000.00." Brentwood thereafter accepted the counteroffer.

Following the execution of the contract of sale extensive negotiations took place in an attempt to eliminate the Santana interest. The defendants engaged an attorney who commenced an action to quiet title. In June of 1950 the parties met with Santana's attorney who stated that Santana intended to enforce the option. On July 13 the parties met with Santana and Brentwood offered a total of $22,500 to satisfy Santana's interest. Santana refused the offer and stated that he would accept $40,000 for his interest. Brentwood asked for "five or six" days to make a decision and failed to reply within that time. Santana

testified that an offer of $40,000 for his interest was never communicated to him at any time. On or about August 13 Brentwood notified the defendants' attorney that they were willing to pay $40,000, less the $5,000 the defendants were to pay from the purchase price to Santana to close the transaction. On August 16 Brentwood offered the defendants' attorney a check for $235,000 on the condition that a deed be executed. The attorney informed Brentwood that he no longer represented the defendants. Later in that day the complaints in the present actions were filed and after service of summons on them the defendants retained their present counsel. Thereafter a check for $235,000 was again offered to the defendants' attorney and a deed demanded without success. Santana's interest in the realty was never eliminated.

[1–3] The trial court found and concluded on substantial evidence that the "plaintiffs have not tendered to the defendants, or either of them, any portion of said purchase price." Tenders to the attorneys were insufficient. Under section 1488 of the Civil Code, an offer of performance must be made to the creditor, or to his duly authorized agent. Section 283 of the Code of Civil Procedure limits the authority of an attorney to the management and conduct of the particular cause for which he is retained and to the receipt of money where his client has asserted a claim for it. In construing section 283 it was properly said in Redsted v. Weiss, 71 Cal.App.2d 660, 663, 163 P.2d 105, 108, that "The courts of this state have held that an attorney by virtue of his general authority * * * cannot pass his client's rights or title to land which is the subject matter of the litigation, Ryan v. Tomlinson, 31 Cal. 11, and cannot accept the amount tendered by the adverse party in full satisfaction of a claim for money due. Ferrea v. Tubbs, 125 Cal. 687, 58 P. 308." In the present case neither of the defendants' attorneys had authority to accept Brentwood's tender of a check in payment of the purchase price plus what they considered to be a sufficient additional amount to satisfy Santana's interest in the property. When the offer of $235,000 was first made Brentwood was put on notice that the one to whom it was made no longer represented the defendants. The second offer was made after the actions were commenced and the status of the parties had become fixed. Kirk v. Culley, 202 Cal. 501, 261 P. 994. Furthermore there is no evidence that the amount offered would satisfy the terms of the contract. Santana's offer to settle for $40,000 was kept open "five or six days" at Brentwood's request but it had not been acted upon and more than a month had expired. There is no proof that the defendants could have eliminated Santana's interest at a cost to them not in excess of $5,000.

[4, 5] The trial court properly permitted the introduction of parol evidence in aid of its interpretation of the provision requiring the elimination of the Santana interest. In re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319; Streicher v. Heimburge, 205 Cal. 675, 272 P. 290; Lynch v. Keystone Con. Mining Co., 163 Cal. 690, 126 P. 968. Upon this and other evidence the court correctly concluded that the provision constituted a condition precedent to Brentwood's right to the performance of the contract of sale. The defendant William McCall testified that he informed Britschgi "that the property was tied up on a golf course lease and to do nothing more about it, bring no deposit of any kind because I wouldn't accept [it], and if you're going to make a sale, there would have to be an arrangement with the man that has got the option on the property first before I'll go any further * * *." The evidence plainly indicates that the parties intended that a tender would be ineffective unless the condition was satisfied. The trial court was therefore justified in concluding that the elimination of the Santana interest was a condition precedent to the defendants' duty to convey.

[6–8] It was in evidence that the plaintiffs were willing to accept conveyance of title to the property subject to the Santana option and that they offered to waive the provisions of the contract that the sale would be "contingent upon the seller being able to eliminate the interest" of Santana for a sum not to exceed $5,000. The question then is whether the plaintiff could

waive the condition and make the waiver binding on the defendants as sellers. The plaintiffs contend that the condition was one for the sole benefit of the buyers and could be waived by them. They place reliance upon the so-called "defect of title" cases such as Miller v. Dyer, 20 Cal.2d 526, 127 P.2d 901, 141 A.L.R. 1428; Farnum v. Clarke, 148 Cal. 610, 84 P. 166; and Twisselmann v. Cohn, 57 Cal.App.2d 987, 136 P.2d 33. Those cases hold that it is no answer for the vendor to say, when specific performance is demanded of him, that the interest or title which is sought to be acquired is not as complete as he agreed to convey. The present case is clearly distinguishable from those cases. Where a seller agrees to convey title subject to an interest held by a third party in the nature of a defect in the seller's title, he does not necessarily incur personal liability to the third party by conveying title without eliminating that defect. This is especially true when the right in the third party is one not created by the personal covenant of the seller. In such cases the elimination of the defect is deemed for the sole benefit of the buyer who may waive it. But here the option to purchase held by Santana involved a personal obligation on the part of the defendants to convey complete title to Santana. This duty would be breached by a conveyance to Brentwood which might subject the defendants to a claim for damages far in excess of what Santana might presently be willing to accept. The willingness of the plaintiffs to assume the obligation of the defendants to Santana by taking title subject to the Santana option would not release the defendants from their obligation thereunder. The burden of the defendants' obligation could be transferred to the plaintiffs only with the consent of Santana, which was never obtained. Civil Code, § 1457. While Brentwood may have effectively assumed liability under the option contract under some circumstances, see Jones v. Allert, 161 Cal. 234, 118 P. 794, the defendants' liability thereunder would not necessarily have been terminated. It is not meant by Section 1457 that a third person cannot assume obligations of contract between other parties, but only that he cannot relieve a party thereto from the latter's obligations without the consent of the creditor, here Santana. See Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 P. 52, 10 L.R.A. 369; Brady v. Fowler, 45 Cal.App. 592, 188 P. 320. The condition precedent was inserted in the contract in vital part for the benefit of the sellers. Its purpose was to protect the defendants from any claim of liability on the part of Santana. A desire to avoid the threat of litigation is a sufficient basis upon which the defendants may contend that they inserted the condition precedent for their own protection. The case therefore involves much more than a mere defect in title which the buyers could effectively waive as against the sellers. Isaacson v. G. D. Robertson & Co., 85 Cal.App.2d 71, 76, 192 P.2d 486.

[9, 10] No fault may be ascribed to the defendants because of the unfulfillment of the condition precedent. The language of the condition and the parol evidence introduced in explanation thereof are devoid of any affirmative undertaking on the part of the defendants to fulfill the condition. The defendants were to convey only if they could eliminate the specified encumbrance, and there was no promise to eliminate or convey in any event. An express condition precedent to performance by a party cannot be construed as imposing a duty on that party to fulfill the condition, where, as here, the language employed does not constitute an undertaking to do so. Edwards v. Billow, 31 Cal.2d 350, 361, 188 P.2d 748.

It is therefore concluded that under the circumstances of this case the condition precedent could not have been waived by Brentwood alone; that it was not waived by the defendants; that specific performance will not lie while the condition remains unsatisfied, and that the judgments should be affirmed.

[11] The actions in which the real estate brokers seek to recover cannot be successfully maintained in view of the holding that the defendants are under no obligation to consummate the sale.

Other questions need not be discussed.

The judgments are affirmed.

GIBSON, C. J., and CARTER, SCHAUER, and SPENCE, JJ., concur.

PARACO, Inc. et al. v. DEPARTMENT OF AGRICULTURE et al.

Civ. 8223.
Sac. 6294.

District Court of Appeal, Third District, California.

June 5, 1953.
Rehearing Denied June 29, 1953.
Hearing Denied July 28, 1953.

Suit by owners and operators of petroleum refining plants against state Department of Agriculture and others for injunction restraining defendants from enforcing against plaintiff provisions of Business and Professions Code dealing with sale of lubricating oils, and for declaratory relief based on claim that such sections are uncertain and unintelligible. The Superior Court, Sacramento County, John Quincy Brown, J., sustained demurrer to the complaint, and entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that the legislature was within its power in requiring all those engaged in re-refining and marketing used lubricating oil to label their product as reclaimed oil, so as to require such product to stand its own merits, win its way in the market and be sold for what it is, and that the statute imposing such requirement was not void for uncertainty.

Judgment affirmed.

1. Appeal and Error ⇐917(1)

Upon appeal from judgment entered after a demurrer sustained, all allegations of pleading which are well pleaded must be taken as true, and additional facts of which judicial notice may be taken will also be considered, though not pleaded.

2. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.2)

The regulation of the sale of petroleum products is within the police power of the state.

3. Constitutional Law ⇐81

A statute, to be within police power, must adopt means reasonably necessary and appropriate for accomplishment of a legitimate object falling within domain of police power, and must be reasonable in its operation upon persons whom it affects, must not be for annoyance of a particular class, and must not be unduly oppressive.

4. Evidence ⇐20(1)

It is a matter of judicial knowledge that the state is dotted with retail establishments for sale to public of lubricating oils for use in internal combustion engines, that severally these outlets are almost uniformly engaged in selling a single brand of lubricating oil, and that generally the buying public expect to buy therein, and without material exception they are sold, lubricating oils that have never before been used.

5. Constitutional Law ⇐296(1)

A vendor or manufacturer has no constitutional right to sell goods without giving to purchaser fair information of what it is that is being sold.

6. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.2)

Legislation is reasonable and appropriately necessary which requires merchandise to be sold for just what it is wherever there is great danger that those wishing to buy one kind of merchandise will be misled through want of labeling into buying something which they do not desire, and it is immaterial that this desire for one as against the other is founded entirely upon prejudice, which in turn is founded on ignorance.

7. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.6)

It is deceptive and fraudulent, through concealment to sell a man against his will what he does not want to buy and thinks he is not getting.

8. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.2)

Legislature was within its powers in requiring all those engaged in re-refining and marketing used lubricating oil to label their product as reclaimed oil, so as to require such product to stand upon its own merits, win its way in the market and be sold for what it is. Business and Professions Code, §§ 20800 to 20806, 20843.

9. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.2)

Statutory classification of lubricating oils on the market into virgin stock oils and reclaimed oils is, in view of evil sought to be remedied, that is, the prevention of deception, a reasonable classification.

Business and Professions Code, §§ 20800 to 20806, 20843.

10. Constitutional Law ⇐208(1)

Generally, as to the reasonableness of any statutory classification, the inquiry must be whether considering the end in view, the statute passes bounds of reason and assumes the character of a merely arbitrary fiat.

11. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.3)

Lubricating oils that have been used and through use have become impure and unfit for use, and which, by refining processes have been restored to their original state of purity and high quality, are "reclaimed" oils, within statutes requiring those engaged in re-refining and marketing such oils to label them as reclaimed. Business and Professions Code, §§ 20800 to 20806, 20843.

See publication Words and Phrases, for other judicial constructions and definitions of "Reclaimed".

12. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.2)

Where there is no known test by which refined lubricating oils can be distinguished from oils that had never been used, and where, prior to addition of record keeping requirements to statute requiring those engaged in re-refining and marketing used oil to label product as reclaimed, those so engaged were unable themselves to enforce labeling provisions, requirement that anyone who buys, sells or stores such lubricating oils shall keep records of purchases, sales and storage, is reasonably necessary to accomplish purpose of the legislation. Business and Professions Code, §§ 20800 to 20806, 20843.

13. Statutes ⇐47

Statutes providing that if lubricating oil has been previously used or has been re-run, filtered, re-distilled or reclaimed, the container shall bear label indicating that it is reclaimed oil, is not void for uncertainty. Business and Professions Code, §§ 20800 to 20806, 20843.

14. Statutes ⇐47

A statute will not be held void for uncertainty if any reasonable and practicable construction can be given to its language, and fact that its meaning is difficult to ascertain will not render statute nugatory.

15. Declaratory Judgment ⇐122

The mere allegation that a statute is in some particulars vague to the point where one bound to observe it is uncertain as to just what is thereby acquired, is not a compelling reason why court should attempt in a declaratory action to direct in detail the manner in which and the method by which the administrative agency shall administer the law.

16. Declaratory Judgment ⇐315

Where operators of petroleum plants sought declaratory relief based on claim that statutes requiring them to label re-refined lubricating oil as reclaimed, and to keep records of purchases, sales and storage of such oil, are uncertain and unintelligible, but their complaint went no further than to allege that, since enactment of record keeping requirement, enforcement of the labeling provisions was threatened, refusal of trial court to entertain count for declaratory relief was within court's discretion. Code Civ.Proc. § 1061.

17. Pleading ⇐225(2)

Where no useful purpose would or could be served by allowing an amendment, order sustaining demurrer to complaint without leave to amend was an action within discretion of trial court.

Rowell, Lamberson & Thomas, Fresno, for appellants.

Edmund G. Brown, Atty. Gen., and Paul M. Joseph, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered after demurrer sustained without leave to amend. The complaint contains two counts. One asks an injunction restraining respondents from enforcing against appellants the provisions of sections 20800 to 20806, inclusive, and 20843, of the Business and Professions Code, which sections deal with the sale of lubricating oils. These sections declare that crankcase

drainings, lube distillate or any other petroleum product shall not be sold for use as lubricating oil in an internal combustion engine unless free from water or suspended matter and possessing certain flash point ratings; that if lubricating oil sold has been previously used for lubrication of such engines, or gears or shafts attached thereto or for any lubricating use or has been rerun or filtered, redistilled or claimed the container shall be labeled "reclaimed motor oil" or "lubricating oil reclaimed" in red letters of specified type and size; that anyone who buys, sells or stores lubricating oil required to be so labeled shall keep records of purchases, sales and storage. The second count in the complaint asks declaratory relief based upon a claim that the code sections are so uncertain and unintelligible that plaintiffs are unable to know what the law requires them to do in order to avoid violation thereof. The factual allegations of both counts are identical.

[1] Upon an appeal from a judgment entered after a demurrer sustained all the allegations of the pleading which are well pleaded must be taken as true and additional facts of which judicial notice may be taken will also be considered though not pleaded. Talley v. Northern San Diego Hospital District, 41 Cal.2d 33, 257 P.2d 22. The several appellants own and operate petroleum refining plants; a large part of their businesses consist in collecting used lubricating oils, re-refining them and selling them under established brands at prices from 30 to 50% lower than prices of virgin stock oils sold by others; appellants' oils exceed the minimum standards required by the code for lubricating oils; although the sections requiring used oils to be labeled before sale, as reclaimed oils, have long been in the code, yet respondents made no attempt to enforce the labeling provisions because it was impossible to determine by any test whether an oil was virgin stock or re-refined; since 1949, however, and since the enactment of code section 20806, which requires record keeping, respondents are demanding of appellants that they keep such records and do the required labeling of their re-refined oils, and are threatening criminal prosecution if appellants fail to do so; re-refined oil, such as is marketed by appellants, is not merely a reclaimed oil, but is an oil which has been completely re-refined by being subjected by appellants to many more steps than are involved in mere reclaiming; the word "reclaimed" is understood by the public as a synonym for the word "inferior" and the enforcement of the labeling law would ruin appellants' market and do them irreparable injury; to label appellants' oils as "reclaimed" would in fact mislead the public because of the public's understanding that reclaimed oils are inferior and thus cause them to refuse to buy high quality re-refined oil not inferior in any respect; appellants' oils are in fact equal to the best, and superior to many, of the virgin stock oils; enforcement of the law, by making it difficult, if not impossible, to market re-refined oil once used, would result in the waste of a valuable asset and prevent conservation of limited underground petroleum stocks; by lessening the sale of re-refined oils the producers of virgin stock oil could easily maintain high prices to the detriment of the public; out of state re-refiners who ship their oils to this state are not subject to the record keeping requirements of our law and are thus immune to the labeling requirements because of the impossibility of detecting re-refined oil from virgin stock oil, and the enforcement of the law would benefit them at the expense of appellants and others engaged in producing and selling re-refined oils in the state; the code requires not only that oil once used be all labeled "reclaimed" before being again sold, but also requires that any blends of products consisting in part of such oils be so labeled and these provisions are made applicable also to oil that has not been used but has been rerun or refiltered or redistilled, thus introducing such doubt into the meaning of the legislation as to make it impossible for appellants to know when they are complying therewith. Both counts in the complaint allege that by reason of the foregoing facts the statutory provisions and their enforcement deprive appellants of liberty and property without due process of law, deny to them the equal

protection of the law and deprive them of equal privileges and immunities of the law; that said sections further grant privileges to certain persons while unreasonably discriminating against appellants; that they do not have a uniform operation and are fatally vague and uncertain.

[2, 3] All parties hereto agree that the general subject matter of the legislation attacked as being unconstitutional, that is, the regulation of the sale of petroleum products, is within the police power of the state and that the subject statutory provisions constitute an attempt on the part of the legislature to protect the public from fraud, deception and misrepresentation in the sale of such products. All parties further agree to the general limits of the constitutional exercise of the police power in that the power cannot be exercised unreasonably and that all police regulations must be reasonable under all circumstances. 11 Am.Jur., "Constitutional Law", sec. 302. "In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. A statute to be within this power must also be reasonable in its operation upon the persons whom it affects, must not be for the annoyance of a particular class, and must not be unduly oppressive." 11 Am.Jur., supra; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479. It is precisely within this field of reasonable exercise of the police power that the parties are at issue.

Taking the allegations of the complaint at their full face value, as we must, the position of appellants may be briefly stated in this way: They are selling lubricating oil which, while it has been used at least once and perhaps many times, is by reason of the rectification processes to which they subject it equal to the best and superior to many of the virgin stock lubricating oils. Their product, when readied for sale by them, is incapable of being distinguished from virgin stock oils by any scientific tests. Oil, they allege, is not worn out by use, and in fact is not changed thereby, nor is it deteriorated except in ways completely rectified by their re-refining processes. It picks up impurities during use which are removed by appellants just as impurities are removed from crude in the process of making refined lubricating oils from the natural product. These impurities they remove and thus restore the oil so that it is the same oil as the virgin stock oil which was first put to use. Therefore, they say, that if the buyers asked for virgin stock oils at the market place and the products of appellants were sold to them they would not be damaged in any way since what they bought would be just as good as, or better than, that for which they asked. Following out this argument, they say that to compel them to place upon their product a name which in the eyes of the buying public brands it as inferior is to compel them to misbrand their product and is an unreasonable, unnecessary and arbitrary exercise of the police power to their detriment.

[4] It is a matter of judicial knowledge that the state is dotted with retail establishments for the sale to the public of lubricating oils for use in internal combustion engines; that severally these outlets are almost uniformly engaged in selling a single brand of lubricating oil. One will sell Standard, another Shell, another Union and so on through the rather extensive list of great corporations engaged in the manufacture and sale of petroleum products of various kinds, including lubricating oils; that generally the buying public expect in these service stations, so called, to buy, and without material exception they are sold, lubricating oils that have never before been used.

[5] With this wide market in which oil never before used is being sold, appellants are in competition. Their business is legitimate and we assume, as we must, that their business is honestly conducted; that the quality of their product is high; and that they serve a most useful purpose in the rectification and resultant re-use and conservation of a limited natural resource. But granting all this, we come to the rock upon which the appellants' ship must founder so far as is concerned the constitutionality of the statutes which they attack. That rock is this: The public have a right

to know what they are buying. If this great buying public, consisting in this State of many millions of motorists and other users of lubricating oils, want to buy oils never before used they have a right to do so and appellants have no constitutional right to sell them something else against their will. "It is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold." Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431, 39 S.Ct. 325, 327, 63 L.Ed. 689, 693; see, also, Kentucky Whip & Collar Co. v. Illinois Cent. R. R. Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270. "'We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is.' * * * It is entirely a question of deception and the buyer has the right to know what he is purchasing." In re Hayes, 134 Cal.App. 312, 318, 25 P.2d 230, 232, quoting from In re Bear, 216 Cal. 536, 541, 15 P.2d 489, 83 A.L.R. 1402. In Parrott & Co. v. Benson, 114 Wash. 717, 194 P. 986, 987, where the statute attacked involved eggs imported from China, the court said: "While there is some evidence in the record tending to show that eggs imported from China are wholesome and equal to the domestic products, except in size, yet there is much tending to the contrary, purporting to show conditions under which eggs are produced, handled, and shipped, which might well justify the consumer in exercising a choice between domestic and such foreign eggs, and all this act can do is to identify imported eggs, either as eggs or as ingredients in other merchandise, so as to permit of such choice. Surely if the foreign egg is entirely fresh and wholesome when placed upon our markets, it can stand upon its own merits and win its way to popular favor under its true designation."

[6–8] Appellants say that they do not in reality quarrel with the cases hereinabove cited or with many others that might be cited to the same effect, but they say that in all these cases there were good reasons why the buying public would want to exercise a choice, which choice was denied them unless the labeling provisions of the legislation there involved were enforced. Here they say, however, there are no such reasons why the buying public should want to exercise a choice and they refer to the allegations concerning the excellence of their product and its actual identity with virgin stock oils. Nevertheless we think the principal is still applicable that legislation is reasonable and appropriately necessary which requires merchandise to be sold for just what it is wherever, as here, there is great danger that those wishing to buy one kind of merchandise will be misled through want of labeling into buying something which they do not desire, and we think it makes no difference that this desire for one as against the other is founded entirely upon prejudice, which, in turn, is founded on ignorance. While actionable fraud would not result under the allegations of the pleading here if the buyer, intending to buy virgin stock oil, was led into buying oil that had been used, since we must accept the allegations that the products are identical and that appellants' products in particular are equal to the best available, yet if, in view of the state-wide market of virgin stock oils, the want of labeling as to appellants' oils will result in the buyers getting that which they do not want to buy, then deception and fraud has resulted; for it is deceptive and fraudulent, through concealment, to sell a man against his will what he does not want to buy and thinks he is not getting. The legislature, we think, was well within its powers in requiring appellants and all those engaged in re-refining and marketing oil that has been used to label their product in such a way that it must stand upon its own merits, win its way in the market and be sold for what it is.

[9–11] Appellants further argue and have alleged that the labeling requirements are in themselves misleading; that their product is not reclaimed oil and they point to their allegations that their re-refining processes restore the oil to its original condition and quality so that it is not in truth and in fact reclaimed. The statute

does require that their product be labeled "reclaimed", but we think that herein we need not accept their allegations as constituting facts well pleaded, for when the legislature required the product to be labeled "reclaimed" wherever the oil had been used they selected a word which fairly described that product. The word means to regenerate, to redeem, to recover, to restore. Webster's International Dictionary. Appellants' allegations that they take oils that have been used and through use have become impure and unfit for use and by their processes restore them to their original state of purity and high quality are allegations that they have reclaimed them. Such oils are reclaimed. And finally on this subject if there is in the minds of the public, as is alleged, an unfounded and superstitious prejudice against reclaimed oil, appellants, in engaging in the reclamation and marketing of used oils, must temporarily bear the burden of this prejudice until, through the continued excellence of their product, aided by the substantial price differential favorable to them, they have gained the public's confidence, at least so far as their own established brands be concerned. The classification of lubricating oils on the market into virgin stock oils and reclaimed oils is, in view of the evils sought to be remedied, that is, the prevention of deception, a reasonable classification. For if we accept the allegations of plaintiffs' complaint, there is no way whereby the buying public who want oil that has never been used, in preference to that which has been used and reclaimed for further use, can know which they are getting. Generally, as to the reasonableness of any classification, "The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." Hebe Co. v. Shaw, 248 U.S. 297, 39 S.Ct. 125, 126, 63 L.Ed. 255, 259.

[12] That the record keeping requirements of the code are reasonably necessary to accomplish the purpose of the legislation is apparent from the allegations of the complaint. It is alleged as to appellants' re-refined oils, that there is no known test by which they can be distinguished from oils that have never been used, and that prior to the addition to the code of the record keeping requirements the respondents themselves were unable to enforce the labeling provisions. The complaint makes out a clear reason why some method had to be adopted to follow, for instance, the oils from the waste pits through the re-refining processes and back into the market again. Generally, on the validity of such requirements and as stating the rule that even if such requirements appear to be unwise or burdensome or inferior to others that might have been adopted they are still permissible see American Telephone and Telegraph Company v. United States of America, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142.

Appellants allege that they are entitled to proceed for declaratory relief under the allegations of their complaint, claiming that they have stated a case of actual controversy relating to the legal rights and duties of the parties under the subject sections.

[13–16] The complaint alleges that appellants, in addition to re-refined used oils, also purchase virgin stock oils, some of which they sell without further processing and some of which they re-refine, rerun, filter or redistill, sometimes also blending such virgin stock oils with other oils, including re-refined used oils "in order to produce lubricating and motor oils of high quality." They say they cannot determine from the code sections whether a reclaimed label must be placed only on containers of used oil which has been rerun, filtered, redistilled or reclaimed or whether such label must be placed on containers of unused oil so treated. We think the statute is clear upon the matter. It is stated specifically that the reclaimed label must be placed on any oil used or unused which has been by the person proposing to sell the same rerun, filtered, redistilled or reclaimed. It may thus result that the label is placed upon virgin stock oils which have never been used, but the purpose of the legislation is plain. There is definite danger that virgin stock oils ready for use

that have been treated by reprocessing may be mixed or blended with used oils and thus become a means of evasion and violation of the labeling law. Appellants say they do not know whether the labels must be placed on containers of unused oils which have been blended or compounded with rerun, filtered, redistilled or reclaimed oil, but the statute clearly says they must be. We think it unnecessary to further follow the complaint's allegations of uncertainty in the statutes. We have considered them all and think that the statutes are reasonably clear in all matters in which it is alleged they are uncertain. The labeling statute clearly requires that if oil has been previously used *or* has been rerun, filtered, redistilled or reclaimed the container shall bear the label. We think this legislation clear enough to meet the tests imposed by courts when a legislative act is challenged for uncertainty. A statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. The fact that its meaning is difficult to ascertain will not render a statute nugatory. 23 Cal.Jur., "Statutes", sec. 36, p. 640. It is to be observed in this connection that the respondent Department of Agriculture, to which is delegated the task of enforcing the code provisions here in question, may within permissible limits implement and interpret and make specific the law administered by it. Gov.Code, § 11371. And the bare allegation that a statute is in some particulars vague to the point where one bound to observe it is uncertain as to just what is thereby required is not a compelling reason why a court should attempt in a declaratory action to direct in detail the manner in which and the methods by which the administrative agency shall administer the law. Appellants do not allege that the respondent Department has attempted any unlawful enforcement within the area now being discussed and indeed alleges that for many years the Department made no effort to enforce the labeling provisions of the law and that appellants have consistently violated the same, all because without the record keeping provisions the Department was helpless to compel the labeling provisions to be observed. The allegations of the complaint go no further in this respect than to say that the Department, since the enactment of the record keeping requirement, is now threatening to compel the appellants to observe the labeling provisions. Under these circumstances it was entirely within the discretionary power of the trial court to refuse to entertain the count for declaratory relief. Section 1061 of the Code of Civil Procedure provides that, "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

[17] The demurrer was properly sustained without leave to amend. Basically, appellants' cause of action is grounded upon the proposition that they may attack the constitutionality of the subject sections of the code because they are engaged in the business of re-refining used oils, which business will, they say, be materially injured, if not destroyed, if they are compelled to label the products they sell as "reclaimed". If the subject sections be not vulnerable to appellants' attack based upon these fundamental allegations, then we cannot see how an amendment could have served the appellants, for it cannot be supposed, and appellants do not claim, that by amendment they could or would have changed the fundamental basis of their action. Under such circumstances, the sustaining of the demurrer without leave to amend was an action within the discretion of the trial court, which may make such order when it cannot be perceived that any useful purpose would or could be served by allowing an amendment.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

118 Cal.App.2d 379

HANCOCK OIL CO. v. MEEKER-GARNER OIL CO. et al.

CHRISTOPHER v. HANCOCK OIL CO. MILLS et al. v. MEEKER-GARNER OIL CO. et al.

Civ. 19119.

District Court of Appeal, Second District, Division 1, California.

June 8, 1953.

Proceeding against certain lessors under community oil and gas lease and against oil company for injunction perpetually restraining further drilling on certain lots under lease and requiring filling of hole already drilled. Lessor of lot adjoining community lease obtained leave to intervene, and other lessors under community lease obtained leave to file complaint in intervention. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment granting injunction, and defendant and adjoining lessor appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that where two lessors under community lease granted easement to oil company authorizing erection of derrick on their lots, oil company slant drilled oil well through lots' surface to lot not under lease, and well thus drilled would drain common pool located under lots covered by lease, such drilling constituted trespass against assignee of lessee of community lease and could be enjoined.

Judgment affirmed.

1. Mines and Minerals ⇐52

Where there is a subsurface trespass as to realty under oil and gas lease in an area in which it is extremely difficult to ascertain extent to which lessees have been and will in future be damaged by such drilling, circumstances warrant interposition of court of equity, particularly if trespass is of a continuing nature and might ripen into a prescriptive right.

2. Mines and Minerals ⇐52

Where two lessors under community oil and gas lease granted easement to oil company authorizing erection of derrick on their lots, oil company slant drilled oil well through surface of lots to lot not under lease and well thus drilled would drain common pool under lots covered by lease, such drilling constituted trespass against assignee of lessee of community lease and could be enjoined.

3. Mines and Minerals ⇐79(1)

Upon fundamental principles, the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for common benefit.

4. Mines and Minerals ⇐79(1)

Where two lessors under community oil and gas lease granted easement to oil company authorizing erection of derrick on their lots, oil company slant drilled oil well through surface of lots to lot not under lease and well would drain common pool under community lease, lessors would not be permitted to claim royalties under community lease and at same time aid in diminishment of common pool.

5. Mines and Minerals ⇐79(1)

Under community oil and gas lease giving lessee exclusive possession of leased premises, both surface and subsurface, subject only to right of lessors to use surface for certain specified purposes, where two lessors granted easements to oil company authorizing erection of derrick on their lots, oil company slant drilled well through lot surface to lot not under lease and well would drain common pool under lots covered by lease, conduct of lessors could not be justified under terms of lease.

Jennings & Belcher, Los Angeles, Krystal & Paradise, Los Angeles, of counsel, for appellant Meeker-Garner Oil Co.

Samuel Lackman, Long Beach, for appellants Rabinowitz and Budnick.

Ball, Hunt and Hart, Joseph A. Ball, Long Beach, for appellant Christopher.

Harold A. Black, Philip K. Verleger, McCutchen, Black, Harnagel & Greene, Los Angeles, for respondent Hancock Oil Co.

Kenneth Sperry, Long Beach, for respondents Mills and others.

DRAPEAU, Justice.

On May 17, 1947, a community oil and gas lease, hereinafter called the Chalker lease, was executed in counterparts by J.

M. Chalker, as lessee, and by the owners, as lessors, of certain lots embraced within Blocks 1 to 6, inclusive, of Tract 4143, partly located in the City of Signal Hill and partly in the City of Long Beach.

On January 16, 1948, Chalker and wife assigned said lease to the Hancock Oil Company of California, hereinafter referred to as Hancock. On January 31, 1950, the Chalker lease was ratified and confirmed by Hancock and the various owner-lessors, and the time for commencing drilling thereunder was extended.

By a rider attached to the Chalker lease and dated October 1, 1951, Hancock expressly agreed not to erect derricks or install any oil well machinery, or in any way disturb the surface of any real property located in Blocks 1, 2, 3, 4, or 6 of Tract 4143.

Madolyn M. Christopher, plaintiff in intervention, is the owner of Lot 8, Block 2 of said Tract 4143. She did not join in the Chalker lease so that her lot is not included therein. However, it is surrounded by lots which are covered by the lease, and it lies in a restricted zone of the City of Signal Hill upon which surface drilling is prohibited by ordinance.

Among the lessors of the Chalker lease were defendants Rabinowitz and Budnick, owners of Lots 5 and 6, Block 2 of the tract covered by the lease. These lots adjoin Lot 8 and are located in a commercial zone where drilling is permitted.

On July 27, 1951, defendant Meeker-Garner Oil Company entered into an oil and gas lease with Mrs. Christopher covering Lot 8. On the same day, said oil company obtained an easement from Rabinowitz and Budnick authorizing the erection of a derrick on the southerly 45 feet of Lots 5 and 6, for the purpose of slant drilling an oil well through the surface thereof into Lot 8.

In August, 1951, Meeker-Garner procured a drilling permit from the City of Signal Hill, placed equipment on Lots 5 and 6, and on September 4, 1951, commenced drilling a well from the surface of Lot 5. The well was slant-drilled to a depth of 390 feet into Lot 5, where it entered Lot 8. It was the intention to complete it by bottoming it entirely on Lot 8.

At this point, Hancock, as lessee under the Chalker lease, filed its complaint for an injunction against defendants Meeker-Garner Oil Company, Rabinowitz and Budnick, perpetually restraining them from proceeding further with their drilling on Lots 5 and 6, and requiring them to fill the hole already drilled.

Mrs. Christopher obtained leave to intervene and aligned herself with defendants.

D. A. Mills and those named in the heading hereto, as owner-lessors of various lots covered by the Chalker lease, were granted permission to file a complaint in intervention. They aligned themselves with Hancock and against defendants.

A preliminary injunction issued halting further drilling operations pending trial.

Among other things, the trial court found that the well constructed by defendants on Lot 5 "will interfere with the operations of plaintiff, and with the extraction of oil by plaintiff under the Chalker lease"; that said well "does not create any physical obstruction to any of the existing or presently contemplated operations of plaintiff, but that said well will, if completed and operated, by reducing the production of the wells constructed by plaintiff under said Chalker lease, frustrate the object of plaintiff's operations and of the said Chalker lease, to-wit: the achievement of maximum production under said Chalker lease."

Further that, unless defendants are restrained, Hancock and plaintiffs in intervention will suffer irreparable injury, for the reasons that defendants' well (1) constitutes a continuing trespass; and (2) "will drain the pool underlying the lands covered by the Chalker lease, which is the same pool as underlies Lot 8, and will materially reduce the production of plaintiff's wells under said Chalker lease in an amount which is impossible definitely to ascertain. That by virtue of said drainage, plaintiffs in intervention will suffer a substantial loss of royalties which are and will be impossible to ascertain."

From the judgment which followed perpetually enjoining defendants from con-

structing, maintaining or operating any oil or gas well within the boundaries of said Lots 5 and 6, and requiring them to fill and abandon the well already drilled, defendants Meeker-Garner Oil Company, Irving and Rose Rabinowitz, Mae Geller Budnick, and intervener Madolyn M. Christopher appeal.

The pertinent paragraphs of the lease and a rider thereto attached read as follows:

"1. Whereas, Lessors believe that their interests will be best furthered and conserved by joining their respective properties in this 'Community Oil Lease' under the terms of which their said property may be jointly explored and developed for oil, gas and kindred substances, and all Lessors may share in the royalties from the wells whereever drilled on said land, and they now desire to 'pool' their interests in such manner:

"2. Now, Therefore, and in consideration of the agreements hereinafter specified, Lessors * * * each for himself and with all of the others do hereby lease unto Lessee exclusively the real property described opposite the names of each of said Lessors for the purpose of exploring, drilling and operating for oil, gas, gasoline and other hydrocarbon substances and taking, storing, removing and disposing of same with the right to use for such purposes and without cost to Lessee, such oil, gas and water from said land as may be necessary or convenient in Lessee's operations and in drilling for and producing oil and gas from said premises, together with rights of way, easements and servitudes for pipe lines * * * together with every other right and privilege incidental to the use of said land in connection with the drilling, operating, producing, refining, marketing and storing of oil and gas or the hydrocarbon substances produced; all upon the terms, covenants and conditions hereinafter contained.

"3. Lessor Warrants, covenants and agrees that Lessee's possession of the demised premises shall be continuous, sole and exclusive, subject only to the right in Lessor to use, occupy or lease the surface of the demised premises or any part thereof for agricultural, horticultural, dairy, stock raising or similar purposes, which shall not interfere with Lessee's operations hereunder. The use of any dwelling on the demised premises for residence purpose is hereby reserved by the Lessor."

The rider dated October 1, 1951: "Lessee expressly agrees that it will erect no derricks or install any oil well equipment machinery, or in any way disturb the surface of any real property located in Blocks One (1), Two (2), Three (3), Four (4), or Six (6), of said Tract 4143, Los Angeles County, California."

It is appellants' contention that the Meeker-Garner well, as drilled—slanted from the surface of Lot 5 into Lot 8 where it was to be bottomed—does not constitute a trespass against either Hancock or the owner-lessors. This for the reason that the exclusive right to produce oil and gas under the Chalker lease is limited to production by Hancock from wells bottomed under the surface of the lots covered by that lease. Consequently, appellants' well bottomed on an adjoining lot does not interfere with the operations under said lease.

In support of this stand, appellants cite Brookshire Oil Co. v. Casmalia etc. Co., 156 Cal. 211, 218, 103 P. 927, 930, which holds that an owner-lessor may grant to a third party the right to lay and maintain an oil pipeline through land covered by an oil and gas lease "so long as it does not interfere with the actual operations of the defendant [lessee] under the lease."

The facts in the cited case may be easily distinguished from those here involved. In the Brookshire case, the lessee did not claim that the pipeline interfered with its operations for discovery of oil on the premises. The defense was founded upon the theory that under its agreement lessee had the sole right to lay pipelines in the land for any or all purposes and in all parts of it, and that any other pipeline laid in the land was a trespass on that right. It was there stated 156 Cal.2d at page 217, 103 P. at page 929:

"The right given is limited to the use of the land for the purpose of pro-

ducing the minerals. Any use by the owner, or others operating under him, which does not affect the search for and production of the minerals, is lawful, and the defendants [lessees] have no right to interfere with such use, except when in the actual exercise of the lessees' rights under the lease, the other occupation or use shall be found adverse, injurious, or conflicting."

In the instant case, Hancock established a drilling island on Block 5 and agreed not to disturb the surface of any other lots in the remaining blocks covered by the lease.

Respondents urge that the operations of Meeker-Garner are a deliberate use of Hancock's land as a means of drilling a well to the damage of Hancock's production under the Chalker lease.

It was stipulated at the trial:

"That the present hole of the defendant Meeker-Garner Company on Lots 5 and 6 does not presently interfere with any of the existing operations of plaintiff in the sense of creating any physical obstruction thereto, and will not do so insofar as contemplated future activity of plaintiff is concerned."

It was further stipulated "That a well bottomed under Lot 8 would drain oil from the same pool as underlies the Chalker lots and, if produced, would reduce the amount of oil which would otherwise be recovered under the Chalker lease, but the amount thereof cannot be accurately measured."

The basic interference here is the draining of oil by the Meeker-Garner well from the common pool, thereby reducing the amount recoverable under the Chalker lease, with resultant loss to all the owner-lessors under that lease.

[1] This court is of the opinion that the holding in Union Oil Co. v. Domengeaux, 30 Cal.App.2d 266, 270, 86 P.2d 127, 130, is decisive here. In that case the defendants drilled from their land through land under lease to plaintiff oil company, and bottomed the well under land which was under lease to General Petroleum Company, immediately adjacent to plaintiff's land, so closely that it drained it. General Petroleum was not a party to the action so that its interests were not involved. As to plaintiff's interests, it was contended that no damage was caused.

It was there stated. "Defendants raise another point with respect to the sufficiency of the evidence, which point requires further consideration. They contend that, even assuming that they were chargeable with trespassing, the damages were 'too trifling and inconsequential' to justify the granting of injunctive relief. It appears to be defendants' theory that an injunction will issue only upon a showing of irreparable injury. *In this connection, defendants entirely ignore the testimony showing that their well, after trespassing upon the property of the several plaintiffs, was bottomed at a point where it was producing oil from the property of plaintiff Union Oil Company.* But even in the absence of such showing, we are still of the opinion that there is no merit in said contention. *The trespass here was a subsurface trespass in an oil and gas producing area.* It was conceded by plaintiffs on the trial that they could make no such showing as to actual damage as would justify an award of damages in any specific amount. The difficulty in making such a showing is recognized and discussed in the recent decision in Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, at page 254, 73 P.2d 1163 [1164]. Such concession, however, does not justify the conclusion that plaintiffs had suffered no injury. It has heretofore been held in a case involving a subsurface trespass by way of tunneling that 'the injury is irreparable in itself.' Richards v. Dower, 64 Cal. 62, 28 P. 113, 114. Furthermore, we believe that the evidence before us brings the cause within subdivision 2 of section 3422 of the Civil Code providing for the issuance of an injunction 'where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief'. It appears from the authorities cited by the parties that each case must stand upon its own facts in determining whether equitable relief should be granted and defendants have not called to our attention any authority in this jurisdiction holding that such relief should be denied under the circumstances before us.

In some cases, notably those involving inconsequential surface encroachments, injunctive relief has been denied ordinarily upon the application of the maxim *de minimus* but in such cases it is obvious that there was no appreciable damage or at least that the extent of such damage was easily ascertainable. *But here we are dealing with a subsurface trespass in an area where it is extremely difficult to ascertain the extent to which plaintiffs have been and will in the future be damaged by defendants' drilling * * * through their oil producing properties. Under such circumstances, we believe that the circumstances warrant the interposition of a court of equity and particularly where the trespass is of a continuing nature and might ripen into a prescriptive right.*" (Emphasis added.)

[2] Explicit in the cited case is the principle that one who drills through leased land to cause drainage from it violates the lessee's rights and commits a trespass against him. Such conduct being a trespass against the lessee, it can make no difference that the owner-lessor has consented.

[3] In Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 825, 129 P.2d 383, 389, the Supreme Court recognized that a landowner cannot lawfully cause drainage from the leased land when it observed:

> "Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. Williston on Contracts, vol. 5, § 1293A. Upon fundamental principles, the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors."

[4] In the later case of Tanner v. Olds, 29 Cal.2d 110, 115, 173 P.2d 6, 167 A.L.R. 1219, the court determined that this principle did not apply as between lessors, as was assumed in Tanner v. Title Ins. & Trust Co., supra, and confined it to cases as between lessee and lessor. As so confined, the stated principle forbids the conduct of appellants Rabinowitz and Budnick.

[5] Neither can their conduct be justified under the terms of the Chalker lease. By the third paragraph thereof, Hancock is given exclusive possession of the leased premises, both surface and subsurface, subject only to the right of lessors to use the surface for certain specified purposes.

With respect to the rider in which Hancock agreed not to disturb the surface of any block covered by the lease except Block 5, the court found:

> "* * * That the purpose of said rider was to prevent interference by Lessee's oil and gas operations with the existing surface uses; that said rider was not intended as, and did not operate as a renunciation of the estate otherwise conveyed by said Chalker lease, and/or a giving back to, or a reservation to the Lessors, or any of them, of the right to use or to permit others to use the surface or the subsurface of said land for oil drilling or production purposes."

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 346

PEOPLE v. SHEPHERD.

Cr. 4988.

District Court of Appeal, Second District, Division 3, California.

June 5, 1953.

Defendant was convicted of unlawful possession of heroin. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment and an order denying a motion for new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held that the evidence was sufficient to support implied finding that defendant had possession of heroin.

Appeal from order denying a new trial dismissed and judgment affirmed.

1. Criminal Law ⇐1131(4)

Appeal from nonexistent order denying defendant's motion for new trial after conviction of offense of possessing heroin would be dismissed, where record did not indicate that such motion had been made.

2. Poisons ⇐4

As respects unlawful possession of heroin, "possession" is established when it is shown that a person has physical control thereof with intent to exercise such control, or, having had physical control, has not abandoned it and no other person has such possession.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

3. Poisons ⇐9

In prosecution for unlawful possession of heroin, evidence was sufficient to support implied finding that defendant had possession of the heroin.

Max M. Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1] Defendant was convicted of having in his possession a preparation of heroin. He appeals from the judgment. He also appeals from an order denying a motion for a new trial. Since the record does not disclose that a motion for a new trial was made, the appeal from the nonexistent order will be dismissed. The claim is that the evidence is insufficient to support the implied finding that defendant had possession of the heroin. The claim cannot be sustained.

About 3:30 p. m. on May 19, 1952, a police officer observed defendant as he parked his automobile in front of a residence in Los Angeles. Defendant got out of the car and walked towards the sidewalk. As he did so, the officer left his car, which was two lengths away, and ran toward defendant. Defendant turned, saw the officer, and started to run. The officer called that he was a police officer and ordered defendant to stop. Defendant fell to the ground. As he was going down the officer saw two objects drop from his hand. They fell to the ground to the left of where defendant was lying. The officer placed defendant under arrest and told another officer to pick up the objects, which he did. The objects were bindles of heroin.

At the time of the arrest, one of the officers showed the objects to the defendant and asked him what they were. Defendant replied, "That's my stuff." The officer then asked him if it was marijuana. Defendant replied, "No, it's H." The officer asked, "What do you mean by H?" Defendant replied, "Heroin."

Defendant testified he had purchased the heroin, but had not had possession of it; he had been told by someone where to pick it up—in a rut by the driveway; as he was going to that location to pick it up he was arrested; he did not have it in his car; as he ran on the lawn he slipped and fell as the officers were running toward him; he did not put his hand on any of the bindles and he had not touched them when the officers got them; he did not throw the bindles; he was arrested before he had a chance to pick them up; he did not fall at the place where he was to pick them up; the bindles were seven feet from where he fell.

[2, 3] "'Possession' of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession (Rest., Torts, Sec. 216)." People v. Bassett, 68 Cal.App.2d 241, 247, 156 P.2d 457, 460. The evidence we have narrated supports the conclusion that defendant had physical control of the heroin with the intent to exercise such control and that no other person had that possession. This meets the requirements of the statute. People v. Monge, 109 Cal.App.2d 141, 240 P.2d 432.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.



113 Cal.App.2d 401

DALEY v. NICOLL & CO.

Civ. 15453.

District Court of Appeal, First District, Division 2, California.

June 10, 1953.

Action for damages from fall allegedly resulting from defendant's negligence. The Superior Court, County of San Mateo, Edmund Scott, J., denied plaintiff's motion for new trial on issue of damages alone, and entered judgment on verdict for plaintiff, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that award of $800 for physical suffering, loss of wages, etc., from sprained ankle and bruished left hip, was not inadequate compensation for those minor injuries.

Judgment affirmed.

Damages ⇐131(6)

Award of $800 for physical suffering, loss of wages, etc., from a sprained ankle and bruised left hip, was not inadequate for those minor injuries.

Edward E. Heavy and Frederick L. Hewitt, San Francisco, for appellant.

Ropers & Majeski, Redwood City, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages alleged to have resulted from a fall due to defendant's negligence. The jury returned a verdict for the plaintiff in the sum of $800. Plaintiff's motion for a new trial on the issue of damages alone was denied, and she now appeals from the entire judgment.

The facts are not materially in dispute. From early childhood the plaintiff had suffered from congenital dislocation of both hips and particularly from degenerative arthritis of the right hip. From the age of sixteen she had fallen frequently injuring either one or both hips. She had undergone surgery to her right hip to replace a worn hip socket by a metal one. This was done in the year 1942. In 1943 she returned to partial employment, having then discarded her crutches, but soon thereafter she again fell and sprained her right ankle. The fall which is the basis of this cause of action occurred October 13, 1949. It was then diagnosed as a sprain of the right ankle and back and a contusion of the left hip. At the time of this later treatment she stated positively that she had not injured her right hip as a result of the fall. Approximately six months later she filed a suit for damages alleging injury to the right ankle and contusions to the left hip, also contusions to the chest. She was then examined by a physician selected by the defendant to whom she stated that she had received no injuries to her right hip in this fall. Before the trial she contacted the same physician who treated her in 1942 and a second operation was then performed on her right hip. Following that operation she filed an amended complaint in which for the first time she alleged a fracture of the right hip as a result of that fall.

In the trial before the jury the main issue was whether the plaintiff had suffered any injury to the right hip as a result of the fall. This left to the plaintiff the claim for damages to the left hip and the sprained ankle, which were concededly of minor importance. The evidence upon which appellant relied showing physical suffering, loss of wages, etc. is tied to the bruise on the left hip and the sprained ankle. There was competent testimony that the condition of the right hip, upon which she now relies to support her claim for special damages, loss of wages, etc., is not a result of the accident but was of congenital origin.

There is no question of law raised on the appeal which calls for any discussion. The single question is whether the jury's award of $800 limited as it must have been to the sprained ankle and bruised left hip was adequate compensation for these minor injuries. Nothing has been shown herein that would justify us in exercising an independent judgment on the amount of the damages. When we take into consideration that the trial judge on the hearing of the motion for a new trial had heard all the evidence, we must assume that the court approved the jury's verdict as covering ample compensation for the specific injuries sustained in that particular accident. There are no legal questions raised on appeal which require consideration.

Judgment affirmed.

DOOLING, J., concurs.



118 Cal.App.2d 327

In re SAYEGH'S ESTATE.

SAYEGH v. SAYEGH et al.

Civ. 19461.

District Court of Appeal, Second District, Division 1, California.

June 4, 1953.

Proceeding involving validity of antenuptial agreement and right of widow to family allowance. The Superior Court, Los Angeles County, William R. Gallagher, J., entered judgment and order declaring antenuptial agreement void and granting widow family allowance of $400 per month, and executors appealed. The District Court of Appeal, Doran, J., held that evidence supported findings that confidential relationship had existed between decedent and widow at time of execution of antenuptial agreement and that fraud or undue influence had been practiced by decedent upon widow.

Order affirmed.

1. Appeal and Error ⇐1011(1)

Where record discloses substantial evidence in support of findings of trial court, a reviewing court is not permitted to become a trier of fact nor a weigher of conflicting evidence.

2. Appeal and Error ⇐931(1)

On appeal from a judgment, all the evidence most favorable to respondents should be accepted as true and that which is unfavorable should be discarded.

3. Husband and Wife ⇐34

In proceedings involving validity of antenuptial agreement and right of widow to family allowance, where widow testified that she did not read antenuptial agreement and that she did not know she was signing away any of her rights, evidence supported findings that confidential relationship had existed between widow and decedent at time of execution of agreement and that fraud or undue influence had been practiced by decedent upon widow. Civ.Code, § 1574.

4. Appeal and Error ⇐301, 762

Contention which was not raised in motion for new trial, was not set forth as ground for appeal in opening brief, did not deal with any issues of case and was raised for first time in reply brief on appeal, would not be considered by District Court of Appeal.

5. Appeal and Error ⇐843(1)

Appellate court will not review questions which are only of academic interest.

6. Appeal and Error ⇐762

Appellate courts are not disposed to consider points raised for first time in appellant's closing brief.

Harris & Magdlen, Los Angeles, for appellants.

A. G. Ritter, Los Angeles, for respondent.

Louis P. Pink, and J. Perry Langford, Los Angeles, for minor beneficiaries.

DORAN, Justice.

Executors of the Estate of Gabriel N. Sayegh, deceased, are here appealing from a family allowance of $400 per month

granted by the probate court to the respondent, decedent's widow. The judgment and order also declared void a certain ante-nuptial agreement executed by respondent and decedent on February 18, 1952, the day of their marriage. The decedent died six days later, on February 24th. At the time of the marriage respondent, by profession an electrical engineer, was some 21 years younger than the decedent who was in poor health.

The Ante-Nuptial Agreement in question reads as follows:

"Whereas, first party and second party contemplate legal marriage under the laws of the State of California; and

"Whereas, it is their mutual desire to enter into this agreement whereby they will regulate their relationships toward each other with respect to the property each of them own and in which each of them has an interest:

"Now, Therefore, it is Mutually Agreed as Follows:

"1. That all properties of any kind or nature, real, personal or mixed, wherever the same may be found, which belong to each party, shall be and forever remain the personal estate of said party, including all interest, rents and profits which may accrue therefrom.

"2. That each shall have at all times the full right and authority, and in all respects the same as each would have if not married, to use, enjoy, manage, convey and encumber such property as may belong to such party as set forth in paragraph (1) above.

"3. That each party may make such disposition of his or her property as the case may be, by gift or will during his or her lifetime, as each sees fit; and in the case of the decease of one of the parties hereto, the survivor shall have no interest in the property of the estate of the other, either by way of inheritance, succession, family allowance or homestead.

"4. That each party, in the case of a separation of the parties hereto, shall have no right as against the other by way of claims for support, alimony, attorney fees, costs, or division of property."

The instrument was duly signed by both parties and acknowledged before a notary public on February 18, 1952.

The record discloses evidence to the effect that the respondent, Alice Araxie Sayegh, first met the decedent in 1938 or 1939 and that "she started going regularly" with Mr. Sayegh in July 1951. On September 1, 1951, decedent suggested that respondent stay at decedent's home during a vacation, from which date respondent continued to reside with decedent, "Shopping, cooking, running the household; as any wife would have". The respondent further testified that "The only thing that kept him from marrying me was the divorce decree" from decedent's third wife, which had not become final. During this period Mr. Sayegh was ill, suffered from heart disease, and in December, 1951 had the pneumonia and spent a week in a hospital.

There was much objection "From the Syrian Colony, from his brothers, from all his friends, no one wanted to see him marry me"; decedent was advised that "Everybody knows that you are loaded with money, she is after your money", to which Mr. Sayegh replied that "This is not the truth, she is willing to sign a paper for me". There is testimony that respondent, before the marriage, had stated, "Yes, I don't care about the money" which respondent knew had been willed to decedent's nephews; that "I just want to get married, I don't care whether he marries me one day before he died", and "I don't want nothing, I have a good position, I have money of my own".

On the morning of February 18, 1952, Gabriel N. Sayegh told the respondent that it was necessary to pick up the final divorce decree (from decedent's third wife) at the law office of Hahn, Ross and Saunders. Upon arriving there, according to Mr. Ross' testimony, "Mr. Sayegh and Miss Bakurjian (respondent) asked me to draw up an agreement, an ante-nuptial agreement between them in which Miss Bakurjian would agree to waive any interest in any of his property and to waive any claims that she

may have against him by reason of being his wife". Mr. Ross "told her that as a result of this agreement she would never be able to get anything from Mr. Sayegh as a result of the marriage", and "She told me that she understood that". Respondent read the paper, both parties signed it and were married immediately thereafter.

The respondent testified that decedent went into the law office while respondent was parking the car; that thereafter decedent talked with Attorney Ross alone in another office for 15 or 20 minutes. Upon returning, Mr. Sayegh said: "Alice, I am going to have you sign an agreement in order to appease my brothers because they won't accept you"; this was the first time a property settlement had been mentioned. Respondent further stated that Gabriel (decedent) "read it and that is all there was to it; I didn't even read it". Decedent further said, "it meant nothing, he would destroy it when it had served its purpose, I shouldn't worry about it, it was only to appease his brothers so they would accept me", and that "he would take care of me in another way, that this meant nothing".

The respondent further stated that "I didn't know I was signing away any rights of any kind", and that the paper would not have been signed if it had been known that "it was in effect a waiver of all your rights". Respondent was informed at the law office, and believed that the paper was "an acknowledgment what was his was his and what was mine was mine up to the time of our marriage, what we accumulated together was ours, and I told him I was willing to sign an agreement of that nature". Miss Grotsky, the notary, was not produced as a witness, and the only testimony as to what happened in the law office was that of respondent and Attorney Ross. As stated in appellants' brief, there was a direct conflict in the testimony of these two witnesses. The respondent's brief notes that Mr. Ross admitted that "in many of the points the witness was" somewhat hazy as to details.

In making the order for a family allowance of $400 a month in favor of Mrs. Sayegh, the trial court found that a confidential relation existed between the parties; that "said signing by petitioner was not the free and voluntary act of said petitioner and that said document and the said signature of petitioner were procured and obtained by duress, menace, fraud and undue influence of said decedent * * * and that said document does not contain the true agreement of the parties and is null and void and of no effect". The court further found that "petitioner had not waived any of her interest or rights as widow or any right to the estate of said decedent, or her right to family allowance, or otherwise"; that "said agreement was not based upon any consideration to petitioner * * * and that petitioner is not bound thereby". The reasonableness of the family allowance ordered is not questioned.

Appellants' contention that "There is no evidence to sustain the findings of fact that fraud or undue influence was practiced by the decedent upon the petitioner" is not borne out by the record. As hereinbefore indicated, there were but two witnesses as to what transpired at the attorney's office, namely respondent and Attorney Ross, and the latter was "somewhat hazy as to details". The testimony of these witnesses is in direct conflict, and the trial judge was compelled to weigh the evidence and to determine relative credibility in respect to the testimony given. As pointed out in respondent's brief, "the lower court rejected the testimony of Ross on such matters as conflicted with the testimony of petitioner. This the lower court had the right to do".

It cannot be said, as maintained by appellants, that the testimony of the respondent widow "is highly improbable". The testimony of Mrs. Sayegh was positive, and the witness was not impeached. If this testimony is to be believed, and the trial judge who observed the witnesses did so believe, it appears, as respondent's brief affirms, "that never at any time was petitioner informed that she was waiving her rights to support in fact she was not informed about anything else but was taken advantage of in a manner which should not be countenanced".

[1–3] The rule governing appellate courts in matters of this nature is well established. Where the record discloses substantial evidence in support of the findings of a trial court, a reviewing court is not permitted to become a trier of fact nor a weigher of conflicting evidence. As said in Re Estate of Washington, 116 Cal. App.2d 139, 253 P.2d 60, 64, "On appeal from a judgment in a will contest, like any other civil action, the evidence most favorable to the respondent should be accepted as true, and that which is unfavorable should be disregarded. In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384." Applying this rule in the present case, appellants' contention cannot be sustained. The same may be said in respect to appellants' argument that the facts do not support a finding that there was a confidential relationship between decedent and respondent.

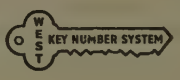
Both parties concede that "independent advice of counsel is not essential but is a circumstance to be considered in determining the validity of an antenuptial contract". In the present case it is admitted that respondent had no independent legal advice as to the nature and effect of the contract, and the trial court doubtless took this matter into consideration along with the other circumstances shown by the evidence. Under express provision of Section 1574 of the Civil Code, "Actual fraud is always a question of fact."

[4] In appellants' reply brief, joined in by attorneys for minor beneficiaries under decedent's will, it is urged that the judgment of the trial court "is not res adjudicata as against the testamentary beneficiaries of decedent, and is not binding upon them". As pointed out in a supplementary brief filed by the respondents, this point is now raised for the first time. It is not set forth as one of the grounds of appeal in appellants' opening brief; it was not raised in the motion for a new trial, and does not deal with any of the issues of the case.

[5, 6] An appellate court will not review questions which are only of academic interest, Streator v. Linscott, 153 Cal. 285, 95 P. 42. It has likewise been repeatedly held that appellate courts are not disposed to consider points raised for the first time in appellants' closing brief, Monk v. Ehret, 192 Cal. 186, 219 P. 452.

The judgment and order granting a family allowance to the respondent is affirmed.

WHITE, P. J., concurs.



118 Cal.App.2d 332

PEOPLE v. MARTORANA.

Cr. 4990.

District Court of Appeal, Second District, Division 2, California.

June 4, 1953.

Proceeding for writ of error coram nobis, wherein defendant alleged that witness in his behalf was prevented from testifying. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered order denying writ, and defendant appealed. The District Court of Appeal, Fox, J., held, inter alia, that evidence was insufficient to support defendant's charge that witness was prevented from testifying because of trial court's failure to grant a short recess so that witness could be brought in to testify.

Affirmed.

1. Criminal Law ⇐997

In proceeding for writ of error coram nobis, defendant's affidavits that attorney for complaining witness was also attorney for plaintiff in civil action involving a witness for defendant and that such attorney unduly prolonged civil action so as to prevent witness from testifying were insufficient, in absence of allegations that attorney knew that witness was expected to be witness in criminal case and in what manner attorney prevented witness from testifying.

2. Criminal Law ⇐997

Neither trial court nor appellate court is bound to accept at face value allegations of petition for writ of error coram nobis.

3. Criminal Law ⇐997

In proceeding for writ of error coram nobis, presumption that judgment is valid in all respects is strong.

4. Criminal Law ⇐997

In proceeding for writ of error coram nobis, evidence was insufficient to support defendant's claim that witness, who allegedly would have testified in defendant's behalf but who was not under subpoena, was prevented from testifying by failure of judge to grant short recess so that witness could be brought in to testify.

5. Criminal Law ⇐997

If defendant felt aggrieved by trial court's failure to grant short recess so that witness, who allegedly would have testified in defendant's behalf but who was not under subpoena, could be brought in, remedy would be by appeal and defendant could not have judgment of conviction set aside through coram nobis.

6. Criminal Law ⇐997

A writ of error coram nobis may not be used as a substitute for an appeal.

Arnold J. Provisor, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Allan, R. Woodard, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted on February 7, 1952, of assault with intent to commit rape. His motion for a new trial was denied. He did not appeal.

In November, 1952, defendant filed an application for writ of error coram nobis together with a notice of motion therefor. He appeals from the order denying his petition.

[1] Defendant's application was based upon the asserted ground that a fraud had been perpetrated upon the court in that one of defendant's witnesses, George R. Hubbard, had been prevented from testifying at his trial. From the affidavits in support of defendant's application it appears that Mr. Hubbard had had some conversations with the complaining witness and that she had made statements to him which would be advantageous to defendant's defense. Hubbard was a friend of defendant and indicated his willingness to testify in his behalf. It further appears that Hubbard was a defendant in a civil action in the Los Angeles Municipal Court which went to trial on February 6, 1952. The time estimated by plaintiff's counsel for the trial of this civil case was less than one day. It required, however, two days. Hubbard met defendant at noon on the 7th and told defendant he would testify for him that afternoon, after his case was concluded, "shortly after the noon recess." It is asserted that the attorney for the plaintiff in the civil action against Hubbard was also attorney for the complaining witness in the criminal case; that he contemplated filing, and did later file, an action for damages in behalf of the complaining witness against the defendant herein; that the attorney knew Hubbard "was interested" in the criminal case; and that Hubbard's civil trial was "unduly prolonged" by this attorney to prevent him from testifying on behalf of defendant. Hubbard was not under subpoena. It is also stated that Hubbard was prevented from testifying because of the failure of Judge Fricke to grant a short recess in which to bring him in to testify. The two trials were being conducted in near-by buildings in Los Angeles.

[2, 3] Defendant fails to make any substantial showing for setting aside his conviction. His affidavit does not state that the attorney in Hubbard's civil action knew that Hubbard was expected to be a witness in the criminal case. Defendant's present attorney says the other lawyer told him he knew Hubbard was "interested in" the criminal matter. That, of course, does not mean that he understood that Hubbard was to be a witness for defendant. It is stated in defendant's affidavit that "investigation has revealed that the trial in which Mr. Hubbard was involved was unduly prolonged by said attorney * * in an attempt to prevent Mr. Hubbard from testifying on behalf of the affiant herein." Just how this was done is not

stated. It does not appear that Hubbard was on the witness stand all afternoon, or that his personal presence was otherwise continuously required in the trial of his civil case, or that he asked to be excused so that he might testify for defendant, or that he requested a recess for that purpose, and that any such request was objected to or refused. In connection with the last-quoted statement from defendant's affidavit it may be appropriately observed that "Neither the trial court nor the appellate court is bound 'to accept at face value the allegations of the petition' for the writ." People v. Smith, 109 Cal.App.2d 76, 80, 239 P.2d 903, 905. "The presumption that the judgment is valid in all respects is strong * * *." People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330, 333. It is thus apparent that the general and hearsay statements in defendant's affidavits furnish no substantial basis for defendant's charge that Hubbard was prevented by the attorney for the complaining witness from testifying at defendant's trial. People v. Adamson, 34 Cal.2d 320, 329, 210 P.2d 13. Furthermore, it is conceded that no subpoena was ever issued for Hubbard. Upon its appearing that he was not present to testify when needed, a subpoena to appear forthwith would undoubtedly have been issued if the materiality of his contemplated testimony had been revealed and his presence in an adjacent building disclosed. But no such request was made.

[4] There is no support whatever in the record before us of the charge that Hubbard was prevented from testifying in defendant's behalf because of Judge Fricke's failure to grant a short recess so that he could be brought in to testify. In fact, the record is quite to the contrary. The court in this proceeding pointed out that "the defendant rested without any motion for a continuance in order to get the witness." The Judge also commented: "All that would have been necessary would have been a continuance * * * [for] a matter of * * * minutes in order to get the witness * * *, which could easily have been accomplished. I never indicated I wouldn't give them an opportunity to get the witness. * * * I would not grant an extended continuance where the defendant failed to use any diligence to get the witness here."

[5, 6] Furthermore, if defendant felt aggrieved by any of the court's rulings he had his remedy by appeal. He did not, however, avail himself of it. He may not, of course, have his judgment of conviction later set aside through coram nobis for asserted errors which could have been corrected on appeal for the writ may not be used as a substitute for an appeal. People v. Watkins, 92 Cal.App.2d 375, 376–377, 206 P.2d 1118; People v. Smith, supra, 109 Cal. App.2d at page 79, 239 P.2d 903; People v. Martinez, 88 Cal.App.2d 767, 774, 199 P.2d 375.

Affirmed.

MOORE, P. J., and McCOMB, J., concur.



118 Cal.App.2d 451

GALE v. SANTA BARBARA COUNTY et al.

Civ. 19424.

District Court of Appeal, Second District, Division 1, California.

June 12, 1953.

Rehearing Denied June 29, 1953.

Hearing Denied Aug. 6, 1953.

Suit against county and its employees for injury allegedly sustained by plaintiff in fall on steps in county courthouse. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., entered judgment for defendants pursuant to order sustaining demurrer to first amended complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Scott, J. pro tem., held that failure to file verified claim against county until 91 days after injury was fatal to cause of action.

Judgment affirmed.

1. Counties ⇐213

Statute authorizing court to relieve a party from judgment or other proceeding taken against him through his mistake, in-

advertence, or excusable neglect did not authorize court to grant relief from consequences of failure to file within time limited by statute verified claim against county for injury allegedly sustained in fall on steps in county courthouse, even if such delay was result of mistake, inadvertence or excusable neglect. Code Civ.Proc. § 473; Government Code, § 53052.

2. Counties ⇐213

Municipal Corporations ⇐741(1)

Schools and School Districts ⇐115

The liability of municipalities, counties and school districts for negligent acts of their officers and employees is derived solely from statute, and mandatory requirement of statute that verified claim must be filed as prerequisite to maintaining a suit under statute must be fulfilled. Government Code, § 53052.

3. Counties ⇐213

Failure to file verified claim against county for injury allegedly sustained in fall on steps in county courthouse until 91 days after injury was fatal to cause of action against county and its employees for such injury. Government Code, § 53052.

Clarence A. Rogers, Santa Barbara, for appellant.

Vern B. Thomas, Dist. Atty., and Griffith & Thornburgh, Santa Barbara, for respondents.

SCOTT, Justice pro tem.

Plaintiff appeals from a judgment for defendant pursuant to an order denying relief under section 473 of the Code of Civil Procedure, refusing permission to file a second amended complaint and sustaining demurrer to first amended complaint without leave to amend.

On June 22, 1951, plaintiff claims that she sustained personal injury falling on the steps leading from the street to the sunken garden of defendant county's court house. On Sepetmber 21, 1951, she filed her verified claim for damages with the county clerk. This exceeded by one day the ninety-day period fixed by section 53052 of the Government Code within which the claim had to be filed.

When she later brought suit for damages against defendant county and its employees this delay in filing her claim with the county caused the trial court to sustain a demurrer without leave to amend to plaintiff's first amended complaint. From judgment pursuant thereto plaintiff appeals.

[1] It is her position that the time element with respect to the filing of the proper claim is procedural in nature and should be excused under section 473 of the Code of Civil Procedure, the delay being the result of mistake, inadvertence and excusable neglect. No authority is cited and we are not aware of any which would support plaintiff's suggestion that she can properly resort to that section for relief from her failure to file a verified claim which the law requires as a prerequisite to bringing suit against these defendants. A reading of the section itself in no way fortifies her position.

The record discloses that soon after the accident plaintiff verbally notified the county and was offered a nominal settlement for her claim. This was refused and on July 31, she consulted her attorney who accepted the case on August 1. The latter then wrote on his calendar under September 22 that it was the last day to file plaintiff's claim. The claim was filed, as above stated, on September 21. The ninety-day period had expired September 20. No excuse is offered for the delay.

Appellant does not suggest that defendants are precluded by estoppel from asserting the defense that plaintiff had not filed timely notice. Defendants had not caused the delay or misled plaintiff to her detriment as was the situation in Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, and Cruise v. City and County of San Francisco, 101 Cal.App.2d 558, 225 P.2d 988. Nor is any mental incapacity of plaintiff urged so as to bring it within the language of Schulstad v. City and County of San Francisco, 74 Cal.App.2d 105, 168 P.2d 68.

[2, 3] Cases have established that the liability of municipalities, counties and school districts for the negligent acts of their officers and employees is derived solely from statutory provisions in this state. Any plaintiff, therefore, must fulfill the mandatory requirements that a verified claim be filed as a prerequisite to maintaining a suit under the statute and failure to file such a claim is fatal to the cause of action. Redlands High School District v. Superior Court, 20 Cal.2d 348, 358, 125 P.2d 490.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.



118 Cal.App.2d 399

REED v. REED.

Civ. 19467.

District Court of Appeal, Second District, Division 2, California.

June 9, 1953.

Divorce proceeding. The Superior Court, Los Angeles County, Ingal W. Bull, J., rendered interlocutory decree for husband, and wife appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that husband was entitled to divorce on ground of extreme cruelty.

Affirmed.

1. Divorce ⇐130

Evidence sustained finding that husband was entitled to divorce on ground of extreme cruelty.

2. Appeal and Error ⇐967(1)
Reference ⇐20

A motion for a reference is addressed to discretion of trial court, whose ruling will not be disturbed on appeal, in absence of abuse of discretion.

3. Divorce ⇐143

In divorce proceeding, denying defendant's motion for a reference was not an abuse of discretion, notwithstanding that certain witnesses who were served with subpoenas duces tecum before trial failed to produce records sought. Code Civ.Proc. § 639.

4. Appeal and Error ⇐1170(12)
Judgment ⇐306

Statement in interlocutory decree that trial took place on March 13, when, in fact, it was tried on March 14, was purely a clerical error, subject to correction by trial court, and would be disregarded as obviously not prejudicial. Code Civ.Proc. § 473; Const. art. 6, § 4½.

Joe Mayer, Los Angeles, for appellant.

Hyman Getzoff, Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from an interlocutory judgment of divorce awarded to plaintiff. There is also a purported appeal from the order denying the motion for a new trial.

[1] *Questions:* First: *Was there substantial evidence to sustain the trial court's finding that plaintiff was entitled to a divorce on the ground of extreme cruelty?*

Yes. Plaintiff's testimony which was corroborated showed that defendant harassed him both at home and at his place of business, unjustly accusing him of having "affairs" with other women and also refused to take care of his personal needs. Plaintiff further testified that such conduct caused him great mental anxiety and made him extremely nervous. Such testimony substantiated the trial court's findings. It would serve no useful purpose to set forth other evidence which would also support the findings.

[2, 3] Second: *Did the trial court err in not granting a reference when certain witnesses served with subpoenas duces tecum failed to produce the records sought?*

No. One day before the trial certain subpoenas duces tecum were issued. There were no affidavits of service of said subpoenas. However, even assuming that they

were duly served, there is no showing that the trial court abused its discretion in refusing to grant defendant's motion for a reference. Such question was addressed to the discretion of the trial court whose ruling, in the absence of a showing of an abuse thereof, will not be disturbed on appeal. (Sec. 639, Code of Civ.Proc. Cf. Sibert v. Shaver, 113 Cal.App.2d 19, 21[2], 247 P.2d 609.)

[4] Third: *Was the interlocutory decree fatally defective and void because it recites that the trial took place on the 13th day of March when in fact it was tried on the 14th day of March?*

No. Such error was purely a clerical error subject to correction of the trial court under the provisions of section 473 of the Code of Civil Procedure at any time. (Estate of Goldberg, 10 Cal.2d 709, 716[5], 76 P.2d 508.)

In addition, under the provisions of Article VI, section 4½, Constitution of the State of California, such error must be disregarded as it was obviously not prejudicial.

The purported appeal from the order denying the new trial is dismissed. The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 169

SCHULTZ v. UNION PAC. R. CO.

Civ. 19359.

District Court of Appeal, Second District, Division 3, California.

May 27, 1953.

Hearing Denied July 22, 1953.

Action under Federal Employers' Liability Act by a citizen and resident of state of Washington against a Utah corporation engaged in interstate commerce, authorized to do and doing business in Washington and California, for injuries sustained in Washington. The Superior Court, Los Angeles County, granted defendant's motion to dismiss on ground of forum non conveniens, and from judgment of dismissal, plaintiff appealed. The District Court of Appeal, Vallée, J., held that California courts may not, consistently with the United States Constitution, decline on basis of forum non conveniens to take jurisdiction of an action under the Federal Employers' Liability Act, founded on a cause of action which arose without the state, brought by a noncitizen and nonresident against a foreign corporation doing business within the state.

Reversed.

1. Courts ⇐28

Policy of a state decides whether and to what extent the state will entertain in its courts transitory actions, where causes of action have arisen in other jurisdictions, but any policy the state may choose to adopt must operate in same way on its own citizens and those of other states. U.S.C.A. Const. art. 4, § 2, cl. 1.

2. Courts ⇐28

The rule of "forum non conveniens" is an equitable one embracing the discretionary power of a court to decline to exercise jurisdiction which it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere.

See publication Words and Phrases, for other judicial constructions and definitions of "Forum Non Conveniens".

3. Constitutional Law ⇐207(3)

A state court may not decline to entertain an action by a citizen of another state under the Federal Employers' Liability Act, even though the cause of action arose out of state and defendant is a noncitizen and nonresident, unless circumstances are such that the court would also decline the action if brought by a citizen of the state of suit. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; U.S.C.A. Const. art. 4, § 2, cl. 1.

4. Courts ⇐28

The general policy of the common-law courts is to entertain transitory tort actions regardless of parties or place where cause of action arose, if court in which action is brought has jurisdiction over the parties and the subject matter.

5. Courts ⇐7

If a cause of action is transitory and the defendant is found within the state, the action may be brought therein.

6. Courts ⇐28, 118

The Superior Court is a court of general jurisdiction which is empowered to and does take cognizance of actions to recover damages for personal injuries, and it is accustomed to exercise that jurisdiction, not only in cases where the right of action arose under state laws, but also in cases where it arose in another state under its laws and irrespective of whether brought by citizen, resident or nonresident, or by a noncitizen and nonresident.

7. Courts ⇐8

California courts exercise jurisdiction in actions by citizens of other states, nonresidents of California, for trial of transitory causes of action for personal injuries, whether based on common law or a statute of a sister state or a statute of the United States, with limitation that law of sister state be not contrary to express provisions of law or public policy of California, to abstract justice or pure morals, or injurious to the people.

8. Courts ⇐489(9½)

The Federal Employers' Liability Act empowers California courts to entertain actions arising under it, but does not compel them to do so. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

9. Constitutional Law ⇐207(3)

Where it is the state policy to entertain actions by its citizens, residents and nonresidents against foreign corporations found within the state on transitory causes of action arising without the state, the privileges and immunities clause of the federal Constitution precludes the state from barring citizens of other states from doing likewise. U.S.C.A.Const. art. 4, § 2, cl. 1.

10. Master and Servant ⇐250¼

Although Congress authorized district courts of the United States to transfer an action under the Federal Employers' Liability Act to any other district or division where it might have been brought, for convenience of parties and witnesses and in interest of justice, state courts were not so empowered, and venue of state court suits was left to practice of the forum. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; 28 U.S.C.A. § 1404.

11. Limitation of Actions ⇐130(6)

Under doctrine of forum non conveniens, the cause is dismissed and must be instituted anew in a more convenient forum, carrying with it the hazard of being barred by statute of limitations.

12. Master and Servant ⇐253

Where Congress has given the right under the Federal Employers' Liability Act to an injured party to maintain action for damages in courts of district where defendant is doing business at time suit is commenced, the privilege of venue thus granted cannot be frustrated for reasons of convenience or expense. Federal Employers' Liability Act, § 6, as amended in 1948, 45 U.S.C.A. § 56.

13. Constitutional Law ⇐70(1)

Province of courts is to interpret laws passed by Congress and not to seek to correct legislative enactments or to change laws because they have given rise to consequences which may not have been contemplated by Congress, no matter how dire the results.

14. Constitutional Law ⇐207(3)

California courts may not, consistently with United States Constitution, decline on the basis of forum non conveniens to take jurisdiction of an action under the Federal Employers' Liability Act, founded on a cause of action which arose without the state, brought by a noncitizen and nonresident against a foreign corporation doing business within the state. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56; U.S.C.A.Const. art. 4, § 2, cl. 1.

Hildebrand, Bills & McLeod and D. W. Brobst, Oakland, for appellant.

E. E. Bennett, Edward C. Renwick and Malcolm Davis, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on the granting of a motion of defendant to dismiss on the ground of *forum non conveniens* in an action for damages for personal injuries brought under the Federal Employers' Liability Act.[1]

Plaintiff, a citizen and resident of the state of Washington, was injured in Washington while in the employ of defendant. Defendant is a Utah corporation, engaged in interstate commerce, authorized to and doing business in Washington and California. Plaintiff commenced the action in the superior court of Los Angeles County and obtained service on defendant in that county. Defendant answered and as a special defense asked that the action be dismissed on the plea of *forum non conveniens*. The special defense was heard separately on motion. The motion was supported by an affidavit which stated facts showing harassment, inconvenience, and expense, sufficient to have warranted the granting of the motion if the doctrine of *forum non conveniens* may be applied. The motion was granted and a judgment of dismissal entered.

Plaintiff contends that to deny him the privilege of maintaining the action in the superior court of this state would violate the Privileges-and-Immunities Clause of the Constitution of the United States.[2] Congress has enacted that an action under the Federal Employers' Liability Act may be brought "in the district of the residence of the defendant, * * * or in which the defendant shall be doing business at the time of commencing such action."[3] Defendant appears to concede that the superior court has jurisdiction.[4] Its claim is that although the superior court has jurisdiction, it is not compelled to exercise it, and may dismiss the action under the doctrine of *forum non conveniens*. We have concluded that by reason of the Privileges-and-Immunities Clause plaintiff's choice of a forum in this state cannot be denied on the plea of *forum non conveniens*.

The Privileges-and-Immunities Clause reads:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[5]

In Chambers v. Baltimore & O. R. Co., 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143, the cause of action, which ran to a nonresident, was grounded on the death of a locomotive engineer which occurred in a foreign jurisdiction. The Supreme Court of the United States announced these principles, 207 U.S. 148, 28 S.Ct. 35, 52 L.Ed. 146:

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. * * *

[1] "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it af-

1. 45 U.S.C.A. § 51 et seq.

2. Const.U.S. Art. IV, § 2, cl. 1.

3. 45 U.S.C.A. § 56, as amended June 25, 1948, c. 646, § 18; 62 Stat. 989.

4. Code Civ.Proc. § 395; Corp.Code, § 6403; Tropico Land & Improvement Co. v. Lambourn, 170 Cal. 33, 45, 148 P. 206; Hale v. Bohannon, 38 Cal.2d 458, 473–475, 241 P.2d 4; Mondou v. New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44; 28 Cal.L.Rev. 109.

5. Const.U.S. Art. IV, § 2, cl. 1.

fords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." [6]

In Miles v. Illinois C. R. Co., 315 U.S. 698, 62 S.Ct. 827, 830, 86 L.Ed. 1129, 1134, it was said: "To deny citizens from other states, suitors under F. E. L. A., access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause."

[2] "The rule of *forum nonconveniens* is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere." [7]

In Leet v. Union Pac. R. R. Co., 1944, 25 Cal.2d 605, 155 P.2d 42, the Supreme Court of this state held that a plaintiff has an absolute right to have an action under the Federal Employers' Liability Act tried in a competent state court; that such right cannot be defeated by the doctrine of *forum non conveniens*; that the state court must exercise jurisdiction; and that California courts cannot refuse jurisdiction.[8]

However, in Missouri v. Mayfield, 1950, 340 U.S. 1, 71 S.Ct. 1, 3, 95 L.Ed. 3, 8, the Supreme Court of the United States held a state may "deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, see McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it." [9]

[3] It is settled that a state court may not decline to entertain an action by a citizen of another state under the Federal Employers' Liability Act, even though the cause of action arose out of the state and the defendant is a noncitizen and nonresident, unless the circumstances are such that the court would also decline the action if brought by a citizen of the state of suit.[10] Where a state court would exercise its jurisdiction of a transitory action not arising under the Federal Employers' Liability Act, it may not decline to exercise it merely

6. See also McKnett v. St. Louis & S. F. Railway Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227; Broderick v. Rosner, 294 U.S. 629, 55 S.Ct. 589, 100 A.L.R. 1133; Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832; Missouri Pacific R. Co. v. Clarendon, etc., Co., 257 U.S. 533, 42 S.Ct. 210, 66 L.Ed. 354; In re Slaughter-House Cases, 16 Wall. 36, 83 U.S. 36, 77, 21 L.Ed. 394; Reynolds v. Day, 79 Wash. 499, 140 P. 681, L.R.A.1916A, 432; Morgan v. Pennsylvania R. Co., 148 Va. 272, 138 S.E. 566; State ex rel. Prall v. District Court, 126 Minn. 501, 148 N.W. 463; Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N.W. 664, 34 L.R.A. 503; Annotation 32 A.L.R. 12; 74 A.L.R. 719; 100 A.L.R. 1143; 134 A.L.R. 1472; Cf. Davis v. Farmers' Co-op. Equity Co., 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996.

7. Leet v. Union Pac. R. R. Co., 25 Cal. 2d 605, 609, 155 P.2d 42, 44, 158 A.L.R. 1008.

8. In the Leet case the decedents were killed in Oregon while in the employ of the defendant, they and their heirs were residents of Oregon, the heirs nominated the plaintiff as administratrix in California, the defendant was a Utah corporation doing business in Oregon and California, and the administratrix brought the action in California. See also annotation 158 A.L.R. 1022.

9. See State ex rel. Southern R. Co. v. Mayfield, 362 Mo. 101, 105, 240 S.W.2d 106, certiorari denied 342 U.S. 871, 96 L.Ed. 655, 72 S.Ct. 107.

10. Missouri v. Mayfield, 340 U.S. 1, 71 S. Ct. 1, 95 L.Ed. 3; Mondou v. New York, N. H. & H. R. Co., (Second Employers' Liability Cases) 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44; Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605, 155 N.W. 504; State ex rel. Schendel v. District Court, 156 Minn. 380, 194 N.W. 780; annotation 32 A.L.R. 12; 96 L.Ed. 412.

because the action is brought under the Act.[11] It is only where a state by statute or judicial decision curtails the jurisdiction of its courts with respect to transitory causes of action arising outside of the state, or sued upon by a nonresident of the forum, that the court has the power to decline jurisdiction if the cause of action arises under the Federal Employers' Liability Act.[12] Where by local law a court has no discretion to refuse jurisdiction over a transitory cause of action of a nonresident, it cannot decline jurisdiction in an action arising under the Federal Employers' Liability Act because the plaintiff is a citizen and resident of another state where the accident happened.[13]

In Mondou v. New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44, the Supreme Court of the United States held that where the ordinary jurisdiction of Connecticut courts as prescribed by local laws, was "adequate to the occasion"—that is, extended to actions to recover for personal injuries and death—and the courts were accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of Connecticut but also in cases where it arose in another state under its laws, jurisdiction of an action to enforce rights arising under the Federal Employers' Liability Act could not be declined by the Connecticut courts on the theory the federal statute was not in harmony with the policy of the state or that the exercise of such jurisdiction would be attended by inconvenience and confusion because of the different standards of right established by the congressional act from those recognized by the laws of the state.

Missouri v. Mayfield, 340 U.S. 1, 71 S. Ct. 1, 95 L.Ed. 3, was certiorari to the Supreme Court of Missouri in Federal Employers' Liability Act cases. The latter court had denied mandate in two original proceedings brought to compel a trial court to exercise discretionary jurisdiction in disposing of motions to dismiss in two actions on the plea of *forum non conveniens*. The two actions were by noncitizens and nonresidents against foreign corporations, which maintained agents in Missouri, for torts committed outside Missouri. The Supreme Court of the United States was in doubt as to whether the Supreme Court of Missouri had felt it was under compulsion by reason of the Federal Employers' Liability Act to deny mandate; and, holding that it "should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law", reversed, saying *inter alia*, 71 S.Ct. 3, 95 L.Ed. 7:

> "A decision by the highest court of a State determining that the doctrine of forum non conveniens cannot bar an action based on the Federal Employers' Liability Act, in the circumstances before us, may rest on one of three theories. (1) According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability Act is rested on such a general local practice, no federal issue comes into play. (It is assumed of course that the State has acquired jurisdiction over the defendant.) (2) By reason of the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, § 2. Therefore Missouri cannot allow suits by non-

11. Missouri v. Mayfield, 340 U.S. 1, 71 S. Ct. 1, 95 L.Ed. 3; Mondou v. New York, N. H. & H. R. Co., (Second Employers' Liability Cases) 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44; McKnett v. St. Louis & S. F. Railway Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227; State ex rel. Southern R. Co. v. Mayfield, 362 Mo. 101, 105, 240 S.W.2d 106, certiorari denied 342 U.S. 871, 72 S. Ct. 107, 96 L.Ed. 655.

12. See cases collected 158 A.L.R. 1029.

13. Missouri v. Mayfield, 340 U.S. 1, 71 S. Ct. 1, 95 L.Ed. 3; Boright v. Chicago R. I. & P. R. Co., 180 Minn. 52, 230 N.W. 457; Bright v. Wheelock, 323 Mo. 840, 20 S.W.2d 684, 66 A.L.R. 263; State ex rel. Southern R. Co. v. Mayfield, 362 Mo. 101, 105, 240 S.W.2d 106, certiorari denied 342 U.S. 871, 72 S.Ct. 107, 96 L. Ed. 655.

resident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who is a citizen of another State. * * *"

On remand the Supreme Court of Missouri in State ex rel. Southern R. Co. v. Mayfield, 362 Mo. 101, 105, 240 S.W.2d 106, 108, again denied the writs and said: "The policy of this state has been to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject-matter, and this applies to citizens who are residents as well as non-residents. * * * Since the policy of this state has been, and is, to allow citizens of Missouri (resident and non-resident) to bring and maintain suits under the Federal Employers' Liability Act in the courts of this state, we cannot bar citizens of other states from doing likewise."[14] Certiorari was denied.[15]

In the very recent case of Pope v. Atlantic Coast Line R. Co., U.S., 73 S.Ct. 749, 751, the injury occurred in Georgia, which was the place of plaintiff's employment as well as his place of residence. He sued in Alabama. Jurisdiction and venue were grounded on section 6, 45 U.S.C.A. § 56, of the Federal Employers' Liability Act. The court said:

"Section 6 of that Act establishes petitioner's right to sue in Alabama. It provides that the employee may bring his suit wherever the carrier 'shall be doing business', and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory course of action; and we have held before, in a case indistinguishable from this one, that § 6 displaces the traditional 'power of a state court to enjoin its citizens, on the ground of oppressiveness, * * * from suing * * * in the * * * courts of another state * * *.' Miles v. Illinois Central R. Co., supra, 315 U.S. [698], at page 699, 62 S.Ct. [827], at page 828 [86 L.Ed. 1129]."

[4–7] The general policy of the common-law courts is to entertain transitory tort actions regardless of the parties or the place where the cause of action arose, if the court in which the action is brought has jurisdiction over the parties and the subject-matter. The rule is that if a cause of action is transitory the action may be brought in this state if the defendant is found here.[16] The superior court of this state is a court of general jurisdiction; it is empowered to and does take cognizance of actions to recover damages for personal injuries; and it is accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of California but also in cases where it arose in another state under its laws and irrespective of whether brought by a citizen, resident or nonresident, or by a noncitizen and nonresident. California courts exercise that jurisdiction in actions by citizens of other states, nonresidents of

14. Accord: State ex rel. Prall v. District Court, 126 Minn. 501, 148 N.W. 463, Ann. Cas.1915D, 198; Davis v. Minneapolis St. P. & S. S. M. Ry. Co., 134 Minn. 455, 159 N.W. 1084, 1085; State ex rel. Bossung v. District Court, 140 Minn. 494, 168 N.W. 589, 590, 1 A.L.R. 145; State ex rel. Schendel v. District Court, 156 Minn. 380, 194 N.W. 780, 781; Erving v. Chicago & N. W. Ry. Co., 171 Minn. 87, 214 N.W. 12, 13; Boright v. Chicago, R. I. & P. R. Co., 180 Minn. 52, 230 N.W. 457, 461; State ex rel. Prall v. District Court, 126 Minn. 501, 148 N.W. 463; Davis v. Minneapolis, St. P. & S. S. M. R. Co., 134 Minn. 455, 159 N.W. 1084; State ex rel. Pacific Mut. Life Ins. Co. v. Grimm, 239 Mo. 135, 143 S.W. 483; Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524, 184 S.W. 999; Morrison v. Illinois Cent. R. Co., 101 Neb. 49, 161 N.W. 1032, 1035; Southern Pac. Co. v. Dusablon, 48 Tex. Civ.App. 203, 106 S.W. 766; Southern Pac. Co. v. Allen, 48 Tex.Civ.App. 66, 106 S.W. 441; Deatrick's Adm'r v. State Life Ins. Co., 107 Va. 602, 59 S.E. 489; Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N.W. 664, 34 L.R.A. 503; State ex rel. Goldwyn Distributing Corp. v. Gehrz, 181 Wis. 238, 194 N.W. 418.

15. 342 U.S. 871, 72 S.Ct. 107, 96 L.Ed. 655.

16. Pugh v. Gillam, 1 Cal. 485; Roberts v. Dunsmuir, 75 Cal. 203, 16 P. 782; annotation 32 A.L.R. 6.

this state, for the trial of transitory causes of action, whether based on the common-law or a statute of a sister state or a statute of the United States.[17] There is the limitation that the law of the sister state be not contrary to the express provisions of the law or the public policy of California, to abstract justice or pure morals, or injurious to the people.[18]

[8, 9] The Federal Employers' Liability Act empowers California courts to entertain actions arising under it, but does not compel them to do so. Since it is the policy of California to entertain actions by its citizens, residents and nonresidents, against foreign corporations found within the state on transitory causes of action arising without the state, the Privileges-and-Immunities Clause precludes it from barring citizens of other states from doing likewise. And California courts entertain actions under the Federal Employers' Liability Act.[19]

In re Estate of Waits, 23 Cal.2d 676, 146 P.2d 5, considered two appeals from orders of the probate court appointing an administratrix of two estates. The deceased persons were nonresidents at the time of their respective deaths. Two causes of action for wrongful death were asserted to have accrued in New Mexico while the decedents were in the employ of the Atchison, Topeka & Santa Fe Railway Company. The claim for damages was the sole estate of each decedent. In holding that each claim for damages was "estate" authorizing the appointment of an administratrix, in California, the court stated, 23 Cal.2d at pages 679, 680, 146 P.2d at page 7:

"The Federal Employers' Liability Act authorizes suit by the aggrieved party in any state where the carrier does business. 45 U.S.C.A., § 56; Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129. Since a suit requires the appointment of a personal representative (American R. R. Co. [of Porto Rico] v. Birch, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879), which is ordinarily allowed to sue only in the state of his appointment (see Code Civ.Proc. § 1913), refusal to appoint an administrator in a state where suit is authorized by the act would nullify the very right the act grants. See Howard v. Nashville C. & St. L. R. Co., supra. [133 Tenn. 19, 179 S.W. 380, L.R.A.,1916B, 794]. An estate must exist before an administrator can be appointed, for if there were no estate there would be no function for the administrator to perform. See Restatement, Conflict of Laws, comment to § 467. Enforcement of a cause of action for wrongful death under the Federal Em-

17. Roberts v. Dunsmuir, 75 Cal. 203, 16 P. 782 (tort committed out of the state); Ferguson v. Sherman, 116 Cal. 169, 47 P. 1023, 37 L.R.A. 622 (action by judgment creditor of foreign corporation on stockholder's liability); Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 P. 862 (death by wrongful act in Alaska); Loranger v. Nadeau, 215 Cal. 362, 10 P. 2d 63, 84 A.L.R. 1264 (tort committed out of the state); Ex parte Howitz, 2 Cal.App. 752, 84 P. 229 (fraud committed in China); Dollar v. International Banking Corp., 10 Cal.App. 83, 101 P. 34 (cause of action on non-negotiable note arose in China); Hodgkins v. Dunham, 10 Cal.App. 690, 103 P. 351 (action for deceit against nonresident on cause of action which arose in Illinois); Faras v. Lower California Dev. Co., 27 Cal. App. 688, 151 P. 35 (tort committed out of the state); McManus v. Red Salmon Canning Co., 37 Cal.App. 133, 173 P. 1112 (death by wrongful act in Alaska); Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal.App.2d 495, 237 P. 2d 297 (cause of action arose in England); Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738, 49 L.R.A. 77 (tort committed out of state); 5 Cal.Jur. 483, § 52; 14 Am.Jur. 422, § 228; annotation 32 A.L.R. 6.

18. Hudson v. Von Hamm, 85 Cal.App. 323, 259 P. 374; Thome v. Macken, 58 Cal. App.2d 76, 136 P.2d 116.

19. Leet v. Union Pac. R. R. Co., 25 Cal. 2d 605, 155 P.2d 42; Maurice v. State of California, 43 Cal.App.2d 270, 279, 110 P.2d 706; Terry v. Southern Pac. Co., 34 Cal.App. 330, 333, 169 P. 86; Spencer v. Atchison, T. & S. F. Ry. Co., 92 Cal. App.2d 490, 207 P.2d 126; Ericksen v. Southern Pacific Co., 39 Cal.2d 374, 246 P.2d 642; Thompson v. Atchison, T. & S. F. R. Co., 96 Cal.App.2d 974, 217 P. 2d 45; Perrett v. Southern Pacific Co., 73 Cal.App.2d 30, 165 P.2d 751; Haskins v. Southern Pac. Co., 3 Cal.App.2d 177, 39 P.2d 895.

ployers' Liability Act is a function that can be performed only by the administrator, and such a cause of action should therefore be regarded as an estate justifying his appointment. * * *

"Petitioner contends that the situs of a debt is properly the domicile of the creditor, and that even if this cause of action is regarded as an estate it does not have its situs in Alameda County. * * * [A] debt will be regarded as an asset wherever the debtor is subject to suit. New England Mutual Life Ins. Co. v. Woodworth, 111 U.S. 138, 4 S.Ct. 364, 28 L.Ed. 379; Equitable Life Assurance Soc. v. Vogel's Executrix, 76 Ala. 441, 52 Am.Rep. 344; see 23 Minn.L.Rev. 221. The Federal Employers' Liability Act makes defendant subject to suit on this cause of action whereever defendant does business. Since defendant does business in Alameda County the cause of action has a situs in Alameda County for purposes of administration."

It is implicit in this reasoning that California courts will entertain an action for damages on a cause of action arising without the state under the Federal Employers' Liability Act by a nonresident against a corporation doing business in this state since "it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action." [20]

In considering the validity of a contract in an action brought by a nonresident in California under the Federal Employers' Liability Act for a wrongful death which occurred in Wyoming, which contract provided that "'in the event settlement cannot be concluded, suit for damages * * * will not be brought in any jurisdiction outside of the State and Federal Courts of * * * Wyoming.'" the court, in Pryor v. Union Pacific R. R. Co., 34 Cal.2d 724, 725, 214 P.2d 377, 378, said: "In other cases, the words 'any liability' were construed as encompassing the liability of being subjected to suit in any proper forum as designated by section 6 [45 U.S.C.A. § 56]. This is the meaning placed upon the statute by the United States Supreme Court, which has just held that a contract limiting venue is void because the 'right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act * * *.' Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 26, 27 [94 L.Ed. 55]." [21]

The courts of California have consistently entertained causes based on transitory causes of action against foreign corporations doing business in this state, brought by a citizen of this state where the tort occurred outside the state. Since a citizen of this state, resident or nonresident, has the privilege of suing any person or corporation who may be found in the state on a transitory cause of action which arose outside the state, a citizen of a sister state has the same privilege secured to him by the Constitution of the United States.

[10, 11] While Congress in 1948 empowered the District Courts of the United States to transfer an action under the Federal Employers' Liability Act to any other district or division where it might have been brought, "for the convenience of parties and witnesses, in the interest of justice," [22] state courts were not so empowered. The venue of state court suits was left to the practice of the forum.[23] The 1948 statute provides that a cause may be transferred—not dismissed. Under *forum non conveniens* the cause is dismissed and must be instituted anew in the more convenient forum, carrying with it the hazard

20. Leet v. Union Pac. R. R. Co., 25 Cal. 2d 605, 613, 155 P.2d 42, 46; annotation 73 A.L.R. 593; 163 A.L.R. 1285.

21. See also Wallan v. Rankin, 9 Cir., 173 F.2d 488; Traglio v. Harris, 9 Cir., 104 F.2d 439, 127 A.L.R. 803; 5 So.Cal.L. Rev. 242; 13 So.Cal.L.Rev. 503.

22. 62 Stat. 937; 28 U.S.C.A. § 1404. See Ex parte Collett 337 U.S. 55, 69 S.Ct. 944, 959, 93 L.Ed. 1207; Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55.

23. Pope v. Atlantic Coast Line R. Co., U. S., 73 S.Ct. 749; O'Donnell v. Elgin, Joilet & Eastern R. Co., 7 Cir., 193 F. 2d 348, 352, certiorari denied 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356.

of being barred by the statute of limitations.[24]

As we have noted, the Federal Employers' Liability Act says that an action arising under it may be brought "in the district of the residence of the defendant, * * * or in which the defendant shall be doing business at the time of commencing such action." [25] It is no doubt true that defendant will suffer some inconvenience and be put to extra expense in taking depositions, with their attendant disadvantages, and in producing witnesses to testify in this state, but we must assume the Congress considered such inconvenience and expense in placing jurisdiction in any state in which the defendant is doing business at the time. While it may not comport with one's concept of justice to permit an action to be litigated in a forum where, on the balance, unnecessary hardship, inconvenience, and expense will be cast on one party without any compensational fair convenience to the other party, but where, on the contrary, the action might more conveniently be litigated in another forum available equally to both parties—the matter is one for the Congress and not for the courts.

The Supreme Court of the United States in the very recent case of Pope v. Atlantic Coast Line R. Co., U.S., 73 S.Ct. 749, 753, speaking of the power which in 1948 had been given to the United States District Courts, stated:

"Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted § 1404(a) refused to enact a bill which would have amended § 6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.

"This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner [314 U.S. 44, 62 S. Ct. 6, 86 L.Ed. 28] cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under § 6 and 'harass' their employers in distant forums without restriction. They insisted that these abuses be curtailed. These arguments prevailed in the House which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and § 6 of the Federal Employers' Liability Act was left just as this Court had construed it."

[12, 13] The Congress having given the right under the Federal Employers' Liability Act to an injured party to maintain an action for damages in the courts of the district where the defendant is doing business at the time the suit is commenced, the privilege of venue thus granted cannot be frustrated for reasons of convenience or expense. We are not concerned with the justice or the wisdom of such legislation. The province of the courts is to interpret the laws passed by the Congress and not to seek to correct legislative enactments or to change laws because they have given rise to consequences which may not have been contemplated by the Congress, no matter how dire the results.[26]

24. Burges v. Proctor & Gamble Defense Corporation, 5 Cir., 172 F.2d 541, 542; Seven Oaks v. Federal Housing Administration, 4 Cir., 171 F.2d 947, 949; Schoen v. Mountain Producers Corporation, 3 Cir., 170 F.2d 707, 714, 5 A.L.R.2d 1226; Cinema Amusements v. Loew's, Inc., D.C. Del., 85 F.Supp. 319, 322.

25. 45 U.S.C.A. § 56, as amended June 25, 1948, c. 646, § 18; 62 Stat. 989.

26. Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28; Hoffman v. Missouri ex rel. Foraker, 274 U.S. 21, 47 S.Ct. 485, 71 L.Ed. 905; Miller v. Municipal Court, 22 Cal.2d 818, 851, 142 P.2d 297; Schendel v. McGee, 8 Cir., 300 F. 273; Butts v. Southern Pac. Co., D.C.N.Y., 69 F.Supp. 895; Winders v. Illinois Cent. R. Co., 177 Minn. 1, 223 N.W. 291, 226 N.W. 213; Sacco v. Baltimore & O. R. Co., D.C.N.Y., 56 F.Supp. 959.

[14] We hold that the courts of California may not, consistently with the Constitution of the United States, decline on the basis of *forum non conveniens* to take jurisdiction of an action under the Federal Employers' Liability Act, founded on a cause of action which arose without the state, brought by a noncitizen and nonresident against a foreign corporation doing business within the state.

Reversed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



118 Cal.App.2d 501

PEOPLE v. GENTRY.

Cr. 783.

District Court of Appeal,
Fourth District, California.

June 15, 1953.

Defendant was convicted of possession of narcotics. The Superior Court of San Diego County, William A. Glen, J., rendered judgment on the verdict, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to support the verdict.

Judgment affirmed.

1. Poisons ⇐4, 9

While accused's mere presence at scene of alleged crime of possessing narcotics is insufficient to sustain finding of his guilt and his actual knowledge of presence of narcotic substance is essential, surrounding facts and circumstances may be sufficient to establish such knowledge and physical or constructive possession of narcotics.

2. Poisons ⇐9

Evidence was sufficient to support conviction of possession of narcotics.

Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This defendant appeals from a judgment on conviction of possession of narcotics, and from an order denying his motion for a new trial.

At 1:20 A. M. on August 24, 1952, two police officers were traveling south in a police car. As they approached a certain street intersection they saw a car parked at the northeast corner of the intersection, headed west. As they neared the intersection the other car started up and proceeded west on the cross street. As the officers followed, they saw a small package leave the right side of the other car, at about car-window height, and land about ten feet from the line of travel of the other car. The officers stopped and picked up the package and then went after the other car and stopped it a block or so away. There were four men in the other car, Hurst, Diehl, Chavez and the appellant. The appellant was seated on the right side of the rear seat and the other three were in the front seat. The right rear window of that car was completely lowered and the window of the right front door was lowered about four inches. As the officers and men stood about the car Hurst said, in the presence of the appellant, "They found the stuff. We will get time out of this sure." He testified that what he had said was, "If there is anything in this car we will get time," and that this remark was made to Diehl. On cross-examination, he said that his statement was made to anyone who was there and not to any particular person.

The package which was thrown from the car contained four "bindles" of morphine. At the jail Hurst, Diehl and the appellant denied any knowledge of the package and each stated that he knew of none being thrown from the car and that if one was thrown he had nothing to do with it. When the appellant was asked as to what they were doing parked at the point where the officers first saw the car, he replied that he did not know, that they were just sitting in the car. Needle marks were found on

the arms of Hurst, Diehl and the appellant. The appellant had a number of old needle marks on his left arm and others on his right arm, one of which appeared to be fresh. Some of the marks on the arms of Hurst and Diehl were fresh marks. An expert testified as to the method of applying such narcotics with a needle, saying that it was usually mixed with water and heated. A table model lighter was found in the car. When asked about the old marks on his left arm the appellant said he had not "used" that arm for quite some time. When asked about the fresh mark on his right arm, the appellant said: "Well, I haven't been using very much." Hurst testified in his own behalf but neither Diehl nor the appellant took the witness stand.

Chavez pleaded guilty and was committed to the Youth Authority. The other three were jointly charged and tried, and all three were found guilty. The appellant was also charged with a prior conviction, which he admitted. His probation on the prior conviction was revoked and he was sentenced to prison on this charge and on the prior conviction, the sentences to run concurrently.

Appellant's main contention is that the evidence is not sufficient to support the verdict and judgment. He relies on People v. Foster, 115 Cal.App.2d 866, 253 P.2d 50, arguing that mere presence at the scene of the crime, standing alone, is not sufficient to justify a finding of guilt; that nothing of an incriminatory nature here appears against him outside of his mere presence in this automobile; and that knowledge of any narcotic substance on his part cannot be inferred from the mere fact that he denied that he knew anything about the package being thrown from the car.

[1] While mere presence at the scene of the crime, standing alone, is not sufficient to sustain a finding of guilt, and while actual knowledge of the presence of narcotic substance is essential in such a case as this, the surrounding facts and circumstances may be sufficient to establish the essential facts of knowledge, and physical or constructive possession. People v. Foster, 115 Cal.App.2d 866, 253 P.2d 50; People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480.

[2] In the instant case, it is clearly established that this narcotic came from this car and a table model lighter, which would not ordinarily be found in a car, was there. The appellant had puncture marks on both arms, some fresher than others, and one appearing to be a fresh mark. He admitted that he was "using" such a narcotic. The right rear window of the car, beside which the appellant was sitting, was fully opened and the package appeared to come from about window height. The right front window was only open about four inches and with three men in the front seat and the difficulty of movement it is much less likely that the package was thrown from the front window. The appellant made no denial when the incriminatory statement was made by Hurst at the scene of the arrest. While he later denied to the officers that he knew anything about a package being thrown from the car he did not take the stand or make any such denial under oath. If he did not do the throwing himself he was in the best position, sitting alone at the right side of the rear seat, to observe who did the throwing. The automobile in which the appellant was riding had been parked and on the approach of the police car it was started in motion and the package was thrown out when it had gone about a block, and when it must have been observed that a police car was following. The appellant failed to give any reasonable explanation of what he and his companions were doing while they were parked at the location where they were first seen by the officers. The evidence, with the reasonable inferences therefrom, is sufficient to support the verdict.

The appellant further contends that the court erred in denying his motion for a separate trial, that the deputy district attorney was guilty of prejudicial misconduct, and that the court erred in denying his motion to quash and set aside the information on the ground that no probable cause was shown. The record does not

support any of these contentions and it would serve no useful purpose to set forth and analyze the facts relating thereto.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 520

LARSON et al. v. HOLLAND et al.

SHARP et al. v. HAWORTH et al.

Civ. 4299.

District Court of Appeal, Fourth District, California.

June 16, 1953.

Hearing Denied Aug. 13, 1953.

Consolidated actions arising out of intersection collision involving three automobiles, all of which were traveling in different directions. The Superior Court, San Diego County, Dean Sherry, J., entered judgments adverse to certain motorist, and such motorist and his employer appealed. The District Court of Appeal, Barnard, P. J., held that giving, and, at jury's request, repeating instruction to effect that it was not negligence for driver of motor vehicle to fail to anticipate accident which could be occasioned only by violation of law or duty by another was not, under circumstances, sufficiently prejudicial to justify reversal.

Affirmed.

1. Trial ⇐295(1)

Instructions should be considered as a whole in determining whether an alleged error in one portion is sufficient to require a reversal.

2. Appeal and Error ⇐1064(1)

In consolidated actions arising out of intersection collision involving three automobiles, all of which were traveling in different directions, giving, and, at jury's request, repeating instruction to effect that it was not negligence for driver of motor vehicle to fail to anticipate accident which could be occasioned only by violation of law or duty by another was not, under circumstances, sufficiently prejudicial to justify reversal.

Luce, Forward, Kunzel & Scripps, San Diego, for appellants Sharp and Merkley-Austin Mortuary, Inc.

Miller, Higgs, Fletcher & Mack and Harry P. Bowman, San Diego, for respondents and appellants Larson and Haworth.

Gray, Cary, Ames & Frye, San Diego, for respondents Holland and Hughes.

BARNARD, Presiding Justice.

These are appeals from the judgments in two actions arising out of the same accident, which were consolidated for trial.

Three automobiles were involved in the accident. One was owned by Mrs. Larson and driven by Mrs. Haworth. Both were injured. Another was owned by Merkley-Austin Mortuary, Inc. and driven by Mr. Sharp, who was also injured. It was stipulated that Sharp was an employee of the corporation and acting as such at the time. The third car was owned by Mr. Hughes and operated by Miss Holland, who was alone in the car at the time and was not injured. For convenience, these cars will be referred to as the Haworth car, the Sharp car and the Holland car.

The accident happened about noon on January 29, 1951, at the intersection of Laurel Street and Balboa Drive, in Balboa Park. Laurel Street runs east and west, and Balboa Drive north and south. This intersection is unusual in that while the two streets are much narrower, the intersection itself is a square about 100 feet wide in each direction.

It was raining hard at the time of the accident. The Sharp car was proceeding north on Balboa Drive, the Haworth car was proceeding west on Laurel, and the Holland car was proceeding east on Laurel. As the Sharp car was proceeding through the intersection it was struck on the left rear fender by the front of the Holland car. The impact swerved the rear of the Sharp car toward the east, and the right

rear corner of the Sharp car came into contact with the front of the Haworth car. The Sharp car came to rest at the northwest corner of the intersection and the other cars remained near the point of impact.

There were no disinterested eyewitnesses to the collision. Mr. Sharp testified that prior to the accident he had been traveling about 20 miles an hour but that he had no recollection of anything after he reached a point several hundred feet south of the intersection. Miss Holland testified that she was traveling from 15 to 20 miles per hour; that she did not see the Sharp car until her car had entered the square; that the Sharp car was then in front of her, between 10 and 15 feet away; that she was unable to estimate the speed of the Sharp car, but it was going faster than her car; that she applied her brakes; and that the front of her car collided with the left rear of the Sharp car. Mrs. Haworth testified that she first saw the Sharp car when she was three or four car lengths from the square; that she was then traveling from 15 to 20 miles an hour; that the Sharp car was approximately twice as far from the square as her car was; that the Sharp car was traveling between 30 and 40 miles per hour; that she started slowing down when she first saw the Sharp car; that she then looked to the right and then straight ahead; that she brought her car to a stop before it reached what would be the line of travel of the Sharp car; and that when the Holland car struck the rear of the Sharp car the Sharp car turned counter-clockwise, and the right rear of the Sharp car struck the left front of her car. Mrs. Haworth's testimony was corroborated in most respects by that of Mrs. Larson.

The first action was brought by Mrs. Larson and Mrs. Haworth against all the other parties as defendants. The other action was brought by Sharp and Merkley-Austin Mortuary, Inc., against the owners and drivers of the other two cars. In the first action, the jury brought in a verdict in favor of the plaintiffs Larson and Haworth, and against the defendant Sharp and Merkley-Austin Mortuary, Inc., and in favor of the defendants Holland and Hughes. In the second action the verdict was against the plaintiffs Sharp and Merkley-Austin Mortuary, Inc. and in favor of all defendants. In reply to special questions submitted to the jury, by stipulation of the parties, the jury also found that neither Mrs. Haworth nor Miss Holland were guilty of any negligence that proximately contributed to these collisions or either of them, and that Mr. Sharp was guilty of such negligence. Judgments were entered accordingly, from which two appeals were taken. The main appeal, which will first be considered, is that taken by Sharp and Merkley-Austin Mortuary, Inc., from the judgments in the two actions.

The sole contention of these appellants is that the court erred in giving and repeating one instruction, which reads: "It is not negligence for the driver of a motor vehicle to fail to anticipate an accident which can be occasioned only by a violation of law or duty by another." It is argued that this instruction told the jury in effect that "irrespective of the negligence of appellant's adversaries and irrespective of whether they were using due care and caution for their own protection and welfare, they nevertheless had a right to assume that they were not exposed to danger even though they knew or should have known they were in a perilous position." They rely on White v. Davis, 103 Cal.App. 531, 284 P. 1086; Roller v. Daleys, Inc., 219 Cal. 542, 28 P.2d 345; and Angier v. Bruck, 56 Cal.App.2d 55, 131 P.2d 876, in which it was held that under the circumstances there appearing an instruction, to the effect that a driver has a right to presume that another driver will perform his duty and obey the law, was prejudicially erroneous in that it omitted the elements that a party is not entitled to such a presumption unless he himself was not negligent, and that he has no right to assume that he was not exposed to danger if he knew he was in a perilous position and by the exercise of care on his own part could avoid it. It is argued that this instruction omitted these elements and could not have been other than prejudicial, since Mrs. Haworth admitted that she continued to travel at a substantial speed after she had seen the appellant's car and had thus been put on notice of impending danger;

and that this prejudice was emphasized and increased when the instruction was later reread to the jury. In connection with the facts, it may be observed that the evidence shows without conflict that the Haworth car had slowed down before the impact, and we are unable to find in the record any substantial evidence to conflict with the testimony of two witnesses that the Haworth car was stopped before the Sharp car came into contact with it.

In its original instructions, after defining negligence, contributory negligence and proximate cause at considerable length, the court gave the instruction here complained of. This was immediately followed by the following instruction:

> "It is the duty of the driver of any vehicle, using a public street or highway in this state, to exercise ordinary care to avoid placing himself or others in positions of danger, to use like care to avoid an accident from which injury might result, to be vigilant at all times, keeping a lookout for traffic and other conditions to be reasonably anticipated, and to keep his vehicle under such control that to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position."

The court then gave the usual instruction that a person who, without negligence on his part, is suddenly and unexpectedly confronted with a perilous condition is required to exercise only the care that an ordinarily prudent person would exercise in the same situation. After the jury had been out some seven hours, it returned and asked for further instruction on negligence. The foreman told the court that the jury could not agree on "what constitutes negligence". The court asked if a reading of the definition of negligence was what the jury desired and was told that it was. The court then reread his instruction defining negligence. The foreman then stated that one juror wanted to ask a question. That juror then asked "Did Your Honor ever read that the law had required in any way that a driver anticipate a dangerous situation?" The court then reread the instruction here complained of, and asked "Is that the one?" Nothing further was said, and the jury then retired and brought in a verdict some forty minutes later.

[1] While it has been held that an instruction that a party had a right to presume that the driver of another car would obey the law should be qualified by telling the jury that this presumption applies when the first party is himself free from negligence, and also that it is not applicable if the first party, realizing that the other party was not going to obey the law, had an opportunity to avoid the accident, it has frequently been held that a failure to include these elements in the instruction was not prejudicial where the facts and circumstances were such that the omission of these required elements could not reasonably be expected to have affected the result. Passarelli v. Souza, 37 Cal.App.2d 1, 98 P.2d 809; Forrest v. Pickwick Stages, 101 Cal.App. 426, 281 P. 723; Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Yack v. Tiffin, 69 Cal.App.2d 226, 158 P.2d 620. It is also well settled that the instructions should be considered as a whole in determining whether an alleged error in one portion is sufficient to require a reversal. O'Connor v. City and County of S. F., 92 Cal.App.2d 626, 207 P.2d 638; Perbost v. San Marino Hall-School, 88 Cal.App.2d 796, 199 P.2d 701; Shuey v. Asbury, 5 Cal. 2d 712, 55 P.2d 1160.

[2] The instruction here in question did not tell the jury that anybody had a right to assume anything. It simply stated that the failure to foresee a certain danger was not in itself negligence, and described that danger as one which could be occasioned only by the violation of law or duty by another. The language used can fairly be said to be equivalent to the elements which the appellants contend were omitted, since the accident would not be occasioned solely by the negligence of another if the driver referred to in the instruction was himself guilty of negligence in the first place, or failed to exercise ordinary care after the danger became apparent. Ohran v. County of Yolo, 40 Cal.App.2d 298, 104 P.2d 700. The instruction complained of referred to any of the drivers involved in

the accident and was not limited to the driver of the Haworth car. The giving of this instruction originally was preceded by full definitions of negligence, contributory negligence, and proximate cause, and was immediately followed by an instruction stating that it was the duty of the driver of any vehicle to exercise ordinary care to avoid placing himself or others in positions of danger, to use like care to avoid an accident from which injury might result, and to keep his vehicle under such control that he could stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position. When the jury returned for further instructions the court gave those which were specifically asked for, and no request was made that any other instructions be also read.

The evidence shows without conflict that Sharp, traveling fast in a heavy rain, dashed across a main street in a city park between two cars which were traveling in opposite directions on that street, when he was unable to avoid a collision with the first of these cars and when a collision with the other was almost inevitable. The evidence also shows, without conflict, that the driver of the Holland car was driving slowly near the middle of a main street; that her view to the south was obstructed by bushes until she entered the square; and that the appellant's car came suddenly into the square at a high rate of speed for that place and under existing conditions. It further shows that the driver of the Haworth car, having observed the appellant's car, either stopped or slowed down to an extent that no accident would have resulted to it except for the collision between the other two cars. From the evidence and the verdict it seems inconceivable that the jury did not fully understand that it was to consider and pass upon whether or not each of the drivers in question had used proper care at any and all times material here, or that it could have been misled into improperly relying on any presumption. It cannot be held, under the circumstances here appearing, that the giving and repeating of the instruction complained of was sufficiently prejudicial to justify a reversal.

The plaintiffs Mrs. Larson and Mrs. Haworth have also appealed from the judgment against them as to the defendants Miss Holland and Mr. Hughes. They state that this appeal was taken solely for the purpose of having the entire matter again tried in the event the judgments in their favor should be reversed. No argument is made and no ground appears, in connection with this appeal, which would justify a reversal in that connection.

The judgments appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 392

WOLFSON et al. v. BEATTY.

Civ. 19298.

District Court of Appeal, Second District, Division 2, California.

June 9, 1953.

Rehearing Denied June 22, 1953.

Hearing Denied Aug. 6, 1953.

Action by widow to quiet title to realty and an automobile and to establish community property rights therein while estate of deceased husband was in process of administration. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., entered judgment favorable to widow, and defendant, who claimed property, appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to sustain findings that property was community property and that decedent had not made gift of such property to defendant-claimant.

Affirmed.

1. Quieting Title ⇐10(2)

Widow of decedent could maintain action against claimant of realty and automobile allegedly purchased by decedent to quiet title to property and establish community property rights therein. Probate Code, § 581.

2. Appeal and Error ⇐151(6)

In action by widow to quiet title to realty and an automobile and to establish community property rights therein, where lower court recognized right of public administrator to possession of property, District Court of Appeal would not determine defendant-claimant's contention that complaint did not state cause of action against administrator, in view of fact that claimant was not aggrieved thereby.

3. Appeal and Error ⇐870(6)

A final order granting a motion for a new trial, if not void on its face nor appealed from, is not reviewable on appeal from a subsequent judgment rendered upon a retrial of the cause.

4. Appeal and Error ⇐870(6)

In action by widow to quiet title to realty and an automobile and to establish community property rights therein, where order granting motion of widow and public administrator for new trial was not void on its face, defendant-claimant by failing to appeal from order had waived right to raise contentions that judge was not authorized to grant motion and that public administrator did not pay filing fee within 10 days after notice of entry of judgment.

5. Action ⇐59

Where two lawsuits are ordered consolidated for trial, and are actually tried together, there should be but one set of findings of fact and conclusions of law and one judgment.

6. Appeal and Error ⇐846(1)

Where two lawsuits are ordered consolidated for trial and are tried together, if there is a duplicate set of findings of fact and conclusions of law, it will be considered an inadvertence of the trial judge and they will be considered for all purposes as one set of findings of fact, conclusions of law and one judgment.

7. Action ⇐59

Where actions were consolidated and were tried together, trial court made findings in each case, entered judgment in each case for a defendant, and motion for new trial was allegedly made relative to findings in one case but not other, order granting new trial operated to grant motion for new trial in both actions.

8. Appeal and Error ⇐931(1)

Where findings of fact are attacked because not supported by substantial evidence, District Court of Appeal must view evidence in the light most favorable to appellee.

9. Gifts ⇐49(1)
Husband and Wife ⇐264

In action by widow to quiet title to realty and an automobile and to establish community property rights therein while estate of deceased husband was in process of administration, evidence was sufficient to sustain findings that property was community property and that husband had not made gift of such property to defendant-claimant.

10. Appeal and Error ⇐931(1), 989

An appellate court must disregard contrary evidence, as well as contrary inferences and conclusions which were not but which might have been drawn by the trier of fact.

Morris Lavine, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Baldo M. Kristovich, Deputy County Counsel, Los Angeles, for respondent Public Administrator.

Frank W. Troost, Los Angeles, for respondent Wilma Wolfson.

McCOMB, Justice.

Defendant Inez Dodds Beatty appeals from a judgment in favor of plaintiff in an action to quiet title to a parcel of real estate and an automobile, and to establish community property rights therein while the estate of Frank Wolfson, husband of plaintiff, was in the process of administration.

Chronology:

i. Plaintiff and Frank Wolfson were married July 11, 1922.

ii. Some period after the marriage plaintiff and decedent separated but were never divorced.

iii. In 1926 decedent went to Texas without any money, at which time he met defendant Beatty, a married woman.

iv. In June, 1945, decedent and defendant Beatty came to California.

v. In June, 1946, defendant Beatty was divorced from her husband.

vi. After coming to California decedent and defendant Beatty looked at the parcel of real property here involved, located at 4262–4264–4266 Normal Street, Los Angeles. Thereafter decedent gave $300 in cash as earnest money to the real estate agent who showed them the property. An escrow was then opened on August 25, 1945, with the Citizens National Bank to complete the purchase of said real estate. The original instructions dated August 25, 1945, provided that title in the real property was to vest in decedent, a married man. On the same date decedent delivered the sum of $2,200 to the escrow.

vii. August 28, 1945, amended escrow instructions were signed providing for title to vest in defendant Inez Dodds Beatty Wolfson, a married woman, as her sole and separate property. At the close of the escrow a grant deed from the sellers to Inez Dodds Beatty Wolfson, a married woman, was recorded together with a quit claim deed from decedent to Inez Dodds Beatty Wolfson, his wife, and a trust deed from Inez Dodds Beatty Wolfson to the vendors securing a trust deed note in the sum of $6,900.

viii. October 11, 1945, decedent gave the vendors two checks, one in the sum of $800 and one in the sum of $34.50 as payments on a trust deed note executed by defendant Beatty. Subsequent payments upon the trust deed notes were made by decedent.

ix. In 1947 decedent went to Michigan where he purchased a 1947 Buick Sedanette. A certificate of title was issued in decedent's name. After returning to Los Angeles, decedent handed defendant Beatty the certificate of title to the car.

x. September 17, 1947, Frank Wolfson died.

xi. March 25, 1948, defendant Brown was appointed administrator with the will annexed of decedent's estate.

xii. May 7, 1948, plaintiff instituted the present action against defendant Beatty and the public administrator to quiet title in the real property and automobile mentioned above. The action in the Los Angeles Superior Court was No. 544457.

xiii. Prior to filing the present case defendant Beatty had instituted an action against the public administrator to quiet title to the automobile above mentioned. The number of this case in the Los Angeles Superior Court was No. 536792.

xiv. October 25, 1948, both the aforementioned cases were consolidated for trial.

xv. Thereafter the consolidated cases were tried before the Honorable William L. Bradshaw, Judge of the Superior Court of Kern County, duly assigned by the Chairman of the Judicial Council to preside in the Superior Court of Los Angeles County. After trial Judge Bradshaw, on October 3, 1950, signed a judgment in favor of defendant Beatty.

xvi. December 14, 1950, pursuant to a motion for a new trial duly and regularly made by plaintiff in the instant action (Los Angeles Superior Court, No. 544457), Judge Arnold Praeger, a duly elected Judge of the Superior Court of Los Angeles County, granted the motion.[1] No appeal was taken

1. Omitting the title, the order reads:
"The Court has read all of the pleadings, the findings of fact and conclusions of law, the reporter's transcript, and has examined all of the exhibits.
"A brief resume of the Court's reasons for its rulings follows. Time does not permit a more detailed discussion.
"It is alleged that plaintiff and Frank Wolfson, deceased, were married more than twenty-five years ago and were husband and wife at the date of his death. The Court found only that they were husband and wife when he died.
"It is alleged in paragraph III of the complaint 'That said Frank Wolfson was not possessed of any property at the time of his marriage to the plaintiff herein other than a small amount of property necessary for their living' and paragraph V, 'and was at the time of his death a resident of' 'the County of Los Angeles,

from this order and it has become final. Upon a retrial before Judge Clarence Kincaid a judgment was entered in favor of plaintiff against defendant Beatty quieting

State of California.' No finding is made with respect to these allegations.

"It is alleged in paragraph VII of the complaint 'that the consideration for the deed from Ernest L. and Mabel Nelson to said Inez Dodds Beatty was given by said Frank Wolfson, Deceased, and was the community property of said deceased and the plaintiff herein.'

"In finding IV, page 5, the Court found that the funds used were not community funds, but does not specify their character. The only evidence with respect to the character of decedent's property is that it was acquired by him in the state of Texas, a community property state.

"The Court found (finding I, page 4): 'It is true that on the 27th day of August, 1945, Frank Wolfson purchased the real property mentioned and described in said complaint from Ernest L. Nelson and Mabel M. Nelson for the consideration of Sixteen Thousand ($16,000) Dollars for the defendant Inez Dodds Beatty * * * and he intended that title be vested in said Inez Dodds Beatty * * * as her property.' The Court found (finding VI, page 6) that Frank Wolfson 'deposited in said escrow the sum of Two thousand Two hundred ($2,200) Dollars; that the broker, H. D. Kirk, deposited said sum of Three Hundred Dollars ($300) in said escrow;'. In finding I, on page 3, the Court found, '* * * it is not true that he did not intend to make a gift of said property to said Inez Dodds Beatty.' In finding III, page 9, the Court found, '* * * it is true that Frank Wolfson intended that title to said property should at all times remain vested in said Inez Dodds Beatty.' In finding VI, page 3, the Court found, 'It is not true * * * that there was no consideration for said deed.' (meaning the deed to Inez).

"The cross-complaint of the public administrator alleges that the entire $2,500.00 deposited in escrow belonged to Frank Wolfson.

"The answer of Inez Dodds Beatty to the cross-complaint, paragraphs V, VI and VII, alleges that she furnished the money to Wolfson and that he was acting as her agent.

"No finding was made on the issue that Inez furnished the money. The weight of the evidence indicates she did not.

"With respect to the second trust deed executed by Inez it is alleged in said cross-complaint (paragraph XIV) with respect to payment of the trust deeds that Wolfson '* * * also paid the interest and principal of the above mentioned notes and trust deeds from his money solely, and without any aid or assistance whatsoever of the said cross-defendant Inez Dodds Beatty.'

"The finding of the Court in this regard was 'that with the *aid* of Frank Wolfson, *they* (emphasis added) have paid said trust deed in full.' (meaning the second trust deed). This finding is vague and uncertain and does not find the fact in issue.

"In finding I, page 4, the Court found that: 'It is true that on the 27th day of August, 1945, Frank Wolfson purchased the real property mentioned and described in said complaint from' * * * the Nelsons.

"In finding IV, page 6, the Court finds, 'That on August 27, 1945, the said Frank Wolfson and Inez Dodds Beatty * * * entered into a written agreement of purchase with' the Nelsons. These findings are conflicting and it cannot be determined therefrom just what the Court did find.

"In finding I, page 9, the Court found that a confidential relation existed between Wolfson and Inez.

"Finding VI, page 3—'It is not true * * * that there was no consideration for said deed'—certainly is against the weight of the evidence. This is borne out by the documentary evidence. (As to right of Court to weigh evidence see Woods v. Walker, 57 Cal.App.2d 968 [136 P.2d 72].)

"Findings are insufficient if they merely tend to establish the fact in issue or state only general conclusions, leaving it doubtful what particular facts are established. 24 Cal.Jur. 964.

"Findings should be consistent. Where there are contradictory findings about matters material to the merits of the case and the determination of them, one way or the other, is essential to the correctness of the judgment, the judgment cannot stand. 24 Cal.Jur. 965, sec. 202.

"General findings are insufficient if specific facts are put in issue, it is the duty of the Court to find these facts specifically. A general finding which is in effect a conclusion of law is insufficient. 24 Cal.Jur. 973.

"The motions of plaintiff and cross-plaintiff for a new trial are granted on the following grounds:

"1. That the decision is against law, and

title in the property in question in plaintiff subject to the rights of the public administrator in administering the estate of decedent. From this judgment defendant Beatty prosecutes the present appeal.

[1] Defendant Beatty contends:

First: *The complaint does not state a cause of action on behalf of plaintiff as against defendant Brown, the public administrator, and defendant Beatty for the reason that section 581 of the Probate Code provides that the devisees or heirs may maintain an action for real property against any other "except the executor or administrator," relying on* Harper v. Strutz, 53 Cal. 655 and Thorpe v. Sampson, C.C., 84 F. 63.

This contention so far as defendant Beatty is concerned is devoid of merit. Section 581 of the Probate Code reads in part as follows: "* * * The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real property, or for the purpose of quieting title to the same, against anyone except the executor or administrator; but they are not required so to do."

In passing upon a similar question in Wilson v. Stoudamire, 60 Cal.App.2d 642, 141 P.2d 457, after referring to Harper v. Strutz, and Thorpe v. Sampson, supra, Mr. Justice Drapeau, 60 Cal.App.2d at page 644, 141 P.2d at page 458 says, "All other California decisions which we have been able to find declare that the quoted clause as used in the Probate Code means what it says, and that the heir may bring the action plead in the complaint in the present case. (Citing numerous cases.)"

The foregoing authority disposes of defendant Beatty's claim.

[2] It is unnecessary for us to decide whether the complaint stated a cause of action against defendant Brown for the reason that the trial judge expressly found and recognized the rights of the public administrator to the possession of the property for the purposes of administration. Thus defendant Beatty was not an aggrieved party and has failed to show any prejudice so far as she is concerned.

Second: *The order of Judge Praeger granting plaintiff's and defendant Brown's motion for a new trial was void for the reasons, (1) that Judge Praeger was not authorized to grant the motion for a new trial, and (2) defendant Brown did not pay the filing fee due for filing his intention to move for a new trial within 10 days after notice of the entry of judgment.*

[3] This contention is likewise devoid of merit. An order not void on its face granting a motion for a new trial from which no appeal has been taken and which is final is not reviewable on appeal from a subsequent judgment rendered upon a retrial of the cause. (Zschokke v. Lumley, 22 Cal.App.2d 224, 225 [1], 70 P.2d 495. Cf. Snyder v. Dorosh, 22 Cal.App.2d 591 [1], 72 P.2d 158.)

[4] In the present case a mere reading of the order granting the motion for a new trial set forth in extenso, supra, shows that it is not void on its face. Since the questions here urged by defendant Beatty could have been raised on appeal from such order, by failing to appeal therefrom she has waived them.

Third: *Since no motion for a new trial was made relative to Judge Bradshaw's finding in case No. 536792, it became final and the present judgment quieting title in favor of plaintiff was beyond the issues in the case.*

This proposition is not meritorious. Defendant Beatty contends that since Judge Bradshaw entered findings and judgment in each of the consolidated cases and a motion for a new trial was made and granted as to one of the actions only (No. 544457), the judgment in the other case (No. 536792) in favor of defendant Beatty became final. Such is not the law.

[5, 6] Where two law suits are ordered consolidated for trial, and actually tried together, there should be but one set of findings of fact and conclusions of law and

"2. Insufficiency of the evidence to sustain the decision.

"Dated: December 14, 1950.
"Arnold Praeger, Judge"

one judgment. If there is a duplicate set of findings of fact and conclusions of law, it will be considered an inadvertence of the trial judge and they will be considered for all purposes as one document, that is, one set of findings of fact, conclusions of law and one judgment. (Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 287, 105 P.2d 984; Clinton v. Hogan, 80 Cal.App. 2d 815, 821, et seq., 183 P.2d 50; Stanton v. Superior Court, 202 Cal. 478, 484 et seq., 261 P. 1001; Willamette, etc., Co. v. Los Angeles College Co., 94 Cal. 229, 232 et seq., 29 P. 629; Union Lumber Co. v. Simon, 150 Cal. 751, 762, 89 P. 1077, 1081.)

[7] Applying the foregoing rule to the facts in the instant case it is obvious that when the motion for a new trial was granted in action No. 544457, the order operated to grant a motion for a new trial in the consolidated action No. 536792.

[8, 9] Fourth: *There was not substantial evidence to sustain the findings of the trial court that the property in question, (a) was community property, and (b) was not a gift to defendant Beatty.*

This contention is untenable. Viewing the evidence as we must in the light most favorable to plaintiff (respondent) and pursuant to the rule set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, the record discloses (a) both the real property and automobile in question were purchased with funds earned by decedent during his marriage to plaintiff which, being community funds, established the character of the real property and automobile as community property, and (b) at no time during the trial did defendant Beatty claim that the property was a gift to her, but on the contrary she contended she had paid for it with her own funds. It is therefore clear the trial court's finding is sustained by substantial evidence.

[10] It needs no citation of authority to support the thesis that an appellate court must disregard contrary evidence, as well as contrary inferences and conclusions which *were not* but which *might* have been drawn by the trier of fact. It would serve no useful purpose to herein further detail other evidence in support of the trial judge's conclusions which appear in the record. It is likewise unnecessary to discuss other points argued by counsel, since regardless of the finding on such contentions the judgment would necessarily be affirmed. (Cf. Thatch v. Livingston, 13 Cal. App.2d 202, 203, 56 P.2d 549.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 386

OHANESIAN v. WATSON et al.

Civ. 4637.

District Court of Appeal, Fourth District, California.

June 8, 1953.

Mandamus proceeding by licensed real estate broker against Real Estate Commissioner and state real estate division following 90 day suspension of broker's license. The Superior Court of Fresno County, Milo Popovich, J., denied petition, and broker appealed. The Distict Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain trial court's finding that broker had taken commission to which he was not entitled.

Judgment affirmed.

1. Brokers ⇐32

A real estate broker cannot represent both parties in a transaction without knowledge and consent of all parties involved.

2. Brokers ⇐32

Where real estate broker accepted written appointment from vendors to sell their ranch, advised vendors regarding price and terms, got purchasers to reduce price of dwelling they were selling, and concluded agreement with purchasers, and vendors and purchasers did not meet until after details of sale had been worked out, broker could not be considered as merely a "mid-

dleman" but came within prohibition of statute forbidding broker to act for more than one party without knowledge or consent of all parties. Business and Professions Code, § 10176(d).

3. Mandamus ⇐168(4)

In mandamus proceeding by licensed real estate broker against real estate commission and state real estate division following 90 days suspension of broker's license, where broker had allegedly cancelled contract giving him exclusive right to sell purchasers' house prior to closing of contract for purchase and sale of vendors' ranch, but received commission from both vendors and purchasers, evidence was sufficient to sustain trial court's finding that broker had taken commission to which he was not entitled by accepting commission from purchasers. Business and Professions Code, § 10176(d).

4. Mandamus ⇐168(4), 174, 187(9)

In mandamus proceeding by licensed real estate broker against Real Estate Commission and state real estate division following 90 days suspension of broker's license, findings that broker had acted for more than one party in violation of statute, had taken secret commission, engaged in fraud or dishonest dealing, and acted in manner which would warrant denial of application for real estate license, but had not made substantial misrepresentation or false promise likely to persuade were not inconsistent or prejudicial to broker and were sustained by evidence. Business and Professions Code, §§ 10176(a, b, d, g, i), 10177 (f).

John Said, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and August F. Cetti, Deputy Atty. Gen., for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying an application for a writ of mandate.

The petitioner was a licensed real estate broker. An accusation was filed with the Real Estate Commissioner charging him with a violation of the provisions of subsections (a), (b), (d), (g) and (i) of section 10176 and subdivision (f) of section 10177 of the Business and Professions Code. After the usual hearing, the petitioner was found to have violated subsections (d), (g) and (i) of section 10176 and subsection (f) of section 10177, and an order was entered suspending his license for a period of ninety days. He applied to the superior court for a writ of mandumus and at the hearing it was found that the findings of the Real Estate Commissioner were supported by the evidence, and the petition was denied.

The following facts appear in the evidence. On February 4, 1951, the petitioner obtained from Mr. and Mrs. Nazarian an exclusive right to sell their 20-acre ranch at a price of $13,000. The petitioner advertised this ranch for sale in a newspaper at a price of $13,500. Mr. and Mrs. Trower read this advertisement and contacted the petitioner. On February 15, 1951, they gave the petitioner an exclusive right to sell their house in Fresno for $10,000, inserting a provision that the cash proceeds from the house were to be applied to buy this Nazarian ranch at $13,000. The petitioner did not advertise the Trower house or send any prospective buyer to look at it. On the morning of February 25, 1951, the petitioner called Mr. Trower and told him that since their house had not been sold, he was selling the Nazarian ranch to a third party; that he had a written contract with this third party; and that he had received a $500 deposit on the ranch. Mr. Trower asked that the listing on his house be canceled and petitioner agreed to do so. Trower went to petitioner's office shortly after noon on that day and petitioner gave him back the listing on the house, having written across the face of it the word "canceled", with a date and his signature.

Later that day a man named Peterson called at the Trower house and offered them $9,600 for the house. They were unwilling to sell the house unless they could get the ranch, so they told Peterson they would let him know before 7:00 o'clock that night. Mr. Trower contacted the petitioner about 6:00 P.M. and asked if there was any way he could still purchase the Nazarian

ranch if he sold the house to the Petersons for $9,600. The petitioner told Trower that he would prefer to sell the house to him, as he was a better financial risk, and agreed to let him have the ranch.

On the next day the Trowers and the Petersons signed escrow papers for the sale of the house at the office of a title company, after which the Trowers met the petitioner in the office of the same title company for the purpose of going into escrow on the sale of the Nazarian ranch to the Trowers. The petitioner then told Mr. Trower that he would not let the ranch deal go through unless he was paid an extra $500, stating that he was the loser on this property and would have to have an extra $500. Mr. Trower, not wanting to lose the ranch deal, offered to add $500 to the purchase price of the ranch but the petitioner refused to allow this, saying that he had to have the money himself. After some discussion, the Trowers and the petitioner went to the escrow officer handling the house deal and those instructions, which provided that no commission was to be paid, were changed to provide for the payment of a $480 commission to the petitioner. The escrow papers on the ranch deal were then signed, both escrows were later closed, and the petitioner received $640 commission from the Nazarians and $480 from the Trowers. The Nazarians knew nothing of any such payment from the Trowers. About a month later, the Nazarians discovered that the Trowers thought they had paid $13,500 for the ranch. A complaint was then made, and the administrative proceeding followed.

The appellant first contends that there is no substantial evidence to support the finding to the effect that he failed to reimburse the Nazarians for operating costs on their ranch between the date of the listing and the time the Trowers took over the work, a period of 24 days. That listing contract provided for the payment of such expenses, not exceeding $500, in the event of a sale of the ranch. The appellant admitted that he agreed to pay for such expense, but he argues that only a few days intervened between the time the matter was placed in escrow and the time the Trowers took over the work. There is evidence that the petitioner made no attempt to adjust this matter with the Nazarians. There is also evidence that the petitioner gave a check for $50 to the Nazarians, but it does not appear what this was for. While the evidence on this is not very satisfactory, the matter is not important in view of the other findings.

[1, 2] It is next contended that there is no substantial evidence to support the finding that the appellant violated section 10176 (d), by acting for more than one party without the knowledge or consent of all parties. The appellant admits the fundamental rule that a real estate broker cannot represent both parties in a transaction without the knowledge and consent of all parties involved, but contends that there is a common law exception making this rule inapplicable where the broker acts merely as a "middleman". Assuming that this exception could apply in such an administrative proceeding in view of the provisions of section 10176(d), the evidence here convincingly shows that the appellant was not acting as a mere "middleman". He accepted a written appointment as agent for the Nazarians and agreed to use his best efforts in selling their property; he advised them with respect to the price and terms at which they should offer the ranch for sale; he advertised the ranch for sale; he carried on extensive negotiations with the Trowers, who were trying to buy the ranch, and got them to reduce the selling price of their house from $11,000 to $10,000; he secured a written agreement for the sale of the ranch and accepted a deposit from a third party; he then set that deal aside and concluded one with the Trowers; the Nazarians and Trowers never saw each other until all of the details had been completely worked out by the appellant; and he then prevented the Nazarians from receiving $13,500 for their property. The appellant acted as an agent in the usual manner and he cannot, under the circumstances, be considered as merely a "middleman". Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P. 2d 768.

[3] It is next contended that there is no substantial evidence to support the finding that the appellant took a commission to which he was not entitled. This relates to the $480 which the appellant compelled the Trowers to pay as a commission on the sale of their house, before he would allow them to proceed with the purchase of the Nazarian ranch. Appellant's sole contention is that he intended his cancellation of the listing on the Trower house to be conditional; that the Trowers had a sale to the Petersons in mind when they asked the appellant to cancel that listing; that it thus appears that the Trowers obtained that cancellation by fraudulently concealing the facts from the appellant; and that it follows that the cancellation was ineffective and the agreement to pay a commission was still in force. This argument is based entirely on a conflict in the evidence. While the appellant testified to that effect, there was ample evidence that the cancellation of that listing was not conditional; that it was canceled because the appellant had sold the ranch to a third party and had taken a deposit; that the Trowers knew nothing of the Peterson deal until after the appellant's listing on their house had been canceled; and that they later reduced the selling price to the Petersons because they understood that there would be no commission to pay. The conflict was resolved against the appellant, in the administrative proceeding and by the trial court, and the evidence is sufficient to sustain the finding made.

[4] Appellant's final contention is that the findings are inconsistent in that it was found that he had violated section 10176(d), (g) and (i) and section 10177(f), and was also found that he had not violated subsections (a) and (b) of section 10176. We see no inconsistency between these findings, and nothing in this connection which would in any way prejudice the appellant. The evidence indicates that the findings, and the penalty imposed, were more favorable to the appellant than they might well have been.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

118 Cal.App.2d 359

WESTERN HELICOPTER OPERATIONS, Inc. v. NELSON et al.

Civ. 4629.

District Court of Appeal, Fourth District, California.

June 5, 1953.

Action by seller against buyers for breach of contract. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment against one defendant, and she appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that an option to purchase two helicopters, signed by appellant's co-defendant, whose interest therein was subsequently assigned to appellant, ripened into an executed agreement of sale and purchase between seller and appellant, which appellant breached to seller's damage.

Judgment affirmed.

1. Contracts ⇐164

Where there are several papers relating to same subject and executed as part of one transaction, they are to be construed together as one contract, and effect should be given, if possible, to the purpose intended to be accomplished. Civ.Code, § 1642.

2. Sales ⇐4(4)

A distinction between a "contract to sell and purchase" and an "option to purchase" is that the former creates a mutual obligation on the one party to sell and on the other to purchase, while the latter merely gives a right to purchase, within a limited time, without imposing any obligation to purchase.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract to Sell and Purchase" and "Option to Purchase".

3. Sales ⇐86

One of two prospective buyers of two helicopters, who signed agreement whereby, in consideration of $1,000, the seller agreed to hold such property for option of both prospective buyers, thereby bound seller to sell such property and acquired a definite interest in the option which he might have enforced as against seller either individually, or as an authorized agent of

the other prospective buyer, or as one of joint venturers in the transaction, and an assignment of such interest, with seller's knowledge and consent, to the other prospective buyer, vested in such other any right signer had in and to the option.

4. Contracts ⇐35

Before a written instrument is effective, it need not necessarily be signed on the instrument itself by the parties to be charged. Civ.Code, § 1642.

5. Sales ⇐52(5), 383

In seller's breach of contract action, evidence sustained finding that an option to purchase two helicopters, signed by one of two prospective buyers, whose interest therein was subsequently assigned to the other prospective buyer, ripened into an executed agreement of sale and purchase between seller and such other which the latter breached to seller's damage.

6. Sales ⇐384(1)

Where seller recovered judgment for buyer's breach of contract of purchase, and not for failure to exercise option, amount of damages was not limited to the balance on the option price. Civ.Code, § 3300.

John A. Willey, Fresno, Hiram W. Johnson, 3rd, San Francisco, for appellant.

Wild, Carlson & Reeve, A. W. Carlson, R. H. Reeve, Fresno, for respondent.

GRIFFIN, Justice.

Defendant Elmer A. Riley, and defendant and appellant Mary Nelson, were each operating a pilot training school on their respective airports. In June, 1951, they became interested in the purchase of and examined two helicopters and their special equipment owned by plaintiff and respondent Western Helicopter Operations, Inc., in Fresno. They discussed with F. S. Moulton, Jr., secretary and manager of plaintiff corporation, the terms of sale, and tentatively agreed upon a price of $42,000, with a down payment of 10 per cent and the balance payable in 30 days. About four days later Riley phoned plaintiff and said that he and Mrs. Nelson had decided to purchase the ships. Plaintiff's attorney drew up a letter of offering, reading in part:

"June 29, 1951.

"Western Helicopter Operations, Inc.
"P. O. Box 1346
"Fresno, California
"Gentlemen:

"We hereby offer to buy from you those two * * * Helicopters, * * for the sum of $42,000.00 in cash, and hand you herewith as a deposit thereon the sum of $4,200.00.

"Said deposit is to be applied to the purchase price, and we agree to pay to you the balance of said purchase price in the sum of $37,800.00 by certified check in your favor at Fresno, California, on or before the 29 day of July, 1951 * * *.

"If the balance of said purchase price is not so paid on or before said date, our rights hereunder will thereupon cease and terminate, and you shall be entitled to retain said deposit in consideration of your acceptance of this offer.

"We agree to accept delivery of all of said property at Hammer Field, Fresno County, California, at the time of the payment of the balance of said purchase price, as aforesaid, and delivery thereof to us is to be made by you at that time and place.

"We have examined all of said property and are satisfied with the condition thereof * * *.

"Title to all of said property is to pass to us or our nominee at the time specified for delivery thereof to us above mentioned.

"If the foregoing conforms with your understanding of our agreements above set forth, please endorse and return to us a copy hereof for our files.

"Elmer A. Riley
El Monte, California

"Mary Nelson
Palm Springs, California

"The above and foregoing is hereby approved and agreed upon.

"Western Helicopter Operations, Inc.
"By_____"

They agreed to meet at El Monte to sign the necessary agreement. Appellant did not appear. At that meeting, according to plaintiff's testimony, Riley indicated that the agreement was in accordance with the ideas expressed by defendants. Riley testified, however, that it was not in accordance with his ideas because he was only interested in an option to purchase them. Moulton then testified that after some period Riley phoned to appellant at Palm Springs and explained to her the letter of offering as to the price and terms therein indicated; that Riley asked Mrs. Nelson if that was satisfactory and she said she did not have the $4,200 in the bank at that time but suggested a smaller down payment, i. e., $1,000, to keep the deal open for a few days; that this arrangement was agreed upon and he drew up an additional agreement (Exhibit 1):

"Western Helicopter Operations, Inc.
"P. O. 1346, Fresno, California
"June 15, 1951

"Miss Mary Nelson
"Elmer A. Riley
"% Riley Flying Service, Inc.
El Monte Airport
El Monte, California
"Gentlemen:

"In consideration of $1000.00, receipt of which is acknowledged, Western Helicopter Operations, Inc. agrees to hold for your option those certain Bell Model 470 helicopters, N138B and N 194B and their spare parts and special tools as shown on the attached lists until June 29, 1951. At that time Elmer A. Riley and Mary Nelson agree to pay the balance of the option price as described in the attached letter which shall become a part of this agreement.

"Western Helicopter Operations, Inc.
"Ferris S. Moulton, Jr.
"Sec. Treas.

"The above and foregoing is hereby approved and agreed upon.
"Elmer A. Riley."

That he signed the original and two copies on behalf of plaintiff company and Riley signed them; that the original and one signed copy attached to the offering letter with the date of June 29 inserted therein were left with defendant Riley; that Riley gave him a check for $1,000; that on June 28th appellant phoned him and said she was signing the papers and sending him a check that day for the balance of the down payment on the sale of the ships; that on June 29, he received a letter signed by her (Exhibit 2):

"F. S. Moulton
"Western Helicopter Operations
"P. O. Box 1346
"Fresno, California
"Dear Bud:

"Enclosed please find a check for $3500.00 for next part of payment on the helicopters we are purchasing from you. I am taking over the financing of this deal and Elmer will come back into it if we get into a training operation which is our ultimate goal. In the meantime would you please send me a receipt for above check and a signed copy of option agreement plus a notation on same that second part of agreement has been fulfilled. I will proceed and hope to get everything squared away before the July 29 deadline but certainly by then. I have every intention of completing our deal and have made all the necessary arrangements. I would appreciate your sending me also the names and addresses of any pilots who are satisfactory to the Forest Service under their regulations and you might also tell Nick that I may put one of the ships on a Forest Service or other contract while retaining the second one to get our school going as I anticipate it will take a little longer than we had hoped to get our various approvals. If Nick would be interested in such a job you might ask him to drop me a line.

"Very best wishes,
"Mary B. Nelson";

that enclosed was a check for $3500; that in that conversation she indicated to him

that Riley did not have his finances in order to be able to complete the down payment at that time; that she was mailing a check to cover it and she and Riley would get together at a later date and make their own arrangements; that agents of a finance company would look at the equipment in a few days; that he informed her they had been there that day; that upon receipt of her letter (Exhibit 2) he, on July 6, 1951, forwarded her a signed copy of the agreement with a request that she sign and return the one left with Riley and containing a note acknowledging receipt of "$4500 to be applied on the purchase price as named herein" (Exhibit 5).

Exhibit 4 is an assignment to Mary Nelson dated July 11, 1951, of any interest of Elmer A. Riley "in attached contract dated June 15, 1951."

Moulton then testified that on July 6, he called appellant to find out why she had not sent back the executed copies of the letter of offering and to tell her he had received her check for $3500 balance of the down payment; that she told him they were with the finance company and she would be in Fresno within the next day or two and execute them.

On July 8th appellant wrote plaintiff (Exhibit 7) that she had discussed her transaction with an attorney and he advised that since Riley had signed the original option a release should be secured from him before "going into the second part of our deal"; that her attorney informed her she should not have made the payment of $3500 until this was done; that he recommended that payment of that check be stopped at the bank until his release was obtained and that she did so; that she would then send a new check, a copy of the release and a new agreement in which he would not be involved; and that she now had the release. She stated: "Inasmuch as this operation has been bogged down through no fault of yours I hesitate to ask if it would be possible to make the purchase agreement extend 30 days from the 15 of July if I send you the signed agreement and check and release by that date? My reason for asking this is I know that summer is a terrible time to get things done inasmuch as people are on vacations, taking long weekends and the like and I do not want to be pressed for time to get everything buttoned up. It is my belief that things should be settled long before that but I know how things go. If this is agreeable would you be so kind as to send me a wire * * *. Please accept my abject apologies for this being allowed to get into this state of confusion * * *. (Signed) Mary Nelson."

Moulton then testified that on July 25, appellant came to Fresno and brought some form of written agreement prepared by her attorney (Exhibit A) which changed the terms of the original agreement in many respects and provided for some form of an escrow; that a check for $3,200 accompanied this agreement and it was made payable to the escrow agent and was attached to the assignment mentioned in Exhibit 4; that he turned this proposed agreement over to plaintiff's attorney, who advised against signing it; that on August 1st he wrote appellant and returned her proposed purchase agreement; that some oral negotiations thereafter were attempted; that he (Moulton) informed her that he had other offers for the purchase of those helicopters and wanted to know what to do about her contract with the company; that on August 27, 1951, Moulton received her letter (Exhibit D) reciting:

"Dear Bud:

"Pursuant to our telephone conversation of yesterday I am willing to go through with our deal on the basis of a total price of $42,000.00 for the two ships total price, subject to the escrow discussed and drawn up being executed and subject to payment of $36,000.00 at close of escrow which would include $4000.00 already paid, $3200.00 check held by you and which would leave a balance of $31,800.00 and your taking my note for six months for $6000.00 at 5% int.

"This deal could be consummated by 15 September.

"If you have someone presently willing and able to take on the ships at $42,000.00 or thereabouts on an immediate

basis it would be quite agreeable with me inasmuch as I would simply put the ships up for resale inasmuch as some of my other projects are going very well and the demands on my time would be such that I could not operate the ships competently or intelligently during the next six months. I want you to know however that I am most willing not to let you down and that I will, having made the arrangements with PF, go ahead rather than have you have to struggle with the sale of these ships.

"Please accept my apologies that there was any confusion on this deal and I trust that however you determine to act will be the best possible way for you. I have no intention of dropping my interest in operating helicopters whatever happens as I have great confidence in the future of them.

* * * * * *

"Mary Nelson."

On August 24th appellant told Moulton she definitely would not complete the deal. He then looked for someone to purchase the ships and due to the seasonal drop in the market he sold them for $32,000. Plaintiff then instituted this action for damages for the difference in price agreed upon by appellant and that obtained by plaintiff.

The court found generally that on the 15th of June, 1951, in consideration of $1,000 paid by defendants, plaintiff did, in writing, offer to sell the ships described at any time up to and including July 29, 1951, for the sum of $42,000, to be paid by defendants to plaintiffs at Fresno as follows: $4,200 on or before July 29, 1951, subject to credit thereon of the sum of $1,000 and the remaining $37,800 upon the delivery of said property not later than July 29; that said option was exercised by appellant Mary Nelson alone and on her own behalf on the 29th of June; that such exercise of option was without the knowledge or consent of defendant Riley; that said option was exercised in writing by her on June 29, 1951, enclosing her check for $3,500; that plaintiff accepted the check as part payment of the purchase price and then recognized the exercise of the option by appellant Mary Nelson by acknowledging the receipt thereof in accordance with her written request; that Riley assigned to Mary Nelson his interest in the option agreement and offer of purchase and sale of said property; that plaintiff demanded of defendants the payments due and performance of the balance of the total purchase price; that it was ready, able and willing to perform all the terms of the agreement; that appellant Nelson failed to pay the amounts due thereunder and refused to carry out her obligations under said contract or accept said property; that plaintiff sold the property for $32,395, the fair and reasonable market value thereof as of that date; that by reason of the foregoing plaintiff was damaged by appellant's refusal to fulfill the agreement in the sum of $8,605. It was then found that defendant Elmer A. Riley was not liable thereunder. Judgment was entered against appellant Mary Nelson accordingly.

On her appeal she challenges first (a) the sufficiency of the evidence to support the finding that a contract came into being between plaintiff and appellant on June 29, 1951; and (b) that appellant Nelson had acquired knowledge of the terms of the option at the time she attempted to extend it. Second, it is argued that the history of events does not indicate that a final agreement was ever presented, accepted or settled. She cites such cases as Warner Bros. Pictures, Inc., v. Brodel, 31 Cal.2d 766, 192 P.2d 949, 3 A.L.R.2d 691; Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366, 68 L.R.A. 226; Alexander v. Bosworth, 26 Cal.App. 589, 147 P. 607; Spinney v. Downing, 108 Cal. 666, 41 P. 797; Store Properties, Inc., v. Neal, 72 Cal.App.2d 112, 164 P.2d 38; Tewksbury v. O'Connell, 21 Cal. 60; Anthony Macaroni Co. v. Nunziato, 5 Cal.App.2d 588, 43 P.2d 315; and White v. Bank of Hanford, 148 Cal. 552, 83 P. 698. And third, it is contended that in the event appellant Nelson did exercise the second part of the June 15th option agreement, by the terms of the June 29th letter attached thereto, the limit of damages could not exceed $3200, being the balance due on the option price. Citing Beckwith-Anderson

Land Co. v. Allison, 26 Cal.App. 473, 147 P. 482; and Biescar v. Pratt, 4 Cal.App. 288, 87 P. 1101.

[1] It is true, as pointed out by appellant, that when there are several papers relating to the same subject, and executed as part of one transaction, they are to be construed together as one contract and effect should be given, if possible, to the purpose intended to be accomplished. Symonds v. Sherman, 219 Cal. 249, 26 P.2d 293; Civ.Code Sec. 1642; Basile v. California Packing Corporation, 9 Cir., 25 F. 2d 576.

[2] A distinction between a contract to sell and purchase and an option to purchase is that the former creates a mutual obligation on the one party to sell and on the other to purchase, while the latter merely gives a right to purchase, within a limited time, without imposing any obligation to purchase. Brickell v. Atlas Assurance Company, Ltd., 10 Cal.App. 17, 101 P. 16.

[3] While there is no finding of agency or joint venture as between appellant Nelson and defendant Riley, it fairly appears that Riley did bind plaintiff to sell to him the two ships, and he had a definite interest in that option and probably could have enforced it as against plaintiff either individually, or as an authorized agent of appellant Nelson, or as one of the joint venturers in the transaction. Kurtz v. Forquer, 94 Cal. 91, 29 P. 413; Anthony Macaroni Co. v. Nunziato, supra, 5 Cal.App. 2d at page 590, 43 P.2d at page 316; 6 Cal. Jur. 233, sec. 153. Under the circumstances then, if appellant took an assignment of Riley's interest, with plaintiff's knowledge and consent, she undoubtedly acquired any right he had in and to that option.

The main question is, did such option ripen into an executed agreement whereby plaintiff was obligated to sell and appellant was obligated to purchase the two ships upon compliance with the terms of the agreement? It appears to us that the trial court was justified in finding that appellant had knowledge of the terms of the option, at least at the time she purportedly exercised it. Appellant did not, at the trial, attempt to contradict or deny this fact. She advised plaintiff on June 28, 1951, she was signing the agreement, according to its terms and was sending a check for the balance of the down payment. She was apprised of its terms and conditions and she paid the amount she believed to be due thereunder, as reflected in her signed letter of June 29. This agreement contained all of the terms of the sale, as found by the court, and was attached to and considered a part of the option agreed upon.

[4] It is well settled that before a written instrument is effective it need not necessarily be signed on the instrument itself by the parties to be charged. Civil Code sec. 1642; Frost v. Alward, 176 Cal. 691, 169 P. 379; 6 Cal.Jur. pp. 298–299, sec. 181, and cases cited.

It does appear that after appellant apparently accepted the terms of plaintiff's offering agreement of June 29, and forwarded the check, she consulted an attorney. Thereafter, she expressed a desire to handle the transaction in another manner. However, this desire appears to be only a request by her for permission to modify the original agreement to that extent. This request was not granted and plaintiff stood on the original agreement as accepted by appellant in the first instance.

[5] We conclude that the trial court was justified in finding that a valid agreement of sale and purchase between the parties was effected and appellant breached the terms thereof to plaintiff's damage. This conclusion is fortified by the fact that sometime after the date on which appellant had to exercise the option, she must have believed she acquired the right to purchase those machines under the agreement because, in her letter of August 27th (Exhibit D) she was willing to relinquish that right if plaintiff found a purchaser for $42,000 or thereabouts. She also testified that on August 27th she told Moulton if someone else put up the money "why I would release them".

[6] The basis for the amount of damages awarded is the difference between the agreed price of $42,000 and the $34,000 for

which they were sold, after deducting the $1000 payment, which difference totals $9,000. There was evidence that plaintiff sold some of the extra equipment to another party for a small sum and that that item was allowed as an offset, leaving a balance of $8,605 due under the judgment. Since the amount allowed was found to be due for damages for breach of the contract of purchase and not for failure to exercise the option, defendant's third contention is untenable. Royer v. Carter, 37 Cal.2d 544, 233 P.2d 539; Better Food Markets, Inc., v. American District Telegraph Co., 40 Cal.2d 179, 253 P.2d 10; Civ.Code sec. 3300.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



118 Cal.App.2d 374

In re KNOWLTON'S ESTATE.

HENDRICKS v. KNOWLTON.

Civ. 19056.

District Court of Appeal, Second District, Division 1, California.

June 8, 1953.

Probate proceedings. The Superior Court of Santa Barbara County, Charles F. Blackstock, J., entered order appointing testatrix' son as administrator with will annexed, denied trustee's petition for appointment as administrator, and transferred the case from one county to another, and trustee appealed. The District Court of Appeal, Scott, J. pro tem., held that appointment of son as administrator did not constitute abuse of trial court's discretion and that trustee's attempted appeal was ineffectual and would be dismissed in view of fact that trustee had waited more than a year before appealing from order changing place of trial.

Orders appointing son as administrator with will annexed and denying trustee's petition for letters testamentary affirmed.

1. Appeal and Error ⇐948

Party complaining of order has burden of establishing that order constitutes abuse of discretion, and, unless clear case of abuse is shown and there has been miscarriage of justice, appellate court will not substitute its opinion for that of trial court and thereby divest trial court of its discretionary power.

2. Executors and Administrators ⇐21(1)

Where son was to receive substantially all testatrix' estate and was to be executor without bond under original will, but codicil substituted trustee as legatee, in lieu of son, for benefit of son and grandson, and withdrew son as executor without naming any successor, naming of son, rather than trustee, as administrator with will annexed did not constitute an abuse of trial court's discretion in view of fact that son had been testatrix' favorite and grandson would receive trust income and, eventually, remaining trust corpus. Probate Code, § 422.

3. Appeal and Error ⇐356

Where appellant waited more than year to appeal from order changing place of trial, attempted appeal was ineffectual and would be dismissed. Code Civ.Proc. § 963, subd. 2; Rules on Appeal, rule 2(a).

James B. Salem, Los Angeles, Evert Arnold, Santa Barbara, Girard F. Baker, Los Angeles, for appellant.

Norris Montgomery, Santa Barbara, for respondent.

SCOTT, Justice pro tem.

This is an appeal from an order appointing respondent administrator with will annexed of the estate of his mother, and an appeal from an order denying petition of appellant for appointment as such administrator. Appellant also seeks to appeal from an order transferring the case from the County of Los Angeles to the County of Santa Barbara.

Ellen E. Knowlton, decedent, died October 28, 1949, leaving a will dated February 6, 1939, and a codicil dated September 29, 1944. In her will of 1939, she set out that she had two sons, one of them being re-

spondent David Waldo Knowlton, Jr. To him, in Article V of the will, she bequeathed substantially all of her estate, and in Article VII named him an executor without bond. Article VI forfeited the right of anyone contesting the will to share in the estate, except for the sum of $1.

The codicil of 1944 revoked Article V and VII and substituted appellant as trustee in lieu of respondent as legatee under the will. The effect of this was to withdraw her appointment of respondent as executor and to provide that he should receive a small income as beneficiary under the testamentary trust which was to be administered by appellant as trustee. Respondent opposed the admission to probate of the codicil, but did not prevail. Both will and codicil were admitted to probate. Respondent concedes that because of his unsuccessful contest he is disqualified to receive the benefits of the trust and makes no claim to receive any other portion of his mother's estate.

The question for determination in this case is whether the trial court abused its discretion in appointing respondent instead of appellant as administrator with will annexed of the estate of decedent. Under Probate Code section 422, neither party was entitled to priority. Reliance is placed by appellant on the case of In re Estate of Selb, 93 Cal.App.2d 788, 210 P.2d 45. The facts of that case, as set out on page 793, are as follows: Decedent had two children who were her only heirs, a son and a daughter. At the time of her death she owned a farm in Missouri and property in California consisting of a home located on a five-acre tract, a small amount of cash and personal belongings located in the home. For about thirteen years prior to her death her son had resided with her on the home place. By the terms of her will the farm in Missouri was devised to the children in equal shares and the daughter was given $500, in cash, the residue going to the son. The daughter contested the will on the grounds of incompetency and undue influence. She did not prevail and under the terms of the decedent's will forfeited any interest in the estate by her contest. The will was admitted to probate and petition of decedent's son for letters testamentary was granted. He died before the issuance of such letters, and in turn his son, grandson of decedent, filed a petition for the issuance to him of letters with the will annexed. This grandson was the executor of his father's estate and one of his heirs. The situation, therefore, was one in which the daughter who, by reason of her contest of the will, had no interest in the estate, and the grandson, whose interest was derived through his father's estate and not directly as an heir of his grandmother, were both seeking appointment to administer the estate with the will annexed. The daughter was appointed by the probate court, and on appeal after reciting the above facts, the appellate court concluded that "taking into consideration the size and nature of the estate, the naturalness of the will of decedent, the unsuccessful contest of the will by the respondent, the fact that she had forfeited her interest in the estate, and the further fact that appellant was the son and administrator of the estate of the person to whose estate the entire estate [of the grandmother] would ultimately be distributed, it was unreasonable and unjust for the court to appoint respondent [daughter] instead of appellant [grandson] and thus permit her to direct and control the administration of the estate and receive the commissions and benefits that accrue to an administratrix". In re Estate of Selb, 93 Cal.App.2d 788, 793, 210 P.2d 45, 48.

From a comparison of the facts it is evident that the case of the Estate of Selb is readily distinguishable from the case now under consideration. In the instant case respondent was the favored of two sons of deceased. In the original will she left him substantially all of her estate and named him executor. The provision as to forfeiture in case of contest obviously was not directed at respondent, who could have no reason to oppose its admission to probate, but seemed to have been intended to safeguard his rights under the will. In the codicil the designation of her son as executor is withdrawn but no other person is named to thus serve. Appellant is entrusted with the estate to handle it for the benefit of respondent and the latter's son under provi-

sions which suggest that if testatrix had intended him to be appointed administrator of the estate she would have included that direction in her codicil. From affidavits included in the record and to which our attention is invited it is apparent that deceased and respondent, up to the time of her death, were mutually affectionate and devoted. The mother's intention, in the codicil, was not to deprive her son of the benefits of her estate, but to assure that he would have a lesser benefit over a longer period of time, with respondent's son receiving any residual benefits in case of his father's death. It is doubtful whether decedent was fully aware of the legal effect of the codicil in republishing the punitive provisions of the original will so that her son's resistance to the time and manner in which the benefits of her estate were to be received would result in depriving him of those very benefits which she wanted him to have. Respondent's son, under the provisions of the will and codicil now admitted to probate, will receive the income and eventually any remaining property in the testamentary trust estate. No valid reason can be urged why there is or should be any hostility or antagonism in the relationship between respondent and his own son.

[1, 2] An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. The burden is on the party complaining of the order to establish an abuse of discretion and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. Berry v. Chaplin, 74 Cal. App.2d 669, 672, 169 P.2d 453.

Appellants endeavor to appeal from the order of the Los Angeles court granting the motion for change of venue. The order of transfer was dated February 2, 1950. The date of filing of the order, which would be the "date of entry" of the order, is not shown. Of necessity, it was prior to March 10, 1950, on which latter date an "amended and supplemental petition for probate of will and codicil" was placed on the hearing calendar in the Santa Barbara court. The notice of appeal from the orders relating to the appointment of administrator and including the attempted appeal from the order granting motion for change of venue is dated October 31, 1951.

[3] The latter order changing the place of trial was and is an appealable order. Code of Civ.Proc., sec. 963, sub. 2. Rule 2(a) of Rules on Appeal allows sixty days within which the appeal may be filed, following the entry (filing) of the order. See 3 Cal.Jur.2d 657, and 36 Cal.2d 1. Having failed for more than a year thereafter to appeal from the order changing the place of trial, the attempted appeal therefrom at this time is ineffectual and it is therefore dismissed.

The order appointing respondent as administrator with the will annexed, and the order denying petition of appellant for letters testamentary are affirmed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 518

PEOPLE v. DAVIS.

Cr. 4938.

District Court of Appeal, Second District, Division 2, California.

June 16, 1953.

Defendant was charged with unlawful possession of a narcotic. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered a judgment of guilty after trial without a jury, and defendant appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient to sustain the court's finding of defendant's guilt.

Judgment affirmed.

1. Criminal Law ⇐260(11)

On appeal from judgment of conviction after trial before court without jury, evidence must be viewed in light most favorable to the people.

2. Poisons ⇐9

Evidence was sufficient to sustain trial court's finding that defendant was guilty of unlawful possession of narcotic. Health and Safety Code, § 11500.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alberta Gattone, Dep. Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating Section 11500 of the Health and Safety Code (possession of a narcotic), after trial before the court without a jury, defendant appeals.

[1] Viewing the evidence as we must in the light most favorable to the people (respondent), the record discloses that Police Officer H. R. Howard took from the pocket of the shirt defendant was wearing a package of Phillip Morris cigarettes which contained marijuana and from the pocket of a bathtrobe hanging on the door of defendant's bedroom six marijuana cigarettes.

[2] *Question: Was there substantial evidence to sustain the trial court's finding that defendant was guilty of violating Section 11500 of the Health and Safety Code?*

Yes. Police Officer H. R. Howard testified as follows: "After I found the six brown paper wrapped cigarettes in the bedroom, in the blue robe, I again asked the defendant about the cigarettes and he stated, 'Those cigarettes in the Phillip Morris package are mine, and also the six others. I bought approximately half a can from a fellow some time ago. I have been smoking and using marijuana for 14 years.'"

At the time of the trial it was stipulated by the district attorney and defendant's attorney that if Officer McMurtry were called to the witness stand and sworn he would testify substantially the same as Officer Howard.

Defendant claims no other errors in the trial. This appeal is utterly devoid of the slightest semblance of merit and appears to have been taken solely for the purpose of delay.

Affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 403

ROSENTHAL et al. v. HARRIS MOTOR CO. et al.

Civ. 19294.

District Court of Appeal, Second District, Division 1, California.

June 10, 1953.

Action against motorist, who bought automobile under conditional sales contract and against automobile dealers who sold it for damages arising out of automobile collision. The Superior Court, Ventura County, Walter J. Fourt, J., rendered judgment for plaintiffs and automobile dealers appealed. The District Court of Appeal, Scott, J., held that evidence as to sale of automobile by dealers under conditional sales contract and failure of dealers to give notice of transfer prior to accident was sufficient to support verdict in favor of plaintiffs.

Judgment affirmed.

1. Automobiles ⇐192(8)

Where conditional seller delivers possession of automobile to buyer and fails to comply with statute relating to giving notice of transfer prior to occurrence of accident, conditional seller is liable within amounts stated in statute for operation of such automobile with his consent by his conditional buyer in negligent manner. Vehicle Code, §§ 177, 402.

2. Automobiles ⇐244(22)

In action against motorist and automobile dealers from whom motorist bought automobile under conditional sales contract for damages arising out of automobile collision, evidence as to sale of automobile

by dealers under conditional sales contract and failure of dealers to give notice of transfer prior to accident was sufficient to support verdict in favor of plaintiffs. Vehicle Code, §§ 177, 402.

3. Appeal and Error ⇐930(1)

In action against motorist and automobile dealers from whom motorist bought automobile under conditional sales contract for damages arising out of automobile collision, appellate court would not be justified in assuming that jury made any implied finding, without facts to support it, on question of agency relationship between conditional seller and buyer merely because of inadvertent mention of it in instructions. Vehicle Code, §§ 177, 402.

4. Appeal and Error ⇐1170(3)

Defendants could not object to award of damages which exceeded amount prayed for in petition, containing request for leave to amend to seek greater damages when total amount was ascertained in view of fact that plaintiffs proved their damages and defendants had not been misled, confused or prejudiced by inadvertent failure of trial court to make proper order directing amendment of petition. Code Civ. Proc. § 956a; Const. art. 6, § 4½.

5. Appeal and Error ⇐1170(3)

When an attack upon judgment is based upon error in pleadings, it is incumbent upon appellant to demonstrate before appellate court that error complained of has resulted in miscarriage of justice. Code Civ.Proc. § 956a; Const. art. 6, § 4½.

Frank W. Woodhead and Robert E. Morrow, Frank W. Woodhead, Los Angeles, for appellants.

James C. Hollingsworth and Edward Henderson, Ventura, for respondents.

SCOTT, Justice pro tem.

Defendants Harris appeal from judgment for plaintiffs based upon a jury verdict. Defendant Shinn does not appeal. The action grew out of a collision between plaintiffs' Nash automobile and defendants' De Soto driven by Miss Shinn. Appellants concede that "the evidence was rather clear that the sole proximate cause of the accident was the negligence of Inez Shinn in driving the De Soto Coupe at a high rate of speed on the wrong side of a three lane highway where it collided with plaintiffs' Nash automobile on the west shoulder of the highway. There was also evidence that Miss Shinn was intoxicated and had been drinking". The accident occurred on January 10, 1951. At about 2 o'clock p. m. on that day, defendant Shinn had signed a conditional sales contract and receipt and had taken delivery of the De Soto from defendants Harris. At 7:30 o'clock p. m. that day, the automobiles collided and plaintiffs were injured and sustained other damage.

It is defendants Harris position on this appeal that they should be relieved of any liability primarily because they claim that "Inez Shinn was not driving the automobile by virtue of permission of appellants at the time of the accident, but as owner thereof".

Section 402 of the Vehicle Code fixes liability of an owner whose automobile is negligently operated by a person using it with the owner's permission. That liability of appellants existed at the time they delivered the De Soto to Miss Shinn and continued up to and including the time of the accident. To be relieved of this liability it was their duty to comply with section 177 of the Vehicle Code by immediately notifying the Motor Vehicle Department of such sale. They admit that the evidence discloses that "appellants had not yet had an opportunity to send an immediate notice of sale to the Department of Motor Vehicles prior to the accident."

The purpose of Vehicle Code section 402 is to protect innocent third parties from the careless use of automobiles and this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence. The foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public. Burgess v. Cahill, 26 Cal.2d 320, 323, 158 P.2d 393, 159 A.L.R. 1304. Ap-

pellants cite no authority which would relieve them of responsibility as owner but suggest that "the case law should be reappraised" and that "by proper reappraisal of the statutes, this Court can and should hold as a matter of law that a delay of three to four hours on any day of the week, if there is no fraud or possibility of fraud, should not subject the dealer to liability".

[1] Sections 402 and 177 of the Vehicle Code have been construed as providing that the conditional vendor of an automobile is liable within the amounts stated in the former section for the operation of such automobile with his consent by his conditional vendee in a negligent manner, where he delivers possession of the car to the vendee and fails to comply with section 177 with reference to giving notice of the transfer prior to the occurrence of the accident. Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 776, 135 P.2d 569; Leplat v. Raley Wiles Auto Sales, 62 Cal.App.2d 628, 145 P.2d 350; Gutknecht v. Johnson, 62 Cal.App.2d 315, 144 P.2d 854; Weinberg v. Whitebone, 87 Cal.App.2d 319, 196 P.2d 963.

[2, 3] Appellants declare themselves aggrieved because the issue of agency was brought before the jury, by plaintiffs' suggestion that defendant Shinn may have been the agent of the other defendants. They concede, however, that there was absolutely no evidence in the case which would directly or by inference support a finding that at the time of the accident the defendant, Inez Shinn, was acting as the agent of appellants and in the course and scope of such an agency. In its instructions the court mentioned that an issue was raised by the plaintiffs' claim that defendant Shinn was an agent of defendants Harris and the latter's denial of that relationship. This instruction was unnecessary. It was requested by defendants Harris who are not in a position to complain of error in an instruction requested by them.

Other instructions fully covered the issues which were raised by the pleadings and were supported by competent evidence. We would not be justified in assuming that the jury made any implied finding, without facts to support it, on the question of agency merely because of the inadvertent mention of it in the instructions. We must assume that if agency was considered by the jury that its determination was in favor of defendants Harris.

In this connection it is suggested that the trial court erred (1) in not granting a motion of defendants Harris to strike from the amended complaint a third cause of action pleading agency, (2) in refusing their request for special verdicts on the issue of agency, and (3) in not granting a mistrial because some mention of agency was included in the argument of plaintiffs' counsel. We find nothing in these rulings which was in any way prejudicial to defendants Harris, since their liability is clearly established within limits fixed by section 402 of the Vehicle Code, and plaintiffs seek nothing in excess thereof.

Turning now to the verdicts, we observe that the jury found as follows:

(1) In favor of plaintiff Dorothy Rosenthal for $4,000.

(2) In favor of plaintiff Loren C. Rosenthal $1,000 general damages, $1,382.81 damages for medical, dental and hospital care and expenses for both plaintiffs, $960.18 damage to car, $228.50 loss of use of car. Judgment in favor of respective plaintiffs was thereupon entered, making a total sum of $7,571.49. On motion for new trial the total combined award was treated as one judgment and was reduced to $7,313.46, a deduction of $258.03, as to defendants Harris only.

The parties are apparently agreed that the trial court concluded that of the award of special damages in the sum of $1,382.81, that $1,069.35, was for Mrs. Rosenthal. This, added to the $4,000 general damages, exceeded the $5,000 allowable under section 402 of the Vehicle Code and the court made a deduction of $69.35 on that item. It then considered the award of $1,188.68 for damage to the car and loss of use, concluded that it was $188.68 over the $1,000 limit for property damage under the section cited and made a further de-

duction of $188.68. It thereupon, as above stated, reduced the judgment by $258.03, as to defendants Harris.

With one exception the awards are fully supported by the evidence. The item of $228.50 for loss of use of car lacks this support and must be excluded. The deduction of $188.68, as to property damage has already been made. A further deduction from the judgment is required in the sum of $39.82. This will remove from the judgment the amount of $228.50, which the jury improperly awarded for loss of use of the car.

[4] Defendants Harris further object that the award exceeded the amount prayed for by plaintiffs. The amended complaint alleged certain medical and similar expenses by giving the amount accrued to date of filing, predicting more to come and asking leave to amend when the total amount was ascertained. This formal order amending to conform to proof was never made. Appellants, however, were in no way misled. The evidence amply supports the awards except as to the item just mentioned and because of which the judgment is to be reduced to the sum of $7,273.64.

We have carefully considered this failure of the trial court to amend the pleadings to conform to proof to determine what effect it has, or properly should have, upon our determination. It is true that plaintiffs failed to make their motion when it could and should have been made. But it is also true that defendants were fully aware of plaintiffs' claims in an amount in excess of the figures set out in the complaint and knew that, if proved, the additional amounts should be included in any judgment for plaintiffs. Defendants heard this testimony being given and other evidence being introduced which was more than the precise figures written in the pleadings. They do not direct our attention to any objection or motion made by them to exclude this evidence because the figures exceeded those on the typewritten pages of the amended complaint.

Where liability is established and plaintiffs have proved their damages it would be a miscarriage of justice to take from them that to which they are entitled when those urging this have not been misled, confused or prejudiced by the inadvertent failure of the trial court to make a proper order directing the amendment.

[5] Our legislature speaking for the people undertook to avoid such injustices in cases tried by the court without a jury by provisions of section 956a of the Code of Civil Procedure. While we do not construe it as applying to cases tried by jury, its spirit is disclosed in the final sentence: "This section shall be liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial." Having this in mind, when we have recourse to Article VI, section 4½ of the Constitution of the State of California, we are reminded of its provisions: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Of the many cases construing and applying that section, we direct attention to those mentioned on pages 719 to 733, inclusive of Masons Constitution of California, Annotated 1946. The language used by our Supreme Court in Etienne v. Kendall, 202 Cal. 251, at page 257, 259 P. 752, 755, appears applicable here: "Under the terms of this section when the attack upon the judgment is based upon an error in the pleadings, it is incumbent upon the appellant to demonstrate before the appellate court that the error complained of has resulted in a miscarriage of justice. But even in such a case the appellate court may not reverse the judgment except upon an examination of the entire cause, including the evidence. Where, therefore, upon an examination of the evidence, the appellate court is satisfied that

the error complained of has not resulted in a miscarriage of justice, but that in fact, it has not affected the substantial rights of the appellant in any particular it would be a distinct violation of this section of the Constitution to reverse the judgment solely upon the ground of the error occurring in the pleadings."

Where defendants, knowing the contents of the pleadings, seeing and hearing the evidence as it went before the jury, realizing that unless a few words and figures were added to the complaint the record would be incomplete, stood mute and permitted the jury and the court, as well as their adversaries, to be misled, they will not now be heard to assert that this has led to any injustice to them. It would be contrary to the spirit of modern and enlightened jurisprudence to reverse a judgment or require a retrial under such circumstances.

For reasons previously stated the judgment is reduced to $7,273.64, and as thus modified it is affirmed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 340

PEOPLE v. DANIELS.

Cr. 4956.

District Court of Appeal, Second District, Division 3, California.

June 5, 1953.

Defendant was convicted of having a machine gun in his possession. The Superior Court of Los Angeles County entered judgment and order denying motion for new trial, and defendant appealed. The District Court of Appeals, Vallée, J., held that knowledge of fact that weapon was a machine gun was not essential element of offense of possession.

Judgment affirmed.

1. Criminal Law ⇐21

Legislature has power to declare an act criminal irrespective of knowledge of doer that facts exist which make act unlawful.

2. Criminal Law ⇐21

Whether knowledge of facts is necessary element in statutory offense is matter of construction to be determined from consideration of subject matter of statute, its language, evil sought to be eradicated, its manifest purpose and design, and consequences of several constructions to which statutes may be susceptible.

3. Weapons ⇐4

Under statute making it a criminal offense to sell, offer for sale, possess or "knowingly" transport a machine gun, quoted word signifies knowledge of existence of fact that firearm transported is a machine gun and is not to be confused with criminal intent or with knowledge that act is violation of law. Gen.Laws, Act 1971, §§ 1, 2; Pen.Code, § 7, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Knowingly".

4. Weapons ⇐4

Under statute providing that any one who sells, offers for sale, possesses, or knowingly transports any firearms of kind known as machine gun is guilty of public offense, knowledge of fact that weapon is machine gun is not an essential element of offense of possession but knowledge of such fact is an essential ingredient only of offense of transporting. Gen.Laws, Act 1971, § 1 et seq.; Pen.Code, § 7, subd. 5.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted by a jury of a violation of the statute commonly known as the Machine Gun Law. He appeals from the judgment and the order denying his motion for a new trial.

The statute provides: "Secton 1. On and after the date upon which this act takes effect every person, firm or corporation, who within the State of California sells, offers for sale, possesses or knowingly transports any firearms of the kind commonly known as a machine gun, except as herein prescribed, is guilty of a public offense * * *." Section 2 defines a machine gun. Stat. 1933, ch. 450, p. 1169; 1 Deering's Gen.Laws, Act 1971.

The information charged that on July 11, 1952, defendant "did wilfully, unlawfully and feloniously have in his possession a certain firearm of a kind commonly known as a machine gun."

The court gave the following instruction to the jury: "743. To constitute the offense charged against the defendant in the information, the possession of the weapon knowingly by him, as charged, is sufficient, and if the defendant knowingly had such possession, his intent or purpose, if any, in respect thereto is immaterial."

The assignment of error is that the court erred in giving an instruction immediately following the one just quoted, which reads: "The word 'knowingly' in the preceding instruction (No. 743) does not necessarily include knowledge of the fact, if it be a fact, that the weapon was a machine gun as heretofore defined. In other words, if you are convinced beyond a reasonable doubt that on or about the date charged in the information the defendant knowingly possessed a weapon, and if you should further find that he did not know that the weapon was a machine gun within the definition heretofore given but if you find that the said weapon was in fact a machine gun within the definition heretofore given, you should find the defendant guilty, notwithstanding the fact that he did not know the weapon to be a machine gun within such definition."

It was established that the firearm was a machine gun. Defendant admitted he had possession of it at the time charged. He testified he did not know anything about guns. He was asked: "Did you know when you got it that it was fully automatic?" An objection by the People to the question was sustained. There was no evidence he knew it was a machine gun or that it was fully automatic. He argues, in the absence of proof that he had knowledge the firearm was a machine gun, that the verdict is unsupported, and that in any event the instruction was erroneous.

[1, 2] It is the universal rule that it is within the power of the Legislature to declare an act criminal, irrespective of the knowledge of the doer that the facts exist which make the act unlawful. People v. McClennegen, 195 Cal. 445, 468, 234 P. 91; 22 C. J. S., Criminal Law, § 30, page 85; 14 Am.Jur. 768, § 16. Whether knowledge of the facts is a necessary element of a statutory offense is a matter of construction to be determined by considering the subject-matter of the statute, its language, the evil sought to be eradicated, its manifest purpose and design, and the consequences of the several constructions to which the statute may be susceptible. Matter of Application of Ahart, 172 Cal. 762, 764, 159 P. 160; People v. McClennegen, 195 Cal. 445, 469, 234 P. 91; United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604, 605; United States v. Greenbaum, 3 Cir., 138 F.2d 437, 152 A.L.R. 751; 22 C. J. S., Criminal Law, § 30, page 85.

[3] *Knowing possession* is not to be confused with criminal intent or with knowledge that an act is a violation of law. The latter signify an evil purpose. Knowing possession or "knowingly" signifies knowledge of the existence of a fact or facts—in this case, knowledge that the firearm was a machine gun. Section 7(5) of the Penal Code says: "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission; * * *." When used in a statute creating a criminal offense the word "knowingly" must be construed to import only knowledge of the facts. It has no reference to knowledge of the law. People v. Burns, 75 Cal. 627, 630, 17 P. 646.

[4] An examination of the terms and history of the statute convinces us that

knowledge of the fact the firearm is a machine gun is not an essential element of the offense of possession. The Machine Gun Law was enacted in 1927. Stat.1927, ch. 552, p. 938. As originally enacted, it made possession, not transporting, a crime. It was titled "An act to prohibit the possession of machine rifles, machine guns and submachine guns * * *." In 1931 the statute was amended to provide that "every person * * * who * * * sells, offers for sale, possesses or knowingly transports" a machine gun is guilty of a public offense. Stat.1931, ch. 1050, p. 2203. An amendment in 1933 did not change this wording. Stat.1933, ch. 450, p. 1169.

The Legislature denounced any possession and denounced only "knowingly" transporting. It was clearly not the intention of the Legislature that knowledge of the fact the weapon was a machine gun should be an essential element of the offense of possession. The statute does not say that a person must knowingly have possession of a machine gun. By its express terms, knowledge of the fact is only made an essential ingredient of the offense of transporting. It requires that transporting be done "knowingly."

It is true, as defendant argues, that the absence of the word "knowingly" is not conclusive of the Legislature's intention. In this connection defendant relies on People v. Cole, 113 Cal.App.2d 253, 248 P.2d 141, a prosecution for the illegal possession of narcotics. In a pungent opinion, Mr. Justice Dooling wrote, 113 Cal.App.2d at page 258, 248 P.2d at page 144: "While a specific intent to violate the law is not an ingredient of the crime of possession of a narcotic, ' "a knowledge that *the facts exist* which bring the act * * * within the provisions of this code" ' is necessary. People v. Gory, 28 Cal.2d 450, 456, 170 P.2d 433, 437. One of the facts of which a defendant must have knowledge is that the article is a narcotic, because that is one of the facts, indeed the essential fact, 'which bring(s) the act within the provisions of this code.' To instruct as the court did in this case that it is not necessary 'that the defendant knew that the object or objects which he possessed were narcotics' is to authorize the conviction of a defendant who possessed marijuana in the honest belief that it was not marijuana. If that is the law then if I am given marijuana cigarettes, in a package of one of the standard brands of cigarettes made of tobacco, and retain it in my possession in the honest and innocent belief that it is a package of that brand of cigarettes I am nonetheless guilty of a felony, or if I cut a weed from the roadside which is in fact marijuana and use it as a part of a floral decoration in my home not knowing its narcotic character I am equally guilty. It is axiomatic that all laws must be reasonably construed and such a construction would so clearly pass the bounds of reason as to be unthinkable." See also Baender v. Barnett, 255 U.S. 224, 41 S.Ct. 271, 65 L.Ed. 597. The statute denouncing the possession of narcotics said that "no person shall possess, transport, * * * a narcotic except upon the written prescription * * *." Health & Saf.Code, § 11500. The word "knowingly" was not used in the statute. The cogent reasoning of the Cole case is inapplicable to the Machine Gun Law. In view of the use of the word "knowingly" as applied to transportation, we think it conclusive that, as applied to the possession of a machine gun, the Legislature intended that the mere fact of possession should constitute the crime.

The language of the Machine Gun Law is plain and unequivocal. It does not provide that a person must "knowingly possess" a machine gun in order that the offense of possession be committed. It does provide that a person must "knowingly transport" a machine gun in order that the offense of transporting be committed. Its phraseology discloses a clear legislative determination that society can best be protected against the evil of possession by a vigorous application of an inflexible rule. No doubt the Legislature felt that possession of a machine gun could hardly be had without knowledge that the object was in fact a machine gun; and that, on the other hand, there may be innocent, unwitting, inadvertent, or unintended acts of transportation.

We hold it was not necessary that the prosecution prove the defendant had knowl-

edge that the weapon in his possession was a machine gun, and that it was not error to give the instruction of which he complains.

Affirmed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. The case involves a particular statute as applied to a particular state of facts, namely, possession of a machine gun by an ex-convict, on parole after a conviction of robbery, who gave an unsatisfactory and uncorroborated account of the circumstances in which he came into possession of the weapon. In a prosecution for that offense it is not necessary for the People to prove that the accused knew the weapon to be a machine gun and an instruction to that effect is proper. Nevertheless I am convinced that complete lack of knowledge of the nature of an article, even a machine gun, possession of which is forbidden, would be a good defense. There are undoubtedly situations in which ignorance would be so complete and irrefutable as to render a conviction of possession a grave injustice. In a clear case of complete lack of knowledge the law should not be applied with such harsh and technical precision as to flout reason and justice, and accomplish a result which no legislature, in defining the crime, could have intended. This is not such a case.



118 Cal.App.2d 336

PEOPLE v. BARNETT.

Cr. 2871.

District Court of Appeal, First District, Division 1, California.

June 5, 1953.

Rehearing Denied June 20, 1953.

Hearing Denied July 2, 1953.

Defendant was convicted for unlawful possession of a preparation of heroin and for unlawful sale of heroin. The Superior Court, City and County of San Francisco, entered judgment of conviction, and defendant appealed. The District Court of Appeal, Wood, J., held that evidence was insufficient to support conviction.

Reversed.

1. Criminal Law ⇐59(3)

Mere presence at the scene of the crime, standing alone, is not sufficient to justify a finding of guilt.

2. Poisons ⇐4, 9

The crime of possession of narcotics requires a physical or constructive possession with actual knowledge of the presence of the narcotic substance, and to show such knowing possession, conduct of parties and admissions or contradictory statements and explanations are frequently sufficient. Health and Safety Code, § 11500.

3. Poisons ⇐9

Evidence was insufficient to support conviction for unlawful sale and possession of heroin. Health and Safety Code, § 11500.

4. Poisons ⇐9

In prosecution for unlawful possession and sale of a preparation of heroin, statement of defendant that he did not know where he had gotten marked bills which inspector of Bureau of Narcotic Enforcement had given to operator who allegedly had bought heroin from defendant, did not amount to an admission or a denial indicating a guilty conscience. Health and Safety Code, § 11500.

A. J. Zirpoli, C. Harold Underwood, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

The defendant has appealed from a judgment entered upon a verdict of guilty of two counts, one for unlawful possession of a preparation of heroin, and one for an unlawful sale of heroin, each in violation of § 11500 of the Health and Safety Code.

He has also appealed from an order denying his motion for a new trial.

He bases his appeal upon asserted insufficiency of the evidence to sustain the verdict on either count and errors of law occurring at the trial in respect to the admission and exclusion of evidence. We will consider, first, the sufficiency of the evidence.

The defendant was apprehended by an inspector of the state Bureau of Narcotic Enforcement.

The inspector gave two marked bills to an operator, not identified by name, who was working under his instruction. The inspector observed this operator when she left him and got into an automobile driven by the defendant. The defendant drove off. The inspector followed for about five minutes, after which they left his view. About one and a half hours later the inspector met the operator at Bush and Mason Streets, San Francisco. The inspector knew nothing of the operator's whereabouts during that interval of time. She handed him a paper which contained heroin. Defendant testified that the first time he saw that paper was when he was in court at the preliminary hearing.

The inspector then drove to Haight and Octavia Streets and stopped near 150 Haight Street where the defendant resided. He observed defendant's car unoccupied and unlocked. He searched it but found no narcotics. Defendant then approached the car. The inspector with defendant's key opened the trunk of the car and searched but found no narcotics.

Then they went to defendant's apartment which the inspector searched but found no narcotics. He was there about an hour and a half. In defendant's wallet the inspector found the $5 and $20 bills which he identified by serial number. The defendant had on his person altogether between $60 and $70 according to the inspector or between $80 and $85 according to the defendant. Defendant said he did not know where he got those particular bills which the inspector identified; that he had been with a Mrs. Murray that afternoon, who owed him $75 and that afternoon paid him $37.50 of it.

The inspector found a package which contained heroin and two spoons of the kind used by narcotic peddlers, in a closet near to but separate from defendant's apartment. The closet door opened onto the same hall or corridor as did the door to defendant's apartment. The inspector opened the lock on the closet door by means of a key on defendant's key chain, the key with which he had opened defendant's apartment. He did not try the lock to see if any key would open it. He did not know how many keys there were to that closet.

Defendant said he never saw that package before. A locksmith testified that the lock on the closet had no tumblers; that any key would open it, or a screwdriver, or a dime. The manager of the apartment house said there were 48 apartments in that building, 7 on defendant's floor; that on each floor there are two closets, one in the front and one in the rear; that she just stored things in these closets; that defendant did not rent the closet adjacent to his apartment; that there was no connection between the apartment and the closet; that she did not know how many keys in her place would open that closet door; and that no one has permission to use the closet. She identified the key in defendant's possession as the key she gave him when he rented the apartment.

The operator was not produced at the trial and did not testify.

This is a very tenuous chain of circumstances indeed to support an implied finding that defendant sold the heroin to the operator or that he had possession of the heroin found in the closet.

The case bears a marked resemblance to certain features of People v. Foster, 115 Cal.App.2d 866, 253 P.2d 50,[1] opinion by Justice Dooling.

It appeared in the Foster case that about 1:00 a. m. police officers in a patrol car signalled the three defendants to stop defendants' car. As one of the officers was alighting from the patrol car, he saw a small package come from the right front window of defendants' car and fall to the

1. Petition for a hearing by the Supreme Court was denied March 9, 1953.

street. This proved to be a narcotic user's outfit. Upon questioning, all three defendants denied any knowledge of the package or its contents. "All three defendants were riding in the front seat; Dabney driving the car, Foster in the middle and Phillips on the right side. The officers saw all three defendants moving about in the car but did not see any of the three make any throwing motion. All three both before trial and on the witness stand denied any knowledge of the packet containing heroin and each denied that he had thrown it from the car or seen anything thrown from the car by either of the others.

"In this state of the record it is perfectly clear that one, if not more, of the defendants was guilty of the possession of the heroin, the problem presented by the record being whether the state proved facts sufficient to justify the jury's finding that either Foster or Phillips was the guilty person or, as it actually found, that both were guilty.

[1, 2] "Mere presence at the scene of the crime standing alone is not sufficient to justify a finding of guilt. People v. Le Grant, 76 Cal.App.2d 148, 153, 172 P.2d 554. The crime of possession of narcotics requires a physical or constructive possession with actual knowledge of the presence of the narcotic substance. People v. Gory, 28 Cal.2d 450, 170 P.2d 433.

"To show such knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient. People v. Gory, supra, 28 Cal.2d [450] at page 456, 170 P.2d 433; People v. Bigelow, 104 Cal.App.2d 380, 231 P.2d 881; People v. Rumley, 100 Cal.App.2d 6, 222 P.2d 913; People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480; People v. Sinclair, 129 Cal.App. 320, 19 P.2d 23.

"Against Phillips the People argue that sitting where he was he must have seen the object thrown from the window if he did not throw it himself and therefore his denial of all knowledge of it is sufficiently inculpatory. We cannot agree that any person should be convicted of a crime on such a tenuous theory. The defendants were all moving around in the seat, their attention had been attracted to the police car behind them and a tightly wrapped eyedropper is a very small object. To infer guilty knowledge in Phillips from the fact, standing alone, that he testified that he did not see the package thrown from the car would be to permit a conviction on the wildest sort of surmise and conjecture." 115 Cal.App.2d 866, 253 P.2d at page 51. The judgment and order denying a new trial were reversed and remanded as to Phillips.

[3, 4] Similarly in our case the evidence is insufficient to prove the defendant sold the heroin to the operator or that he had possession or knowledge of the presence of heroin in the closet. The mere fact that the two marked bills, aggregating $25 in amount, were found in his wallet does not prove the sale in question. Nor did his statement that he did not know where he got those bills amount to an admission or a denial indicating a guilty conscience. It is not inherently improbable that a person having bills aggregating $60 to $85 in his possession did not know where, when, or from whom he received two of them. Likewise, his statement that he knew nothing of the heroin in the closet is not inherently improbable in view of the fact that the closet was reserved for the use of the manager of the building and was as accessible to other occupants as to defendant because the lock on the closet door could be opened by means of any key or by a screwdriver, dime, or similar instrument. As to both counts, the judgment and the order appealed from must be reversed.

In view of this holding it is unnecessary to consider the other grounds upon which defendant bases his appeal.

The judgment and the order appealed from are reversed.

PETERS, P. J., and BRAY, J., concur.

118 Cal.App.2d 449

LINK v. FINNEY.

Civ. 19404.

District Court of Appeal, Second District, Division 1, California.

June 12, 1953.

Rehearing Denied July 1, 1953.

Hearing Denied Aug. 6, 1953.

In action by plaintiff to recover for services allegedly rendered by him to defendant, the Superior Court, Los Angeles County, Harold C. Shepherd, J. pro tem., granted judgment for defendant, and plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that defendant's liability under contract was contingent upon an as yet unfulfilled condition.

Affirmed.

Master and Servant ⇐80(10)

In action by plaintiff to recover for services allegedly rendered by him to defendant, evidence sustained finding that defendant's liability under contract was contingent upon an as yet unfulfilled condition.

Hy Schwartz, Beverly Hills, for appellant.

Fendler, Weber & Lerner, Beverly Hills, Robert W. Lerner, Beverly Hills, of counsel, for respondent.

DORAN, Justice.

As stated in appellant's brief,

"This is an appeal from a judgment in favor of defendant and against plaintiff.

"The action was by plaintiff to recover for services rendered by him to the defendant, Edward F. Finney. The defendant, Edward F. Finney, denied generally and specifically that he employed the plaintiff and that he was indebted to the plaintiff in any sum. By way of affirmative defense, the defendant alleged that the plaintiff performed the services for Zenith Pictures, Inc., a corporation, and that in all transactions defendant was acting as a duly authorized agent and on behalf of Zenith Pictures, Inc."

A motion for a new trial on the usual grounds and also on the grounds of newly discovered evidence was denied.

It is contended on appeal that, "the findings are not supported by the evidence and are contrary to law."

It is argued by appellant that the contract of employment was between plaintiff and defendant and that said contract "was an unconditional promise by the defendant Finney to pay plaintiff for his services".

It is argued by respondent that the contract in question was between plaintiff and "Zenith Pictures" and that defendant was acting only in the capacity of agent.

The court found, as a matter of fact that the parties entered into an oral agreement "whereby plaintiff promised and agreed to perform services for defendant as a film editor on a motion picture entitled 'The Prairie'. In consideration of the performance of said services said defendant promised and agreed to pay plaintiff the reasonable value of his services, said payment, however, to be paid when there had been recouped from the distribution of said motion picture a sum sufficient to pay all monies due, owing and unpaid to the Bank of America National Trust and Savings Association by reason of loans made by said Bank for the production of said motion picture, as of November 10, 1947, and out of first monies received by said defendant from the distribution of said motion picture thereafter." That plaintiff performed such services but, "That up to the date of trial of this cause there had not recouped from the distribution of said motion picture 'The Prairie', a sum sufficient to pay all sums due, owing and unpaid to Bank of America National Trust and Savings Association by reason of loans made by said Bank for the production of said motion picture, as of Nov. 10, 1947."

Although the evidence is conflicting there is substantial evidence to support the findings.

In the circumstances presented by the record there was no error in the court's order denying the motion for a new trial. Appellant's contentions, as a matter of law, lack support in the record. There being no prejudicial errors, the judgment is affirmed.

WHITE, P. J., and ROBERT H. SCOTT, J., pro tem., concur.

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HEALY v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 22605.

Supreme Court of California, in Bank.

May 28, 1953.

Petition for review of an order of the Industrial Accident Commission awarding petitioner workmen's compensation benefits for injuries sustained in course of petitioner's employment as a police officer of city. The Supreme Court, Gibson, C. J., held that where city retired police officer for disability and commenced to pay monthly pension, and officer recovered judgment against driver of automobile involved in collision out of which officer's injuries arose, city was entitled to credit for full amount officer received under judgment, without deduction for fee which officer paid his attorney in action for such judgment, where judgment was rendered prior to amendment of Labor Code providing for deduction of a reasonable attorney's fee.

Award affirmed in part, and annulled as to one issue, and proceeding remanded to Commission.

1. Workmen's Compensation ⇐1874, 1887

A petition filed within 30 days for review by District Court of Appeal of order of Industrial Accident Commission awarding petitioner workmen's compensation benefits for injuries sustained in course of employment as police officer of city was sufficient to confer jurisdiction and court had power to permit petition to be amended after 30 days so as to set forth grounds relied upon for review. Labor Code, § 5950.

2. Workmen's Compensation ⇐1108

Where city retired police officer for disability and commenced to pay monthly pension, and officer recovered judgment against driver of automobile involved in collision out of which officer's injuries arose, and Industrial Commission made award for permanent disability, city was entitled to credit for full amount officer received under judgment, without deduction for fee which officer paid his attorney in action for such judgment, where judgment was rendered prior to amendment of Labor Code providing for deduction of a reasonable attorney's fee. Labor Code, §§ 3856, 3858, 3861.

3. Workmen's Compensation ⇐976

An injured police officer of city who was granted an award for permanent disability by Industrial Accident Commission was not entitled to reimbursement for medical care he procured for himself without authorization from city where officer was hospitalized by city immediately after accident and was furnished with medical care and surgical treatment, and for several years thereafter city referred officer to thirteen different specialists and made staff and facilities of hospital available to officer.

4. Workmen's Compensation ⇐222

City is an "employer" of city police officer within meaning of workmen's compensation act. Labor Code, § 3300.

See publication Words and Phrases, for other judicial constructions and definitions of "Employer".

5. Workmen's Compensation ⇐45

Where provisions of Labor Code and provisions of a city charter conflict, the Labor Code prevails.

6. Statutes ⇐223.4

In matters of state-wide concern the general law is paramount.

7. Workmen's Compensation ⇐1913

Where petitioner sought review of order awarding him workmen's compensa-

tion benefits for injuries sustained as police officer of city, and petitioner complained that credit was improperly allowed city, and validity of credit depended upon whether petitioner contributed to pension for which credit was allowed and whether as result of credit petitioner was required to pay part of costs of his compensation in violation of statute, and there was no evidence or findings on matters determinative of such question, court would not attempt to pass upon claim of city that petitioner did not contribute to pension he received.

Riedman & Silverberg and Milton H. Silverberg, Long Beach, for petitioner.

T. Groezinger, Edmund J. Thomas, Jr., and Edward A. McDonald, San Francisco, Ray L. Chesebro, City Atty., Bourke Jones and John J. Tully, Jr., Assistant City Attys., Edwin F. Shinn and Weldon L. Weber, Deputy City Attys., Los Angeles, for respondents.

GIBSON, Chief Justice.

Petitioner, Edward Healy, seeks review of an order of the Industrial Accident Commission awarding him workmen's compensation benefits for injuries sustained in the course of his employment as a police officer of the city of Los Angeles. He complains that credits were improperly allowed the city and that he should have been reimbursed for self-obtained medical care.

Healy was seriously injured when the automobile which he was operating collided with a car driven by Albert Becker. The city, which is permissibly uninsured, Labor Code, § 3700, furnished Healy with hospitalization and medical treatment, and he obtained other medical care on his own initiative. He was paid full salary for two years after the accident. He was then retired for disability, and the city commenced to pay him a pension of $283.50 a month. Healy recovered a judgment against Becker under which he received $2,750, and out of this amount he paid $750 to his attorney. On application to the Industrial Accident Commission he was awarded, insofar as relevant here, $7,200 for permanent disability and $18.46 a week for life. The city was allowed credit against this award for the monthly pension payments of $283.50 and for the sum of $2,750 which Healy received under the Becker judgment.

[1] Healy filed a petition for review in the District Court of Appeal which alleged that the award was erroneous and requested leave to file an amendment setting forth the grounds relied upon for review. Leave was granted, and the amendment was filed more than thirty days after the award was made. Thereafter the District Court of Appeal denied the petition, and a hearing was granted by this court. The petition, which was filed within thirty days as required by section 5950 of the Labor Code, was sufficient to confer jurisdiction, and the court had power to permit amendment. Cf. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358.

[2] The commission properly determined that the employer was entitled to credit for the full amount which Healy received under the Becker judgment, without deduction for the fee which Healy paid his attorney in that suit. See Lab.Code, §§ 3856, 3858, 3861; cf. Dodds v. Stellar, 30 Cal.2d 496, 502–506, 183 P.2d 658. The judgment was rendered prior to 1949 when the Labor Code sections just cited were amended to provide for the deduction of a reasonable attorney's fee, and the amendments may not be construed retroactively so as to entitle Healy to credit for the cost of legal services. See Record v. Indemnity Ins. Co., 103 Cal.App.2d 434, 438–444, 229 P.2d 851.

[3] There is no merit in Healy's claim that the commission erred in failing to allow him reimbursement for medical care he procured for himself without authorization from the city. Immediately after the happening of the accident petitioner was hospitalized by the city and furnished with medical and surgical treatment. During a period of several years thereafter the city referred him to thirteen different specialists and made the staff and facilities of the hospital available to him. In addition, petitioner consulted four other physicians

without authorization from the city and the commission refused to allow reimbursement for the cost of their services. An employee may make his own selection of a physician at the expense of the employer only where the latter has neglected or refused to furnish the necessary medical care. Leadbettor v. Industrial Acc. Comm., 179 Cal. 468, 470, 177 P. 449; Myers v. Industrial Acc. Comm., 191 Cal. 673, 678, 218 P. 11; see Union Iron Works v. Industrial Acc. Comm., 190 Cal. 33, 40 et seq., 210 P. 410. The evidence establishes that Healy was never refused necessary medical treatment.

The principal question raised in this proceeding is whether it was proper for the commission to allow the city credit for the pension payments made to Healy. Section 4909 of the Labor Code [1] provides that any payment, allowance or compensation received by an injured employee during the period of his incapacity and not then due and payable under the workmen's compensation act may be taken into account by the commission in fixing the amount of compensation to be paid. Section 3751,[2] however, prohibits an employer from directly or indirectly taking any contribution from the earnings of an employee to cover any part of the cost of compensation, and Healy claims he was required to contribute to the fund out of which his pension was paid and that as a result of the allowance of the credit he was in effect forced to pay a part of the cost of his compensation.

[4–6] The city is an employer within the meaning of the workmen's compensation act, Lab.Code, § 3300, and the commission, before allowing the city credit for pension payments, should have determined whether Healy would thereby be compelled to contribute to the cost of his compensation. Lab.Code, §§ 5300, 5301. The commission declined to make any inquiry into this matter on the theory that it was precluded from doing so by section 182½ of the city charter, which provides that if an employee who is entitled to a pension because of injury is granted workmen's compensation under general law, then his pension shall be construed as such compensation and shall be applied in payment of the award. If, however, there is any conflict between charter provisions and the compensation sections of the Labor Code, the latter must prevail. Under power expressly granted to it by the Constitution, the Legislature has established a complete system of workmen's compensation which obviously is a subject of state-wide concern, and it is well settled that in such matters the general law is paramount. See Eastlick v. City of Los Angeles, 29 Cal.2d 661, 665–666, 668, 177 P.2d 558, 170 A.L.R. 225. Accordingly, the validity of the credit given the city depends upon whether Healy contributed to the pension for which the credit was allowed and whether as a result of the credit he was required, directly or indirectly, to pay part of the cost of his compensation in violation of section 3751.

[7] The city claims that Healy did not in fact contribute to the pension fund and that, in any event, the pension he received was actually paid solely out of tax money. The record, however, does not disclose the practice followed by the city in operating

1. Labor Code section 4909 provides: "Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, or by his dependents in the event of his death, which by the terms of this division was not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be taken into account by the commission in fixing the amount of the compensation to be paid. The acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer."

2. Labor Code section 3751 provides: "No employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this section is a misdemeanor."

the pension system, and factual questions may be involved with respect to the making and allocation of employees' contributions and the manner in which the pension fund was administered. In the absence of evidence and findings on these matters, we should not attempt to pass upon the city's claim that Healy did not contribute to the pension which he received.

The award is affirmed except as to the portion allowing the city credit for disability pension payments, and as to that issue the award is annulled and the proceeding is remanded to the commission.

SHENK, CARTER, and SCHAUER, JJ., concur.



41 Cal.2d 145

LYONS v. HOOVER.

No. Sac. 6369.

Supreme Court of California, In Bank.

June 12, 1953.

Action by widow of a former member of fire department who had been retired on a disability pension for writ of mandate compelling city controller to draw warrant to cover sums which city retirement board found had been erroneously withdrawn from monthly pension which plaintiff was granted after death of plaintiff's husband. The Superior Court, Sacramento County, entered a judgment which denied the petition and plaintiff appealed. The Supreme Court, Gibson, C. J., held that under city charter the City of Sacramento could not deduct from pension granted plaintiff the amount of workmen's compensation payable to plaintiff's minor children, and that amount which could be deducted from plaintiff's pension was limited to plaintiff's share of compensation award.

Judgment reversed and cause remanded with instructions.

Prior opinion, see 250 P.2d 279.

1. Municipal Corporations ⇐220(9)

City council of city of Sacramento, under city charter, may fix manner in which pension allowances may be reduced by amount of compensation benefits payable on account of death of a city employee, but while city council may control activities of retirement board by general ordinances it is function of board to act in individual cases. St.1941, p. 315, § 173(j); St.1935, p. 2512, § 168.

2. Municipal Corporations ⇐200(7)

Action of city council of city of Sacramento in adopting a resolution that pension granted widow of former deceased member of city fire department be reduced a specified sum monthly until amount withheld should equal total award made to widow under Workmen's Compensation Law on account of disability and death of her husband was not binding on retirement board under city charter. St.1941, p. 315, § 173(j); St.1935, p. 2512, § 168.

3. Municipal Corporations ⇐220(9)

Retirement board of city of Sacramento has power under city charter to fix and modify pension allowances granted retired city employees and their widows and board may correct any error board might have made in original order. St.1941, p. 315, § 173(j); St.1935, p. 2512, § 168.

4. Municipal Corporations ⇐220(9)

If widow of deceased former employee of city of Sacramento receives all of a workmen's compensation award for death and disability of her former husband, portion of widow's pension allowance provided by city's contribution can be reduced until sums withheld equal total amount of compensation award, under provision of city charter that portions of any pension allowance payable because of death or retirement of any city employee which is provided by contributions of city shall be reduced by amount of benefits payable to or on account of such person under Workmen's Compensation Law. St.1941, p. 315, § 173(j).

5. Municipal Corporations ⇐220(9)

Charter of city of Sacramento would be liberally construed in order to carry out beneficial purposes of pension provisions of charter.

6. Municipal Corporations ⇐220(9)

Under provision of charter of city of Sacramento that that portion of any pension allowance payable because of death or retirement of any city employee which is provided by contributions of city shall be reduced by amount of benefits payable to or on account of such person under Workmen's Compensation Law, where compensation award which was granted to widow of deceased city employee who was retired on disability pension before his death was divisible equally among widow and her three minor children, city could not deduct from pension granted widow the amount of compensation payable to widow's minor children, and could only deduct widow's share of compensation award. St.1941, p. 315, § 173(j); Labor Code, § 4703.

James H. Phillips, Archibald D. McDougall and Richard J. Lawrence, Sacramento, for appellant.

Anthony J. Kennedy and Everett M. Glenn, Sacramento, for respondent.

GIBSON, Chief Justice.

Plaintiff, the widow of a former employee of the city of Sacramento, sought a writ of mandate to compel Hoover, the city controller, to draw warrants to cover sums which the retirement board of the city found had been erroneously withheld from her monthly pension. She has appealed from a judgment denying her petition.

Plaintiff's husband had been a member of the fire department and was retired on a disability pension, and after his death she was granted a widow's pension of $75 per month. The Industrial Accident Commission awarded plaintiff and her three minor children $5,910.71 as a disability and death benefit under the workmen's compensation law. The city contributes to the retirement system, and the charter provides that compensation payments shall be a deductible credit against that part of the pension allowance which is provided by contributions of the city. The city council adopted a resolution which ordered that plaintiff's pension be reduced by the sum of $71.31 per month until the amount withheld should equal the total of the compensation award. This deduction represented the portion of plaintiff's pension which was furnished by the city's contributions to the retirement system. On June 30, 1943, the retirement board reduced plaintiff's monthly pension in accordance with the resolution of the city council.

Some time thereafter plaintiff requested the retirement board to recompute her pension allowance, pointing out that section 4703 of the Labor Code provides that the compensation award should be divided equally among her three minor children and herself, and that only one-fourth of the award belonged to her. She claimed that, for this reason, only her share of the award should be deducted from her pension allowance. The board concluded that plaintiff's position was correct, and in February 1948 it ordered that she be given a refund of $2,481.87, the amount withheld in excess of one-fourth of the award, and directed that thereafter she be paid a pension allowance of $75 a month without further deductions.

The board directed the controller to draw warrants in accordance with its conclusion, and he refused upon the grounds that the determination of the board was in conflict with the resolution of the city council authorizing deductions from plaintiff's pension payments until the full amount of the compensation award was withheld, that it was contrary to the action taken by the board on June 30, 1943, and that it was in violation of the city charter.

[1–3] The city council is authorized to fix the manner in which pension allowances may be reduced by the amount of compensation benefits payable on account of the death of an employee. Sacramento City Charter, § 173(j), Stats.1941, pp. 310, 315. The management of the pension system, however, is vested in the retirement board, and the charter provides that the board shall be the sole authority and judge, under such general ordinances as may be adopted by the city council, to determine when members may receive and may continue to receive benefits of any sort under the retirement system. Sacramento City Charter, § 168, Stats.1935, p. 2512. Accordingly,

while the city council may control the board's activities by general ordinances, it is the function of the board to act in individual cases. It follows that the action of the council, which purported to determine the total amount of deductions which should be made from plaintiff's pension, was not binding on the retirement board. The board is also vested with the power to revise its determination with respect to the total deductions to be made from plaintiff's pension. It is authorized to fix and modify allowances for service and disability benefits, Sacramento Ordinance 644, § 7(d), and since it has continuing jurisdiction over pension allowances, it had the right to correct any error which it may have made in its original order.

We must look to the provisions of the charter in order to determine whether the board properly concluded that the deductions from plaintiff's pension should be limited to an amount equal to her share of the compensation award. City employees are members of the retirement system, and subsection (j) of section 173 of the charter provides: "That portion of any allowance payable because of the death or retirement of any such employee which is provided by contributions of the City shall be reduced, in the manner fixed by the City Council, by the amount of any benefits payable to or on account of such person, under the Workmen's Compensation, Insurance and Safety Law of the State of California. It is the express intent that payments under said Workmen's Compensation, Insurance and Safety Law shall be a deductible credit against any allowance under the Retirement System which is provided by contributions of the City payable to or on account of the death of any such person; that double payments, in whole or in part, at the expense of the taxpayers, shall not be permitted."

[4] It is clear that if a widow receives all of a compensation award, the portion of her pension allowances provided by the city's contributions can be reduced until the sums withheld equal the total amount of the award.[1] Where, however, a widow receives only part of the award, the critical question is whether the city may take from her pension the amount of compensation payments made to third persons. The charter provides that a pension may be reduced by the amount of any compensation benefits payable on account of the death of an employee and declares that it is the intent that payments under the workmen's compensation law shall be a deductible credit against any allowance under the retirement system. This provision might be construed as contemplating a deduction from a widow's pension of the total amount of an award made to her and third persons, but it also may reasonably be construed as authorizing a deduction from her pension of only such compensation payments as she is entitled to receive. The further statement that double payments shall not be permitted may likewise be reasonably construed as prohibiting duplicate payment of a pension allowance and compensation benefits to the same person, but not as requiring deduction from one person's pension of compensation benefits awarded to others.

[5, 6] The charter must, of course, be liberally construed in order to carry out the beneficial purposes of the pension provisions. See McKeag v. Board of Pension Com'rs, 21 Cal.2d 386, 390, 132 P.2d 198. When the charter is so interpreted, it follows that the retirement board was correct in concluding that the amount which could properly be deducted from plaintiff's pension was limited to her share of the compensation award.

The judgment is reversed, and the cause is remanded to the trial court with instructions to enter judgment in accordance with the views expressed herein.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

1. Inasmuch as the deductions are to be made from the portion of the pension allowance which is provided by contributions of the city, there is no claim that such deductions could result in charging the employee with part of the cost of workmen's compensation in violation of section 3751 of the Labor Code. See Healy v. Industrial Acc. Comm., 41 Cal.2d 118, 258 P.2d 1.

118 Cal.App.2d 541

ALPERN et al. v. MAYFAIR MARKETS.

Civ. 19460.

District Court of Appeal, Second District, Division 3, California.

June 17, 1953.

Action for declaratory relief by lessor's assignees to determine whether lessee had exercised within reasonable time option to terminate lease in case of injury making premises unfit for occupancy. The Superior Court, Los Angeles County, entered judgment for plaintiffs, and lessee appealed. The District Court of Appeal, Appellate Division, Vallée, J., held, inter alia, that since parties entered into extended negotiations concerning rebuilding and plaintiffs knew that defendant was reserving decision as to whether to exercise option until pending outcome of negotiations, exercise of option within two months of destructive fire was within a reasonable time, in view of fact that plaintiffs were not injured by such delay.

Reversed with directions.

1. Landlord and Tenant ⇐101

Where lease gave lessee option to terminate after any event which caused building to become unfit for occupancy, right to exercise option accrued when lessee was notified building had been destroyed by fire.

2. Contracts ⇐176(10), 212(2)

Where option is silent as to time for exercise, optionee must exercise it within reasonable time, and question of what constitutes reasonable time is ordinarily one of fact not of law, unless facts are not disputed.

3. Contracts ⇐212(1)

Facts to be considered in determining whether option was exercised within reasonable time includes, among others conduct of parties, delay to act, acquiescence in delay, whether delay is for unfair purposes, construction which parties themselves placed upon their contract, and whether optionee acts within such time as will work no injury to optionor.

4. Contracts ⇐316(1)

The party against whom an option is to be exercised may waive compliance with provision designed for his benefit. Civ. Code, § 3268.

5. Contracts ⇐316(1)

Proof of express language is not necessary to show waiver by optionor of compliance with provisions designed for his benefit, but it may be shown by circumstances or course of declarations, acts or conducts. Civ.Code, § 3268.

6. Landlord and Tenant ⇐101

Where lease gave lessee right to terminate after any event causing premises to be unfit for occupancy and lessor's assignees on day of destructive fire requested lessee to make election to remain as tenant and immediately thereafter parties entered into numerous and extensive negotiations looking to rebuilding of destroyed building, and assignees knew lessee was withholding decision on whether to terminate lease until parties either agreed or disagreed as to proposed changes in construction plan and assignees were not injured by lessee's two-month delay in exercising option, assignees waived their right to claim option was not exercised within reasonable time. Civ. Code § 3268.

7. Estoppel ⇐90(1)

Acquiescence in error takes away right of objecting to it. Civ.Code, § 3516.

8. Landlord and Tenant ⇐101

Where lease provided that in event of injury to demised building making building unfit for occupancy, lease should, at option of lessee, terminate as of date of such injury, and lessee should immediately surrender and yield up the premises, and parties entered into extended negotiations concerning rebuilding and lessor's assignees knew that lessee was reserving decision as to whether to exercise option pending outcome of negotiations, exercise of option to terminate within two months of destructive fire was within a reasonable time, in view of fact that assignees were not injured by such delay.

Mitchell, Johnson & Bates, Los Angeles, for appellant.

Walter E. Egerman and Robert Silver, Beverly Hills, for respondents.

VALLÉE, Justice.

Plaintiffs brought this action for declaratory relief to determine whether a lease entered into by plaintiffs' assignor as lessor, with defendant as lessee, is subsisting or had been terminated. The answer hinges on whether defendant-lessee exercised an option to terminate the lease within a reasonable time.

The lease was made June 28, 1948, for a term of 25 years. The demised premises consisted of a market building and a parking lot. The lease contained this provision:

> "If, during the said term, the premises are destroyed by fire, or other action of the elements, or are partially so destroyed so as to cause them to be wholly unfit for occupancy, or if they are so badly injured that they cannot be repaired with reasonable diligence within 180 days of such destruction or injury, then this lease shall, at the option of Lessee, terminate as of the date of such destruction or injury, and said Lessee shall immediately surrender and yield up said premises and all interest therein to the Lessor, in which event the Lessee shall not be liable for any further payments of rental on account of this lease; and the Lessor may, in that event, re-enter and repossess said premises discharged from this lease, and may remove all persons therefrom."

On July 6, 1951, the building was destroyed by fire to such an extent as to make it unusable for any purpose.

The court found: The premises could have been completely restored to the condition they were in immediately before the fire within 180 days; the lease was not terminated by the destruction of the premises; defendant had the right and option to terminate the lease within a reasonable time after receiving notice of the destruction of the premises by fire; on July 6, 1951, defendant had actual notice of that fact and then knew it had the option to terminate the lease because of such destruction; two weeks was a reasonable time for the exercise of the option; defendant did not exercise the option within a reasonable time, or at all, except that on August 29, 1951, it did attempt to assert its right to then exercise the option; plaintiffs did not acquiesce in said attempted termination of the lease; plaintiffs have not accepted the surrender of the premises; plaintiffs are obligated to restore the premises to the condition they were in before the destruction by fire, and 180 days is a reasonable time within which to perform said obligation.

The judgment decreed that the lease is valid and subsisting and that plaintiffs are obligated to restore the building within 180 days after the judgment shall become final. Plaintiffs were awarded $1,250 attorneys' fees. Defendant appeals.

Defendant's contentions are: 1) The determination of the question whether defendant exercised its option to terminate the lease within a reasonable time is solely a question of law. 2) Defendant validly exercised its option to terminate the lease within a reasonable time. 3) Plaintiffs are not entitled to an award of attorneys' fees.

The facts, except as to the reasonable value of the attorneys' services, were stipulated.

On July 6, 1951, the day of the fire, plaintiffs, by letter, informed defendant of the fire and requested it "to make an election to remain as tenants" since they preferred to have it remain "rather than cancel"; that they elected to rebuild; and requested defendant to send them a certified copy of a resolution of its directors showing their decision in the matter. Thereafter plaintiffs and defendant had numerous and extensive verbal conferences and discussed at length the best manner and method of rebuilding the market building. At the insistence of defendant and because of its desire to make certain changes in the floor plan of the building to be reconstructed, defendant, by letter dated August 6, 1951, extended the time for rebuilding an additional 60 days. The letter in relevant part reads:

> "Under paragraph X of the lease, you are permitted 180 days to repair the premises.
>
> "The undersigned desires to make certain changes and submit plans for

certain changes, such as new fixture outlay, etc.

"Therefore, in consideration of the right of the undersigned to make said certain changes, subject to your approval, and conditioned upon our right to make such changes, the undersigned extends the 180 day time by a further additional 60 day period and the undersigned will very shortly submit a new fixture layout plan and other plans for changes to you."

"Almost immediately thereafter" defendant submitted a tentative floor plan "for fixture layout" to plaintiffs and informed them they (plaintiffs) would have to pay all additional costs for the changes required by defendant. Plaintiffs told defendant they would not pay the additional amount, which was estimated to be $50,000. Plaintiffs then offered to reconstruct the building in exact conformity with the original plans and specifications.

On August 24, 1951, defendant sent this letter to plaintiffs' attorney:

"Reference is made to your letter of July 6, 1951, wherein you request, on behalf of your clients Mr. Stanley Krell and Mr. Albert Alpern, that we make an election to remain as tenants under the lease covering subject premises.

"As you know, we have withheld making such an election and withheld exercising our option to terminate the lease, pending negotiations with your clients with reference to rebuilding the market with certain changes which we deem necessary for efficient and profitable operation. Our experience with the old building indicated the changes we desire are so important to the proper operation of the market that we prefer not to continue under the lease unless the changes are made.

"We now understand it is the intention of your clients to rebuild the market in accordance with the old plans and specifications. It is therefore necessary to advise you that if the market is to be rebuilt without the changes we desire we shall exercise our option to terminate the lease as provided in Paragraph X thereof.

"In order that we may make our final determination to remain under the lease or to terminate, we will need a clear statement from you or your clients as to their decision in the matter.

"If there are any questions, or additional information is desired, do not hesitate to call."

It was stipulated that the facts stated in the letter are true.

On August 27, 1951, plaintiffs' attorney sent this letter to defendant:

"Receipt is acknowledged of your letter of August 24, 1951, purportedly in answer to ours of July 6, 1951.

"Please be advised that my clients, Mr. Stanley Krell and Mr. Albert Alpern, plan to rebuild the building occupied by your company in Bellflower, and owned by my clients, in the same condition it was in prior to the fire.

"I am advised by my clients that the changes proposed by you entail additional outlays of considerable sums of monies which my clients are not willing to expend, without equal savings being effected with your permission and cooperation.

"It is quite possible by a simple matter of give and take that a meeting of the minds can be accomplished.

"Mr. Stanley Krell and Mr. Albert Alpern can definitely rebuild the building within six months from September 6, 1951, which is within the time as extended by your mutual consent and agreement.

"In order to set the records straight, please note that as long as my clients elect to rebuild the building, you have no option to terminate the lease whatsoever."

On August 29, 1951, defendant replied to the letter of August 27th, stating it took exception to plaintiffs' interpretation of the lease and asserting it had an option to terminate. The letter concluded:

"Although it is hoped we may reach a satisfactory solution which is fair

both to ourselves and your clients, it is now necessary to advise you that we do hereby exercise our option to terminate the lease dated June 28, 1948 between Gerama Investment Company, as Lessor, and Mayfair Markets, as Lessee, covering the premises, including surrounding parking area, known as 17602 Bellflower Boulevard, Bellflower, California. This termination is pursuant to paragraph X of said lease and is effective July 6, 1951, in accordance with the provisions of said paragraph X."

On September 11, 1951, a conference was had between plaintiffs and defendant, following which plaintiffs' attorney wrote defendant:

"This will confirm our conference today in your office at which were present yourself and your associates, Mr. J. E. Garrett and Mr. Allen Tingey, together with my friend, Mr. Robert Silver and myself.

"At this meeting it was generally understood that we would attempt for the next 30 day period to try to come to some amicable agreement concerning the rebuilding of the market at Bellflower.

"This letter will also restate the position of myself and my clients which was made plain to you at the conference today, that we consider Mayfair Markets legally bound under the lease and that you have breached your contract by wrongfully attempting to cancel the lease.

"Therefore, in the next 30 day period if we can come to some amicable conclusion so that your cancellation of this lease could be withdrawn and the market building built, that would be the desire of my clients and myself.

"In order that no rights of any party are waived, may I suggest that you write me a letter similar to the one you wrote on August 6, 1951, and I attach a rough draft of such proposed letter which you may follow or change in accordance with our verbal conversation of today."

The parties stipulated that the oral agreement referred to was not proved.

On September 17, 1951, defendant wrote plaintiffs stating that "in view of our previous termination of the lease there is no basis for an extension of any nature and that any future discussions must be in contemplation of a new lease."

It was stipulated that the building could have been rebuilt within 180 days from its destruction. Plaintiffs have not acquiesced in or accepted the surrender or cancellation of the lease.

[1–5] The right to exercise the option accrued on July 6, 1951, when defendant was notified the building had been destroyed. Singh v. Cross, 60 Cal.App. 309, 315, 212 P. 946; Pacific Warehouse Co. v. McKenzie-Hunt Paper Co., 80 Wash. 489, 141 P. 1147, Ann.Cas.1916 B. 303, 305. When an option agreement is silent as to the time for exercise, the optionee must exercise his option within a reasonable time. Lohn v. Fletcher Oil Co., Inc., 38 Cal.App. 2d 26, 31, 100 P.2d 505; Singh v. Cross, 60 Cal.App. 309, 315, 212 P. 946. The question of what constitutes a reasonable time is ordinarily one of fact, to be determined from all the circumstances of the particular case. Where the facts are not disputed, the question is one of law. C. O. Bashaw Co. v. A. U. Pinkham Co., 77 Cal.App. 591, 594, 246 P. 1064. The facts to be considered in determining the question include, among others, the conduct of the parties, delay to act, acquiescence in delay, whether the delay is for unfair purposes, the construction which the parties themselves placed upon their contract, and whether the optionee acts within such time as will work no injury to the other party. Lyon v. Goss, 19 Cal.2d 659, 673, 123 P.2d 11; Kutner-Goldstein Co. v. Workman, 112 Cal.App. 132, 135, 296 P. 313; Colvis Fruit Co. v. California Wine Ass'n, 40 Cal.App. 623, 181 P. 229. The party against whom an option is to be exercised may waive compliance with provisions designed for his benefit. Civ.Code, § 3268; Snidow v. Hill, 87 Cal.App.2d 803, 808, 197 P.2d 801; Singh v. Cross, 60 Cal.App. 309, 317, 212 P. 946; 51 C.J.S., Landlord and Tenant, § 91, page 656. Proof of express language is not necessary to show a waiver, but it may be shown by circumstances or a course

of declarations, acts, or conduct. Snidow v. Hill, supra, 87 Cal.App.2d at page 808, 197 P.2d at page 804; Singh v. Cross, supra, 60 Cal.App. at page 317, 212 P. at page 949.

In reversing a finding of a trial court that a party had not exercised its option to cancel contracts within a reasonable time, the court, in Clovis Fruit Co. v. California Wine Ass'n, 40 Cal.App. 623, at page 626, 181 P. 229, at page 231, stated:

> "Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injury or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong; and the main question in each case should be, Is there any just cause, because of delay, to object to the cancellation?"

In Singh v. Cross, 60 Cal.App. 309, 212 P. 946, 949, the plaintiffs were the lessees and the defendants the lessors under a lease of land for the planting and harvesting of rice. The lessors agreed to furnish the necessary water and to have it available for use not later than the 25th of April of each year. The lease provided that " 'In the event that it is impracticable to commence the supply of water by the 25th of April, 1918, then the lessee shall have the option of terminating this lease, and in the event that they exercise their option of so terminating the lease, they shall serve written notice upon the lessor, notifying him of their election so to do' ", and that in such event the lessors would pay the lessee the cost of the work already done by them. The lessors did not make water available as agreed. The trial court found "that at many times between the latter part of April, 1918, and the 5th day of June, 1918, plaintiffs demanded the receipt of irrigation waters upon said premises for said purposes," and that the lessors "by promises and inducements prevailed upon plaintiffs from time to time to await the delivery of water until defendants completed the construction of certain laterals and ditches running to the lands of plaintiffs, and that by said promises and inducements and overtures made by said defendants to said plaintiffs, to the effect that water would be delivered immediately to said plaintiffs, said plaintiffs were induced and prevailed upon to defer and postpone the termination of said lease from time to time until the 4th day of June, 1918". On June 4th the lessees gave the lessors oral notice of termination of the lease, and on June 8th gave them written notice. In holding that a finding that the notice of June 8th was within a reasonable time was a proper one, the court said 60 Cal.App. at page 315, 212 P. at page 948: "The question as to what is a reasonable time for the performance of an act under a contract fixing no time for such performance depends upon the nature of the contract and the particular circumstances. It was a question of fact for the court in the present case. The circumstance that the defendants continually promised plaintiffs that water would be furnished is material. Such promises would make it reasonable for the plaintiffs to wait, in good faith, from day to day. Furthermore, the defendants were not damaged by the delay. * * * When it became evident that the water would be too late to assure plaintiffs a crop, they exercised their option to recover their expenditures and terminate the lease. Under all the circumstances in evidence, particularly the request of defendants, as narrated by Chanan Singh, that plaintiffs allow them a little more time to furnish water, and the additional circumstance that defendants could have been in no better position with regard to raising a crop on the land had plaintiffs abandoned the land earlier, we think the finding of the court that the option was exercised within a reasonable time was a proper one."

[6] The destruction of the building did not terminate the lease. It remained in full force and effect unless terminated by the exercise, within a reasonable time, of the option given to defendant. Defendant, in its answer, pleaded all the facts stipulated except that the building could have been rebuilt within 180 days from its destruction, and that plaintiffs had not acquiesced in or accepted the surrender or cancellation of the lease. We are of the opinion that the stipulated facts constituted a waiver by

plaintiffs of their right to claim the option was not exercised within a reasonable time. On July 6, 1951, plaintiffs asked defendant to make an election to remain as tenants, and said they (plaintiffs) preferred to have defendant remain rather than cancel the lease. Immediately thereafter the parties entered into and had numerous and extensive negotiations looking to the rebuilding of the market building, which continued until about August 29th. These negotiations constituted a withdrawal of the request of July 6th. Plaintiffs knew defendant was withholding a decision on whether to terminate the lease until the parties either agreed or disagreed as to proposed changes. In fact the parties stipulated that plaintiffs knew defendant withheld making an election and withheld exercising the option pending the negotiations with respect to rebuilding with changes. Plaintiffs did not, while the negotiations were taking place, insist on defendant's making an election. It is obvious that the negotiations discouraged defendant from making an immediate election and from exercising the option. It is clear, also, that plaintiffs were hopeful that an agreement would be reached and that defendant would continue as their tenant. When it appeared to defendant that the negotiations were coming to a standstill, it asked plaintiffs for a clear statement of their decision in the matter. It was then, on August 27th, that plaintiffs, in writing, told defendant they were going to rebuild the building in the same condition it was in prior to the fire and that it had "no option to terminate the lease whatsoever." Two days later, on August 29th, defendant exercised the option. On the basis of the negotiations, defendant granted plaintiffs an additional 60 days in which to rebuild. There was no reason why defendant should exercise the option so long as it appeared from plaintiffs' declarations, acts, and conduct that there appeared to be a fair prospect the negotiations would be successful. There was no evidence that the delay worked any hardship on plaintiffs. In fact, they were granted an additional 60 days within which to rebuild.

[7] Furthermore, it appears that until about August 27th both parties were laboring under the mistaken belief that defendant did not have the right or option to terminate the lease if plaintiffs rebuilt within 180 days after the fire. In its letter of August 6th, defendant said, "Under paragraph X of the lease, you are permitted 180 days to repair the premises." The lease did not so provide. It provided, as one ground on which defendant had an option to terminate, that if the premises "are so badly injured that they cannot be repaired with reasonable diligence within 180 days of such destruction or injury, then this lease shall, at the option of Lessee, terminate as of the date of such destruction or injury, * * *." In its letter of August 27th, two days before defendant exercised its option, plaintiffs told defendant: "In order to set the records straight, please note that as long as my clients elect to rebuild the building, you have no option to terminate the lease whatsoever." Acquiescence in error takes away the right of objecting to it. Civ.Code, § 3516.

It is suggested that if defendant desired to exercise the option to terminate the lease, it was obligated to do so immediately on the destruction of the building. The argument is fallacious. The lease does not say that the lessee has the option to terminate the lease immediately on destruction of the building; it says that on the exercise of the option defendant will immediately surrender the premises.

[8] We hold, on the agreed facts of this case, that defendant exercised its option to terminate the lease within a reasonable time.

In view of this conclusion it is unnecessary to consider defendant's point with respect to the award of attorneys' fees.

Since the facts were stipulated a reversal with directions is appropriate.

The judgment is reversed with directions to the superior court to amend its findings of fact and conclusions of law in accord with the views herein expressed, and to render judgment for defendant as prayed for in its answer.

SHINN, P. J., and PARKER WOOD, J., concur.

118 Cal.App.2d 434

EISENDRATH et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 19212.

District Court of Appeal, Second District, Division 1, California.

June 11, 1953.

Rehearing Denied June 29, 1953.

Hearing Denied Aug. 6, 1953.

Guarantors brought action against bank to recover amount of guarantors' deposit in bank after bank debited the account when notes and paper, payment of which guarantors had guarantied, became delinquent. The Superior Court of Los Angeles County, Joseph Marchetti, J., entered judgment adverse to guarantors and entered an order denying their motion for new trial, and they appealed. The District Court of Appeal, White, P. J., held that bank acted properly in debiting the account.

Judgment affirmed, and attempted appeal from order denying motion for new trial dismissed.

1. Banks and Banking ⇐134(3)

Where bank entered into agreement with corporation whereby bank purchased notes and other paper of corporation at 75% of face value, and providing that if amount in excess of 75% of value plus 6% interest should be realized by bank, such amount would be applied first to any indebtedness of corporation and second would be paid to corporation, and individuals executed guaranty of faithful performance by corporation of agreement and payment of papers sold, and individuals gave bank notice that guaranty was terminated after bank had purchased the paper, bank was entitled to debit individuals' account in bank because of delinquent paper and to apply amount debited in payment of delinquent paper.

2. Guaranty ⇐77(3)

Where bank purchased paper of corporation, and individuals executed guaranty of faithful performance by corporation of agreement with bank and payment of paper sold, bank could enforce individuals' liability under guaranty without first exhausting the security.

3. Banks and Banking ⇐134(3)

Where guarantors guarantied payment of paper purchased by bank from corporation, and payments on some of the paper were delinquent, and bank properly debited guarantors' account in bank, any events occurring after bank debited the account could not operate to make the debit wrongful.

4. Guaranty ⇐60

Where bank entered into agreement with corporation whereby bank purchased notes and other paper of corporation at 75% of face value, and providing that if amount in excess of 75% of value plus 6% interest should be realized by bank, such amount would be applied first to any indebtedness of corporation and second would be paid to corporation, and individuals executed guaranty of faithful performance by corporation of agreement and payment of papers sold, and individuals gave bank notice that guaranty was terminated after bank had purchased the paper, bank was not required to apply entire amount of gross collections in reduction of individuals' obligation under their guaranty without charging collection costs.

5. Appeal and Error ⇐1010(2)

An appellant has duty to demonstrate that there is no substantial evidence to support challenged finding.

6. Appeal and Error ⇐1010(1)

Where record disclosed substantial evidence to support all of trial court's findings, judgment was required to be affirmed.

Mitchell & Gold, Los Angeles, Seymour Gold, Los Angeles, of counsel, for appellants.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, Robert H. Fabian, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiffs appeal from an adverse judgment in an action whereby they sought to recover the amount of a deposit in the defendant bank. The bank had exercised its right of "offset" by debiting the plaintiffs' account for $50,000, the limit of plaintiffs' guaranty upon accounts receivable of Empire Jewelry Company which had been bought by the bank.

Empire Jewelry Company, a corporation, of which plaintiff Philip S. Eisendrath was a stockholder and officer, on July 21, 1947, entered into an agreement with Bank of America, entitled "Instalment Paper Indirect Collection", the pertinent provisions whereof are as hereinafter set forth.

The agreement recited that Empire Jewelry Co. was in the business of retail selling and desired from time to time to sell to the bank notes, contracts, mortgages and other evidences of indebtedness, referred to in the contract and in the briefs as "paper"; that the parties contemplated a "future course of dealing" and desired to define their mutual rights, obligations and liabilities. All paper, together with all rights of the seller (Empire Jewelry Co.) was to be assigned to the bank. Seller warranted that the paper was genuine, that the seller was the owner thereof, and that each paper represented a bona fide transaction. In consideration of the purchase of the paper by the bank, the seller guaranteed the payment to the bank "of the total amount of principal and interest at the times and in the manner specified in each paper sold to the Bank."

It was agreed that "The purchase price of any paper purchased under this contract shall be 75% of the face value or unpaid balance of the principal amount of such paper. The said purchase price shall be paid to the Seller or credited to his account when the paper is purchased, and thereupon full title to the paper shall pass to the Bank."

The rights of the bank and the seller with reference to the accounts so sold are set forth substantially as follows:

"If an amount in excess of the purchase price (75%) plus six per cent per annum computed monthly of the unpaid balance of the amount paid by the bank for such paper, is realized by the Bank, the amount so realized shall be applied as follows:

"(1) To satisfy any past due indebtedness of the Seller to the Bank, arising under this contract or otherwise; and

"(2) Any balance remaining shall be paid to the Seller. Such payments as become due the Seller hereunder shall be payable on the tenth (10th) day of each month during the life of this contract."

It was further provided that the bank "will immediately credit Seller with the value of paper calculated on the foregoing basis, provided, however, that Bank shall have ten (10) days from the date of deposit of each paper to make an investigation as to whether each such paper is satisfactory to it, and should it determine from such investigation that such paper is for any reason whatsoever unsatisfactory, upon request of Bank Seller will repurchase such paper for the amount with which Seller has been credited thereon."

By the terms of the agreement the bank appointed the Seller its agent for the purpose of receiving collections, such collections to be held in trust by the Seller. In the event of default by the Seller, upon notice, Seller's agency would terminate, but the Seller might repurchase any "paper" at a purchase price equivalent to its obligation to the Bank, "including Seller's contingent liability under this contract." The contract contained the following pertinent provisions:

> "In the event of a violation by the Seller of any warranty made upon the sale of any paper, or the unlawful failure of Seller to account for any sum or sums collected by the Seller as agent for the Bank, the Bank shall not be required to give any notice of such default, and the agency of the Seller to collect the paper shall, at the option of the Bank, terminate. The Bank may at any time make any reasonable settlement with the obligor on any of such paper that it sees fit, or grant any extension of time thereunder that it may deem necessary, without notice to the Seller, and such settlement or extension of time shall not affect the obligation of the Seller to pay in full the entire principal amount of said paper with interest."

The plaintiffs herein, with other individuals, executed a "guaranty and waiver" which provided that they did "jointly and severally guarantee to the bank, its successors and assigns, the full, prompt and faithful performance and discharge by Em-

pire Jewelry Company" of the terms of the foregoing agreement, and guaranteed the full payment of all accounts sold or transferred to the bank thereunder. The guaranty further provided that, "The above agreement may be altered in any respect without releasing the undersigned from their liability hereunder. No extension in the time of payment or other indulgence or change in terms or amount of payment, made with any debtor, under any paper sold or transferred to the Bank shall release the undersigned from this guaranty."

On June 2, 1948, plaintiffs gave notice to the Bank that their guaranty was terminated as to future transactions. On June 15, 1948, after the bank had made written demand upon Empire Jewelry Company to pay the unpaid balance of contracts then delinquent as well as upon the guarantors, the bank, upon failure of any of the parties to respond, offset the sum of $50,000 from the deposit account of plaintiffs, appellants herein.

Appellants urge seven points:

"The bank holding the guarantee of the Eisendraths' (later their $50,000.-00), and additional collateral as security for an obligation, has no lien thereon for payment of other claims against the principal."

Under this heading, it is urged that after the termination of the Eisendraths' guarantee, the Bank had no right of recourse upon them for the payment of "other claims" or future advances made by the Bank; that the Bank "closed the line of credit" at least by June 18; and that the burden of proof was upon the creditor Bank "to justify charges as being properly chargeable against the debtor or surety."

As a second point it is urged that the Bank failed to apply receipts from the securities to a reduction of the obligation guarantee.

Thirdly it is contended, "The sale and release of the security without demand, notice, consent, public sale, or opportunity to surety to protect self-released surety."

Fourthly, it is contended that "Alteration or Modification of the Contract or Obligation of Surety without His Consent Exonerates Surety."

As a fifth point, it is asserted that the bank negligently failed to obtain payment of the principal indebtedness when default had occurred in that it failed to assert a banker's lien against the principal and continued to support and maintain the operations of the principal.

Further, it is urged that the bank made erroneous interest charges; and finally, that the court erred in not finding "that the proceeds of, and the securities remaining in the bank's possession after the bank indebtedness was paid off, belongs to the plaintiffs, and the amount of the proceeds of said securities ($5,700.00) reduced pro tanto the right of recourse against the plaintiffs' $50,000.00 and required judgment for plaintiffs on this point."

[1] In the main, the answer to appellants' contentions is found in the terms of the waiver and guaranty and in the fact that under the terms thereof, at the time that the bank exercised its right of offset, the obligation of appellants to pay the $50,-000 had fully matured. The Eisendraths had agreed to pay, on demand, the amount of any account not paid on or before its due date. At the time the bank made its demand on the Eisendraths, as well as other guarantors, there was delinquent paper in an amount of $265,560.63, or approximately 70% of the total paper outstanding. In these circumstances, the bank was entitled to offset its deposit liability to its customers against the matured obligation under the guaranty. Code Civ.Proc. sec. 440; Gonsalves v. Bank of America, 16 Cal.2d 169, 105 P.2d 118; Arnold v. San Ramon Valley Bank, 184 Cal. 632, 635, 194 P. 1012, 13 A.L.R. 320; Melander v. Western Nat. Bank, 21 Cal.App. 462, 469, 470, 132 P. 265; McDonald v. Gravenstein Ass'n, 42 Cal.App.2d 329, 108 P.2d 936; Loeb v. Christie, 6 Cal.2d 416, 418, 57 P. 2d 1303; San Francisco Theological Seminary v. Monterey County G. & E. Co., 179 Cal. 166, 172, 175 P. 693, 695. As was said in the last-cited case, "The guarantor's obligation rests solely upon its contract of guaranty. The mortgage is looked to

merely to interpret and measure the extent of the guaranty. The guarantor's obligation is not secured by the mortgage, and suit may be maintained upon it without reference to any proceeding against the principal debtor or the security."

[2] Any contention that the bank was obliged to exhaust the security before any obligation arose on the part of appellants is answered by the language of Loeb v. Christie, supra, where the court said, 6 Cal. 2d at page 418, 57 P.2d at page 1303: "On many occasions it has been declared by this court to be the rule that the guarantor's liability may be enforced without first resorting to the mortgage security."

The bank here undertook to make the advances upon the accounts in reliance upon the guaranty executed by plaintiffs. The language in McDonald v. Gravenstein Ass'n, supra, 42 Cal.App.2d at page 334, 108 P.2d at page 939, is here applicable: "Appellant has received the benefit of a considerable amount of the supplies furnished for the proper care of his property. He knew exactly what he was signing, and it can be reasonably inferred that respondents entered into the contract relying upon the fact that appellant had signed it in the capacity of guarantor. Both justice and equity require that appellant should reimburse respondent-association."

[3] We are in accord with the statement of respondent that events occurring after the offset was made could not operate to make the offset wrongful. Appellants appear to contend that the Bank was under a duty to them to obtain enough money out of the accounts to recoup its investment and thus relieve them as guarantors from liability.

The evidence discloses that appellants' liabilities to which the $50,000 was applied were all liabilities upon transactions entered into prior to the notice of termination given by appellants to the bank on June 2, 1948. Further, the trial court came to the conclusion, upon substantial evidence, that assuming that the guaranty was effectively terminated as of June 2, 1948, there remained in existence on January 27, 1949, approximately $130,000 of liabilities which accrued before June 2, 1948, to which the $50,000 could have been applied.

Contrary to appellants' contention, no part of the $50,000 was applied to the satisfaction of any liabilities other than the accounts guaranteed by them. Between the date of the notice of termination of June 2 and the date of the offset, June 18, the liabilities of Empire Jewelry Company to the bank did not increase, but actually decreased.

There was substantial evidence to support the court's findings to the effect that at all times from June 18, 1948, to January 27, 1949, there was in existence paper sold to the bank having an aggregate unpaid balance of more than $50,000, which was delinquent. At the time of the offset, June 18, 1948, the bank segregated delinquent paper having a face amount of $66,666.66 and "marked it" as "Eisendrath paper." The $50,000 was properly applied to pay the unpaid balances of this paper.

[4] There is no merit to the contention, as we understand it, that the bank was required to apply the entire amount of the gross collections in reduction of the plaintiffs' obligation under their guaranty. As respondent points out, all sums realized from the paper were properly applied in accordance with the contract; and even if the costs of collection had not been paid out of collections, the obligations of the guarantors at all times exceeded the amount of their guaranty (and there can be no question as to the good faith of the bank in the methods used by it to facilitate collections and liquidate the accounts). Any suggestion that collection costs should not be charged against the amount recovered is obviously without merit, even without consideration of the explicit terms of the "instalment paper" contract and the plaintiffs' contract of guaranty.

That the bank properly applied the monies received by its collections through Empire Jewelry Company, or otherwise, finds support in Bank of America Nat. Trust & Savings Ass'n v. Kelsey, 6 Cal. App.2d 346, 44 P.2d 617, 620, where it was held that payments received without designation as to which of several obligations

should be credited must be applied, first, to interest, second, to principal due, third, to obligations earliest in date of maturity, fourth, to obligations not secured by a lien or collateral undertaking; and fifth, to obligations secured by a lien or collateral undertaking. The court further held: "* * * And in this connection it should be stated that third persons, such as guarantors, sureties, indorsers and the like, secondarily liable on one or more of several debts cannot control the application of a payment by either the debtor or the creditor, and where neither party applies the payment to a specific debt the court is not required to apply it so as to exonerate such third persons." See also Hogan v. Paddon, 91 Cal.App. 606, 616, 267 P. 392, and Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P. 190. It follows that the monies received from the liquidation of the paper were properly applied to the payment of the unguaranteed advances rather than on the obligations guaranteed. As was said in Consolidated Naval Stores Co. v. Wilson, 82 Fla. 396, 90 So. 461, 466, 21 A.L.R. 681, 689, "* * * it would be inequitable and manifestly unjust to require the application of the proceeds of the mortgaged property to be applied first to the indorsed notes, for the whole purpose of the *additional security* would be destroyed by such application." (Emphasis added.)

Despite the arguments of appellant as to the effect of the financial statements presented to the trial court, there was substantial evidence to support the conclusion that the bank in its entire operations with Empire Jewelry Company and its successor, accomplished no more than to recoup its investment plus the interest to which it was entitled. In these circumstances, in the light of the views hereinbefore expressed, appellants cannot prevail.

The argument of appellants, that the transaction was in essence a loan rather than a sale of contracts, is purely academic, in the light of the conclusions hereinbefore reached. No question of any attempt to avoid the usury law of this state, or any other rule of public policy, is or can be made. The contention that the basic contract with Empire Jewelry Company was altered without appellants' consent is answered by the plain language of the guaranty to the effect that the contract might be altered in any respect without releasing them from their liability.

With respect to the contention that $5,700 of the paper segregated as "Eisendrath paper" should have been awarded to appellants, it appears that such paper and its proceeds were offered to appellants on several occasions, but refused. The matter was not presented to the trial court until the motion for new trial was made. No request to amend the pleadings to determine the issue as between appellants and Empire Jewelry Company, Empire Home Equipment Company or the assignee for the benefit of creditors of Empire Jewelry Company, who were not parties to the action, was ever made. In the absence of pleadings, or a request to file the same, the finding of the trial court adverse to appellants was the only finding that could be made.

[5, 6] Finally, it must be once more observed that it is the duty of appellant to demonstrate that there is no substantial evidence to support a challenged finding, Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550; Goldring v. Goldring, 94 Cal. App.2d 643, 645, 211 P.2d 342; Tesseyman v. Fisher, 113 Cal.App.2d 404, 407, 248 P.2d 471. The record in this cause discloses substantial evidence to support all the trial court's findings, and under well settled principles the judgment must be affirmed.

For the reasons stated, the judgment is affirmed. The attempted appeal from the "ruling" denying the motion for a new trial is dismissed.

DORAN, J., concurs.

118 Cal.App.2d 465

RAHLVES & RAHLVES, Inc. v. AMBORT et ux.

Civ. 8176.

District Court of Appeal, Third District, California.

June 12, 1953.

Rehearing Denied July 3, 1953.

Hearing Denied Aug. 6, 1953.

Action by owner of land adjacent to defendants' land for judgment quieting title to land as delineated on and according to subdivision map which plaintiff caused to be prepared and filed, which map defendants contended did not conform to plaintiff's record title and showed an overlap onto portion of defendants' land because of difference between map and description in plaintiff's record title. The Superior Court, Yolo County, C. C. McDonald, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Schottky, J., held that evidence sustained implied finding that true location of southeast quarter of section was as located by plaintiff's surveyor a few feet away from an iron pin at street intersection, and justified rejection of contention that iron pin was true corner.

Affirmed.

1. Evidence ⇐358

In action by owner of land adjacent to defendants' land for judgment quieting title to land as delineated on and according to subdivision map which plaintiff caused to be prepared and filed, which map defendants contended did not conform to plaintiff's record title and showed an overlap onto portion of defendants' land because of difference between map and description in plaintiff's record title, map was admissible in evidence as showing what plaintiff claimed and what boundaries were as testified by plaintiff's witnesses.

2. Boundaries ⇐37(3)

In action by owner of land adjacent to defendants' land for judgment quieting title to land as delineated on and according to subdivision map which plaintiff caused to be prepared and filed, which map defendants contended did not conform to plaintiff's record title and showed an overlap onto portion of defendants' land because of difference between map and description in plaintiff's record title, evidence sustained implied finding that true location of southeast quarter of section was as located by plaintiffs' surveyor a few feet away from an iron pin at a street intersection, and justified rejection of contention that iron pin was true corner.

3. Quieting Title ⇐46

In quiet title action ultimate fact was ownership of land involved.

4. Trial ⇐404(3)

If ultimate fact is found in action the probative facts need not be expressly found because ultimate fact includes a finding upon all probative facts necessary to sustain ultimate fact.

5. Appeal and Error ⇐717

When trial is before court without a jury statements of trial judge during course of trial may not be used to impeach finding ultimately signed by court.

6. Judgment ⇐23

Opinion of trial judge is not part of the decision, and may be modified or nullified by findings of fact and conclusions of law, and opinion is merged in or controlled by judgment.

7. Appeal and Error ⇐717

Opinion of trial judge is no part of record on appeal and may not be used to impeach findings.

8. Boundaries ⇐48(3)

Where adjoining landowners have acquiesced for considerable time, at least equal to period of time prescribed by statute of limitations, in location of a division line between lands, although it may not be the true line according to call in their deeds, it is evidence that such division line is true line.

9. Quieting Title ⇐15

In action by owner of land adjacent to defendants' land for judgment quieting title to land as delineated on and according to subdivision map which plaintiff caused to be prepared and filed, which map defendants contended did not conform to plaintiff's record title and showed an overlap onto portion of defendants' land because of difference between map and description in plaintiff's record title, that subdivision map

was not properly executed in accordance with statutory requirements would not be a defense. Business and Professions Code, §§ 11589, 11590.

Royal E. Handlos, San Francisco, for appellants.

Chalmers, Cowing & Sans, Woodland, for respondent.

SCHOTTKY, Justice.

This is an appeal by defendants from a judgment quieting plaintiff's title to certain real property "as delineated on and according to the map of Rahlves Addition filed of record" in the office of the County Recorder of Yolo County.

Appellants urge several grounds for a reversal of the judgment but before discussing these we shall summarize briefly the factual situation as disclosed by the record.

Respondent and appellants are adjoining landowners, appellants' land being located to the north of the land of respondent. The parties acquired title, through predecessors, from a common grantor, appellants' deed having been recorded 1 minute prior to that of respondent, on December 1, 1882. The descriptions in the conveyances of appellants' title show a starting point 20 rods south of the northeast corner of the southeast quarter of section 31 in the particularly described township. The conveyances to respondent's property commence at a point 40 rods south of the same northeast corner of the southeast quarter of section 31. Appellants acquired title in 1938 and respondent acquired title in 1950. Following acquisition of its property in 1950, respondent caused a subdivision map to be prepared and recorded as the Rahlves Subdivision, and houses were then built on the lots and sold. It has been the contention of appellants throughout the litigation that the subdivision map does not conform to respondent's record title but rather shows on its face an overlap of about 2½ feet onto the southern portion of appellants' property because of the difference between the map and the description in respondent's record title.

Respondent brought the instant action to quiet title against appellants as to certain described real property "as delineated on and according to the map of Rahlves Addition filed of record." Appellants' answer was a general denial and an affirmative assertion of ownership as to the amount of overlap which they alleged the subdivision map reflects through its asserted inconsistency with the respondent's record title. The answer also contained as a special defense the allegation that the subdivision map had not been properly executed as required by sections 11589, 11590, of the Business and Professions Code, this latter portion of the answer having been stricken upon respondent's motion.

Following a trial before the court without a jury, the court found that respondent was the owner of the land "as delineated on and according to the map of Rahlves Addition filed of record"; that appellants owned the land as described in their chain of title; that respondent acquired title in 1950, which deed was recorded; that the subdivision map includes no portion of appellants' property. Judgment was entered in accordance with said findings, and appellants' motion for a new trial was denied.

Appellants' first contention is that the admitted facts and the findings that the plaintiff and the defendants acquired title according to exhibits A and B attached to the amended answer are conclusive and binding on the court, and any evidence offered and any findings made in contradiction to these admitted facts was error.

Appellants point out that the deeds by which respondent and appellants acquired their respective properties were attached to appellants' answer as exhibits and that, by respondent's failure to file an affidavit denying it, the genuineness and due execution of said deeds were admitted under section 448 of the Code of Civil Procedure, and that according to said deeds the description of appellants' land commences at a point twenty rods south of the northeast corner of the southeast quarter of section 31 in Township 10 North, Range 2 East, M.D.B. & M., and the description of respondent's land begins at a point 40 rods south of said northeast corner of said south-

east quarter. There is in the instant case no controversy as to the descriptions in the deeds or their due execution. The controversy arises over the true location of the starting point for the description of respondent's land and for the description of appellants' land. The question to be determined, and which was determined by the trial court, was: Where is the correct location of the northeast corner of the southeast quarter of Section 31, Township 10 North, Range 2 East, M.D.B. & M.?

Asa Proctor, licensed land surveyor and civil engineer, who had been engaged in land surveying and civil engineering in Yolo County since 1908, and who was at one time County Surveyor of Yolo County, was the principal witness for respondent at the trial, and we shall give a brief summary of his testimony.

He testified that before making the survey for the respondent's subdivision he inspected the government notes relative to the government survey of section 31 and examined the deeds on record relating to respondent's property and surrounding properties; that West Street in Woodland, running in a general north-south direction, is the east-west dividing line between section 31 and section 32; that Pendegast Street intersects West Street, and constitutes a quarter dividing line for those sections; that the lands here in question are in the southeast quarter of section 31, and have West Street for their eastern boundary. Proctor started by taking the southern line of *occupancy* of the Rahlves tract. He then measured northward to the iron pin located in the intersection of West and Pendegast Streets, which pin had been used in a number of previous surveys of section 32, which adjoins section 31 on the east, but in Proctor's judgment this iron pin did not represent the true U. S. Government survey corner in the east line of section 31 because the distance from the monument at the southeast corner of section 31 to iron pin located in the intersection of West and Pendegast Streets is 2,636.45 feet, whereas the distance from the said iron pin to the northeast corner monument is 2,648.02 feet. He, therefore, determined the location of the occupied southeast corner of the Rahlves property boundary with the property of the owner (Deckman) on the south side of the Rahlves property. This he found to be 1,320.55 feet north of the southeast corner of section 31. The monument from which this measurement was taken has been in place for a great many years and is a corner common to sections 31, 32, 5 and 6.

Section 31 has a surplus of 4.48 feet in it caused by errors in making the United States Government surveys with chains, inaccurate instruments, adverse conditions and the human element of error. Very few sections of land are true sections, especially one such as section 31, which is along a range line. They usually have a surplus or a deficiency in measurement. The distance to point No. 2, Plaintiff's Exhibit No. 1, a quarter of a quarter section, though it did not include exactly a quarter of said surplus, conformed closely.

Theoretically, a section of land is one mile square, although there are frequent variations, and therefore the east line of section 31 should be 5,280 feet long, each quarter of the section should have an east line of 2,640 feet long and each quarter of a quarter section should have an east line 1,320 feet long. Each side of respondent's property theoretically should be 660 feet long.

A survey line was then run along the occupied boundary on the south side of plaintiff's property from said point westerly to the center of the section where fences from the south, north and east intersected and they found the distance to be 1,320.75 feet or only .75 of a foot more than it should be, and the distance to the west line of the plaintiff's property was 659.56 feet or .44 of a foot less than it should be.

Proctor found a fence and trees along this south boundary of plaintiff's property. He found a fence running north and south at the west boundary of plaintiff's property and halfway between the southeast corner of plaintiff's property and the center of the section. The fences running north and south from the center of section 31 were old fences.

The distance from the occupied southeast corner of respondent's property to the iron

pin at the intersection of West and Pendegast Streets was 1,315.90 feet and a reference point was established at half said distance or 657.95 feet north of plaintiff's southeast corner and was about a foot or more south of the occupied boundary between plaintiff and defendants.

There was no fence between the properties of plaintiff and defendants at the time Proctor made his survey. Plaintiff's land was an alfalfa field and defendants' a cultivated orchard. There was a levee along the occupied line that served as a bulkhead against the encroachment of irrigation waters from one tract to the other.

The west line of plaintiff's property was fenced to within a distance of the span of one post from the northwest corner of plaintiff's property. At the time of the survey the fence was not standing at the corner but the fence was composed of wire and barbed wire and the corner post was attached to the wire. Proctor and his survey crew straightened out the fence and stretched it north. They then excavated at a point immediately below the post that was attached to the wire of the fence and found the lower portion of the post that was attached to the fence. It was rotted off. They put in an iron pin at the center of the rotted post and found it to be 659.20 feet from the southeast corner of plaintiff's land.

In view of the fact that there was no visible marker at the northeast corner of plaintiff's land, Proctor set the point for the northeast corner well back on plaintiff's property a distance 1.25 feet south of the northwest corner of plaintiff's property as is shown by the fact that plaintiff's west boundary is 659.20 feet and the east boundary is only 657.95 feet.

Proctor testified further that subsequent to the filing of the action he compiled data and undertook an investigation to locate the United States Government survey monument marking the northeast corner of the southeast quarter of section 31 and did find it.

Knowing that the east boundary of section 31 was 4.48 feet in excess of the 5,280 feet or the one mile that it should be, Proctor made a survey of the south, west and north boundaries of section 31.

After making the measurements of the boundaries of section 31 and comparing the same with the United States Government survey notes of said section (Plaintiff's Exhibit No. 4) and observing that on the east line of section 31 the lines of occupancy proceeding from the northeast corner of section 31 southerly and from the southeast corner of section 31 northerly were very close to the proper division of the surplus of 4.48 feet over one mile, in the theoretical length of the east line of section 31, Proctor then made excavations midway between the northeast and southeast corners of section 31 in search of the United States Government survey monument for the quarter section corner.

Proctor found at a depth of about 39 inches a charcoal deposit 3 inches square and completely black. The government survey notes stated charred section posts were placed at corners. He found loose earth above the charcoal deposit indicating the location of the rotted corner post monument. This United States survey corner post monument is marked point No. 17 on the map of section 31, plaintiff's Exhibit No. 1.

The United States Government survey monument for the northeast corner of the southeast quarter of section 31 was carefully measured by Proctor and Bernard H. Hendricks of the Yolo County Surveyor's office and found to be 4.42 feet north of the monument at the intersection of Pendegast and West Streets and designated on said map, plaintiff's Exhibit No. 1, as point No. 6. A monument was placed there. This made the United States Government survey corner monument 2,640.87 feet north of the monument at the intersection of Gibson Road and West Streets, point No. 1 on plaintiff's Exhibit No. 1, or only 0.87 feet in excess of the one-half mile.

Proctor checked the occupancies along the east line of section 31 and found that they come within 0.22 of a foot of conforming to the theoretical distance of 660 feet. He also checked the occupancies of properties in the north half of section 31 along its east boundary and found that they conformed to the location of the United States Government survey monument as found by

him. Proctor also checked distances on the line running north and south through the center of section 31 and found that the corner and occupancies checked and conformed to what they should be, using the United States Government monument found by Proctor.

Proctor testified the map of Rahlves Subdivision (plaintiff's Exhibit 3) conforms to the survey he made, using the United States Government monument as found by him as the northeast corner of the southeast quarter of section 31. Over appellants' objection the said map was admitted in evidence by the court for the purpose of "showing his [Proctor's] measurements and deductions but not for the purpose of showing the boundary line." He also testified that if the iron pin at the intersection of Pendegast and West Streets was the true point of beginning there would be a shortage between the northeast corner and the southeast corner of the quarter section of section 31 of the difference between 2,640 feet and 2,636.45 feet of 3.55 feet and move the southeast corner of section 31 approximately 2 feet south of where it should be and of where it is occupied. And if the United States Government survey monument located by Proctor is used the north line of Rahlves Subdivision is more than 660 feet south of the northeast corner of the southeast quarter of section 31, and the north half of the section has a surplus of 3.6 feet and the south half has a surplus of .84 feet. Proctor testified further that if the south line of the Rahlves Subdivision were moved 2 feet further south, as appellants argue that it should be, said line would run through the garage on the adjoining Dachtler property and would be south of Dachtler's north fence line. Proctor testified also that the chief witness for appellants, Glover, who surveyed the Casa Linda Park Subdivision and who surveyed appellants' property, used the iron pin at the intersection of West and Pendegast Streets as the northeast corner of the southeast quarter of section 31 and measured the theoretical distances, disregarding occupancies, and that numerous monuments established by Glover were from 2 to 4 or 5 feet south and west of fence corner, fence lines and occupied property lines.

Bernard Hendricks, Assistant Engineer in the Yolo County Surveyor's office, testified Proctor called him to look at a corner he had found at West and Pendegast Streets; that he saw a charred area approximately 3½ inches square in the bottom of a hole there; that he helped Proctor measure the distance north from the iron pin to the charcoal and it was 4.24 feet north and .18 feet east; that they set an iron monument over the charcoal.

Glenn Moeller, a licensed civil engineer and former Yolo County surveyor, testified that he saw the charcoal in the hole at West and Pendegast Streets and that if "the charred stake were the corner, it would come more near to satisfying the theoretical method of relocating a lower corner in accordance with our manual instructions from the Government."

Vincent Owen, a farmer, testified he leased the property, now owned by plaintiff, during 1947, 1948 and part of 1949. That the northwest corner of said property was terminated by a post in the west fence line and there were no broken fence posts at this point. He planted the land to alfalfa. There was a levee along the north line of the property. The levee ran from a point south of said post in the fence at the northwest corner to a point just south of the tree at the northeast corner of the property at West Street. He irrigated his alfalfa twice and found the levee to be weak and let the water run over onto Ambort's property. Not caring to have any difficulty with Ambort over water, Owen ran his three gang plow along the north or Ambort's side of the levee driving it from west to east to plow the levee one turn to the south. In doing so he struck buried fence posts between his second and third plow. These posts were located 24 or 26 inches north of the center of the crest of the levee.

Robert Anderson farmed what is now plaintiff's property in 1949 and 1950 after Owen. He testified there was a fence along the west boundary but at the north end of the fence a broken post and wire were lying on the ground; that there was a levee along the north side of the property.

William A. White, a civil engineer, testified that he worked for Proctor, making his survey of the Rahlves property. He testified that the alfalfa field extended north of the north line of the Rahlves property as surveyed in by Proctor; that when the line got beyond half way between the northwest corner and the northeast corner of the Rahlves property, the north boundary line then went up on said dike and for the last few feet to the northeast corner was on the north slope of said dike; that they found the broken fence post and wire at the north end of the west boundary fence.

[1] As hereinbefore set forth the court found that respondent was the owner of the land as delineated on and according to the map of Rahlves Addition filed of record and that the subdivision map included no portion of appellants' property. The map was introduced in evidence and was thoroughly explained by the civil engineer who made the survey and who prepared it. It was certainly admissible in evidence as showing what respondent claimed and what the boundaries were as testified to by respondent's witness Proctor and others. Appellants assert that the said finding of the court was in contradiction to the admitted facts, the deeds, and the map itself. Appellants argue that since respondent did not controvert the deeds appended to the answer, the descriptions therein amount to an admitted fact which cannot be controverted, either by the evidence or other parts of the pleading; that these deeds gave the point of beginning of each party's property as a certain distance south of a particularly described corner, and since the call in the deed established respondent's line as starting 660 feet south of that corner, the subdivision map showing it as starting 657.95 feet south of that corner is incorrect.

Respondent in reply points out that while the deeds refer to a common starting point, they do not reveal the location of that starting point, and state that while appellants claim that said point is the iron pin at the intersection of Pendegast and West Streets in Woodland, respondent claims that the true point is 4.24 feet north of that pin.

A case strikingly similar to the instant case is Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353. That case was an action to quiet title in which the dispute was as to the location of the dividing line between the properties of plaintiffs and defendant, and the chief issue was as to the location of the common corner section which was the initial starting point for the description used in the deed. In the case the court said, 220 Cal. at page 432, 31 P.2d at page 355:

> "There is no merit in the appeal. The finding of the trial court with reference to the initial starting point is supported by the evidence. The question of the location of the common corner section which was the initial starting point for the description of plaintiffs' and defendant's deeds was gone into thoroughly by both sides."

The court then proceeded to summarize the testimony of the surveyors, and then continued, 220 Cal. at page 433, 31 P.2d at page 355:

> "* * * The map of the Hughes subdivision was also received in evidence. It cannot be said, as claimed by appellant, that a finding based upon the above testimony, locating the disputed point at 44 feet west of the center line of the railroad right of way, was 'contrary to all the evidence and wholly unsupported.'
>
> "Appellant at the trial attempted to prove his contention by showing that there was an iron pipe in the ground located at the point claimed by him to be the common section corner; that is to say, 26.2 feet west of the center line of the railroad right of way. It is admitted that there was an iron pipe there, but there is no direct evidence establishing when the pipe was so located, or that it was a government location of the section corner. Appellant cites section 2077, subd. 2, of the Code of Civil Procedure, which provides that, 'when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are para-

mount,' are requiring that such monument be held to be the common section corner. It will be noted, however, that the original government field notes were not available and appellant in his own brief states that, 'it stands as an admitted fact in the case that there was no established or known government corner common to the four sections.' The testimony of Thomas, the licensed surveyor, who made the survey upon which appellant bases his claim to the 18 feet of land and the well situated thereon, that in several maps of adjoining tracts of lands the iron pipe had been accepted as the section corner by the surveyors making the respective surveys, while persuasive, is not conclusive. As was said in Golden v. City of Vallejo, 41 Cal.App. 113, 182 P. 347, 349, in answer to a similar argument that by virtue of Code section 2077, subd. 2, Code of Civil Procedure, the known monument must control, 'the application of this rule, however, presupposes that the monument * * * was placed there by the government surveyor to mark the corner. But that was not established, and the court, in view of all the evidence, was justified in rejecting that theory.' Inasmuch as neither side could with certainty establish the disputed section corner, the decision of the trial court necessarily rested upon a weighing of probabilities. We have set forth generally the evidence offered by each side. It will serve no purpose for us to balance the facts adduced one against the other and weigh the testimony of the various witnesses upon this phase of the case. That was the province of the trial court. It has done so and decided in favor of the respondents. Under the familiar rule relative to a conflict in evidence, the conclusion of the trial court will not be disturbed on appeal."

[2] Applying the principles of Moniz v. Peterman, supra, to the instant case, we believe there is ample support in the record for the implied finding of the court that the true location of the northeast corner of the southeast quarter of section 31 was as located by Proctor, respondent's surveyor, a distance of 4.24 feet north of the iron pin at the intersection of Pendegast and West Streets. In view of the evidence, the court was fully justified in rejecting appellants' contention that the iron pin was the true corner, as there was no evidence that it had been placed by government surveyors to mark the corner, and the survey made by Proctor checked out, and conformed to the occupancies, theoretical distances, and apportionment of excess distances, to indicate strongly that the monument found by Proctor above the charcoal deposit, which one witness testified appeared to be charred stake or block of wood, was the true government location of said northeast corner of the southeast quarter. It was the province of the trial court to weigh the evidence, and where, as here, there is a conflict in the evidence, the conclusion of the trial court will not be disturbed on appeal.

Appellant next contends that "the Court's conclusion as to occupancy establishing title was erroneous and the evidence thereon insufficient."

Appellants then point out certain statements of the trial court in which the court stated its reluctance to disturb existing boundary lines and its belief that the evidence indicated that there was an implied agreement that the old fence fixed the boundary line between the properties of appellants and respondent.

[3, 4] The court found that respondent was the owner of the land as delineated on and according to the recorded map of Rahlves Addition and that the subdivision map included no portion of appellants' property. Respondent's action was one to quiet title, and the ultimate fact was the ownership of the property. 22 Cal.Jur., Quieting Title, sec. 54. As stated in 24 Cal.Jur., Trial, sec. 207: "And if the ultimate fact be found, it is not necessary expressly to find the probative facts, for the former includes a finding upon all probative facts necessary to sustain it."

As we have hereinbefore stated, the evidence was sufficient to support the implied finding of the court that the true location of

the northeast corner of the southeast quarter of secton 31 was as located by Proctor and as indicated on the recorded map of Rahlves Addition. This finding would be sufficient to support the judgment even if the evidence were insufficient to also support an implied finding that there was an implied agreement that the old fence fixed the boundary line.

[5–7] When a trial is before the court without a jury statements of the trial judge during the course of the trial may not be used to impeach the finding ultimately signed by the court. For as stated in 24 Cal.Jur., p. 924, the well-settled rule is: "Opinions of trial judges, although welcomed by the appellate courts as aids to the justices in discovering the processes by which judgments have been reached, are not binding. Such an opinion is no part of the decision, and may be modified, or nullified by the findings of fact and conclusions of law. The opinion is merged in or controlled by the judgment; it constitutes no part of a record on appeal, and may not be used to impeach the findings."

[8] However, we believe that the statements made by the trial court merely showed that the belief of the trial court that the true corner point was as testified to by Proctor was strengthened by the testimony as to the occupancies and the testimony as to the old fence. For as pointed out by the trial court, it is a well-established rule of law that where adjoining landowners have acquiesced for considerable time, at least equal to the period of time prescribed by the statute of limitations, in the location of a division line between the lands, although it may not be the true line according to the call in their deeds, it is evidence that the said division line is the true line. The law as to this point is clearly stated in the case of Hannah v. Pogue, 23 Cal.2d 849, 147 P. 2d 572, in which case the defendant contended that there was no evidence fixing the boundary between the lands of the parties. The Supreme Court said, 23 Cal.2d at page 856, 147 P.2d at page 576:

> "* * * It is the rule, however, that the court may infer that there was such an agreement ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between the lands of two owners. Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; Moniz v. Peterman, 220 Cal. 429, 31 P. 2d 353; Board of Trustees v. Miller, 54 Cal.App. 102, 201 P. 952; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877; Perich v. Maurer, 29 Cal.App. 293, 155 P. 471; Swartzbaugh v. Sargent, 30 Cal.App.2d 467, 86 P.2d 895; Southern Counties Gas Co. v. Eden, 118 Cal.App. 582, 5 P.2d 654; Raney v. Merritt, 73 Cal.App. 244, 250, 238 P. 767; see Park v. Powers, 2 Cal.2d 590, 599, 42 P.2d 75; Clapp v. Churchill, 164 Cal. 741, 746, 130 P. 1061; see 14 Cal. L.Rev. 138.
>
> "Mrs. Hannah testified that the fence was in existence when her husband acquired the property, that it remained standing down to the time of the trial, and that she believed it marked the boundary until she learned that defendant Pogue had employed a surveyor to determine the boundary. This testimony establishes her acceptance of the fence as the boundary, in all likelihood reflecting the belief of her husband and former owners on the other side of the fence. She also testified that she knew of no agreement that the fence should constitute the boundary. This testimony does not necessarily rebut the inference that there was such an agreement, however, for the inference may be made that an agreement was inherent in the long-standing acceptance of the fence as the boundary. Roberts v. Brae, supra, 5 Cal.2d at page 359, 54 P.2d [698] at page 699; Vowinckel v. N. Clark & Sons, supra, 217 Cal. at page 260, 18 P.2d [58] at page 59; Moniz v. Peterman, supra, 220 Cal. at page 435, 31 P.2d [353] at page 356; Board of Trustees v. Miller, supra, 54 Cal.App. at page 105, 201 P. [952] at page 953; Southern Counties Gas Co. v. Eden, 118 Cal.App. 582, 586, 5 P.2d 654; see 14 Cal.L.Rev. 138. The courts have recognized such boundaries because the early surveys in the state

were most uncertain, and in later years the monuments and landmarks they described could not be found. See Loeb, The Establishment of Boundary Lines by Practical Location, 4 Cal.L.Rev. 179. In the present case the boundary lines could not be ascertained from the early surveys, for the monument determining the northern end of the boundary and most of the other landmarks cannot be found. Given the difficulties of fixing the boundaries anew according to the old surveys, the trial court properly recognized a line that has served for many years as the practical boundary.

"The trial court decided that this boundary was settled by agreement in 1917, apparently because this year marked the acquisition of the property by the Hannahs and their acceptance of the fence as a boundary. It is unnecessary to decide whether on this evidence the agreement can be assigned to this particular date, for the precise date of agreement is immaterial in view of the acceptance of the fence as a boundary over a long period of years."

Appellants argue that this case does not have the requisites for an agreed boundary line or an uncertain line which was then agreed upon as an accepted boundary line because the descriptions in the deeds are specific, certain and accurate. They argue also that evidence of a one-foot levee dividing the property at approximately the point set by Proctor, plus evidence of fencing up to or along that line merely show acquiescence for convenience where, as here, the boundary was not uncertain but capable of ready establishment.

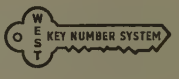
Respondent in reply reviews the evidence as to occupancy and argues that there was an implied agreement as to the boundary line arising out of the conduct of the owners through many years. We believe that the evidence is sufficient to support an inference that there was such an agreement, but as hereinbefore stated the implied finding that the true location of the northeast corner of the southeast quarter of section 31 was as located by Proctor and as indicated on the record map of Rahlves Addition is sufficient to support the judgment.

[9] Appellants contend also that the court erred in striking out that portion of appellants' amended answer setting up the defense that the subdivision map of Rahlves Addition was not properly executed in accordance with the requirements of the Business and Professions Code. We are unable to understand how this could constitute a defense to respondent's action to quiet title, and appellants have cited no authority in support of this contention. There was no error in striking out this portion of the amended answer.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



118 Cal.App.2d 516

CARLSON v. CALHOUN.

Civ. 19425.

District Court of Appeal, Second District, Division 2, California.

June 16, 1953.

Hearing Denied Aug. 13, 1953.

Action for moneys loaned defendant by plaintiff. The Superior Court of Los Angeles County, Clarence E. Johns, Judge pro tempore, in trial without jury, entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that, where purported release of defendant's obligations and indebtedness to plaintiff was attached to defendant's answer, but plaintiff failed, within ten days after receiving copy of answer, to file affidavit denying genuineness and due execution of release, such release, in absence of proof of fraud in obtaining execution of instrument, constituted evidence sufficient to sustain trial court's finding that plaintiff had released defendant from all obligations and indebtedness between them.

Affirmed.

1. Pleading ⇐291(2)

In action for moneys loaned defendant by plaintiff, wherein purported release of defendant's obligations and indebtedness to plaintiff was attached to defendant's answer, but plaintiff failed, within ten days after receiving copy of answer, to file affidavit denying genuineness and due execution of release, such release, in absence of proof of fraud in obtaining execution of instrument, constituted evidence sufficient to sustain trial court's finding that plaintiff had released defendant from all obligations and indebtedness between them. Code Civ. Proc. § 448.

2. Appeal and Error ⇐989

Upon appeal from judgment in favor of defendant following trial before court without jury, evidence from which conclusions or inferences which were contrary to trial court's determination could be drawn would be disregarded by reviewing court.

Louis Warren, Los Angeles, for appellant.

Nathan O. Freedman and Henry J. Merdink, Hollywood, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover for moneys loaned by plaintiff to defendant, plaintiff appeals.

Facts: The evidence disclosed that during the years 1948, 1949 and 1950, plaintiff loaned various sums of money to defendant and that on March 10, 1950, plaintiff executed a bill of sale in favor of defendant covering certain personal property. The bill of sale was likewise signed by defendant. This instrument contained, among other things, the following provision:

"It is farther agreed by me the seller Jerry C. Carlson that upon this date March 10th, 1950 that by buying this furniture I, Jerry C. Carlson release the Buyer David G. Calhoun of all OBLIGATION'S or INDEBTEDNESS both Real or otherwise from the begaining of time until the end of the world. That from this day on there is NO INDEBTEDNESS MORAL — FINANCIAL or OTHERWISE between us whats so ever."

The trial court found: "It is true that on or about March 10th, 1950 there was a full settlement of all accounts, obligations and indebtedness between the parties hereto, including the promissory note of defendant and cross-complainant to plaintiff and cross-defendant in the principal sum of Three Thousand Five Hundred Thirty & 25/100 Dollars ($3,530.25), dated April 26th, 1948, and, for valuable consideration, plaintiff, in writing, released defendant from all obligations and indebtedness of every nature between them."

This is the sole question necessary for us to determine: *Was there substantial evidence to sustain the trial court's finding, quoted supra, that plaintiff had released defendant from all obligations and indebtedness between them?*

[1] *Yes.* The bill of sale, of which the release set forth above was a part, was attached to defendant's answer and made a part thereof. Plaintiff failed within ten days after receiving a copy of the answer to file an affidavit denying its genuineness and due execution. As a result the same were admitted by plaintiff. Section 448, Code of Civil Procedure;* Miller v. McLaglen, 82 Cal.App.2d 219, 224, 186 P.2d 48. There was no evidence offered or received which tended to prove fraud in obtaining the execution of the instrument. Therefore, such instrument constituted substantial evidence to sustain the trial court's finding. No useful purpose would be served by setting forth additional evidence in support thereof. (Thatch v. Livingston, 13 Cal. App.2d 202, 203, 56 P.2d 549.)

* Section 448 of the Code of Civil Procedure reads:
"When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten (10) days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

[2] In view of the fact that plaintiff released defendant from all obligations it is immaterial whether there is any evidence to sustain the trial court's finding that "such loans as were made were repaid in full," for in any event whether the loans were repaid or not plaintiff had released defendant from any liability therefor. It is axiomatic that evidence from which contrary conclusions or inferences could be drawn must be disregarded by a reviewing court. (Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429, 45 P.2d 183; Ferro v. Lagomarsino, 45 Cal.App. 741, 744, 188 P. 626.)

Affirmed.

MOORE, P. J., and FOX, JJ., concur.



118 Cal.App.2d 497

CITY OF PASADENA v. LOS ANGELES COUNTY.

Civ. 19536.

District Court of Appeal, Second District, Division 3, California.

June 15, 1953.

Action by city against county for expenses of maintaining prisoners arrested by city police for alleged felonies and confined in city jail pending arraignment and remand to sheriff's custody. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for county, and city appealed. The District Court of Appeal, Vallée, J., held that, where neither county board of supervisors nor sheriff made an order, gave any consent, or requested that such prisoners should be confined in city jail or be there furnished with care and maintenance, no implied contract arose, and, therefore, county was not liable to city for expenses of maintaining such prisoners.

Affirmed.

1. Arrest ⇐70

The county jail is proper place of confinement of person accused of felony pending examination of charge and completion of trial thereof.

2. Contracts ⇐4

An "implied contract" is one whose existence and terms are manifested by conduct. Civ.Code, § 1621.

See publication Words and Phrases, for other judicial constructions and definitions of "Implied Contract".

3. Contracts ⇐4

An implied contract arises only from request of one party and performance by other though request is often inferred from circumstances attending performance.

4. Contracts ⇐4

An implied contract is consensual in nature.

5. Contracts ⇐4

In general, an implied contract, in no less degree that an express contract, must be founded upon an ascertained agreement of parties to perform it, and substantial difference between an implied and express contract is mode of proof by which they are to be respectively established.

6. Prisons ⇐1

A public corporation is liable for prison expenses when, and only when, such liability is imposed by statute, and, in no case, may a public corporation be held liable for prison expenses merely by implication.

7. Counties ⇐125

Contract will not be implied where a person, without knowledge, direction, or assent of proper county authorities, voluntarily performs services which may be of benefit to county.

8. Counties ⇐139

Where neither county board of supervisors nor sheriff made any order, gave any consent, or requested that prisoners, who had been arrested by city police for alleged felonies and confined in city jail pending arraignment and remand to sheriff's custody, should be confined in city jail or there furnished with care and maintenance, no implied contract arose, and, therefore, county was not liable to city for expenses of maintaining such prisoners. Pen.Code, §§ 142, 4000 et seq., 4015; Civ.Code, § 1621.

Frank L. Kostlan, City Atty., and Robert E. Michalski, Asst. City Atty., Pasadena, for appellant.

Harold W. Kennedy, County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action brought to recover the expense paid by plaintiff in feeding, clothing, and caring for prisoners arrested by Pasadena police officers for alleged felonies and confined in the Pasadena city jail.

Between January 1, 1937, and September 30, 1951, the police of Pasadena arrested a number of persons in Pasadena for alleged felonies. These persons were confined by the Pasadena police in the Pasadena city jail pending arraignment and remand to the custody of the Sheriff of Los Angeles county. During the period they were so confined, Pasadena paid the expense of feeding, clothing, and caring for them. A claim was duly filed with the Board of Supervisors for such expense and that of maintaining these prisoners during the periods of their incarceration in the Pasadena jail. The claim was neither approved nor rejected and this action was filed. At the trial, plaintiff conceded that if recovery be had it should be limited to the expense incurred within two years of the commencement of the action.

The county has, at all times, maintained a Sheriff's substation at Altadena, a municipality adjoining Pasadena on the north, to which the Pasadena police could have transferred the prisoners to the custody of the Sheriff, in lieu of confining them in the Pasadena city jail prior to their arraignment and transfer to the custody of the Sheriff. There was no statute imposing this expense on the county, and there was no express contract between the city and the county covering the care and maintenance of the prisoners. The court found it is not true that the maintenance of these prisoners by Pasadena in its city jail was done and performed at the request of the county.

Pasadena concedes that "one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial." It asserts that since it bore an expense which, under the law, should have been borne by the county, a promise to pay is implied.

[1] The county jail is the proper place of confinement of a person accused of a felony pending the examination of the charge, and pending and until the completion of a trial of the charge. (21 Cal.Jur. 446, § 7.) The statutes contemplate that persons arrested and detained for violation of state law shall be confined in the county jail and that their care and maintenance shall be provided by the county. Pen.Code, § 4000 et seq. It was the duty of the Sheriff to receive these prisoners; and it was the duty of the Board of Supervisors to provide the Sheriff with necessary food, clothing, and bedding for them. Pen.Code, §§ 142, 4015; 13 Ops.Cal.Atty.Gen. 120.

[2–5] Plaintiff may not recover unless on the facts an implied contract arose as a matter of law. An implied contract "is one, the existence and terms of which are manifested by conduct." Civ.Code § 1621. As said in Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 393, 30 P. 564, 565: "An implied contract arises only from the request of one party and performance by the other, though the request is often inferred from the circumstances attending the performance." An implied contract is consensual in nature. " 'In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established.' * * * The true implied contract, then, consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 773, 97 P.2d 798, 803. Whether a contract may be implied is a question of fact. Silva

v. Providence Hospital of Oakland, 14 Cal. 2d 762, 774, 97 P.2d 798.

[6, 7] The general rule is that a public corporation is liable for prison expenses when, and only when, such liability is imposed by statute, and that in no case may a public corporation be held liable for prison expenses merely by implication. 72 C.J.S., Prisons, § 26, p. 909. The general rule that a contract may not be implied does not seem to be the rule in this state, as appears from County of Sonoma v. City of Santa Rosa, 102 Cal. 426, 36 P. 810, on which both parties rely. The question in that case was whether the city of Santa Rosa was liable to the county for the board of prisoners committed to the county jail by the city recorder for violation of ordinances of the city. In holding the city liable, the court stated 102 Cal. at page 431, 36 P. at page 812:

"But, as we construe the charter, the county has borne an expense which, under the law, should have been borne by the city. It is said, however, that the complaint does not allege that these prisoners were received 'at the request of the city;' but the complaint alleges the facts which show they were so received. A commitment by the judicial officer of the city ought, though erroneous, to have at least the force of a request; and, the expense of enforcing its ordinances being imposed upon the city by law, a promise to pay therefor is implied." A contract will not be implied where a person, without the knowledge, direction, or assent of the proper authorities of the county, voluntarily performs services which may be of benefit to the county. County of Tulare v. City of Dinuba, 205 Cal. 111, 270 P. 201; 20 C.J.S., Counties, § 204, p. 1048.

[8] In the present case, neither the Board of Supervisors nor the Sheriff of the County of Los Angeles made any order, or gave any consent, or requested, that these prisoners should be confined in the Pasadena jail, or that they should there be furnished with care and maintenance. There are no circumstances attending their incarceration from which a request may be inferred. Pasadena apparently voluntarily cared for and maintained them. Under such circumstances, no implied contract arose and the county is not liable for such expense.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



118 Cal.App.2d 453

PALMER et al. v. FOX et al.

Civ. 19538.

District Court of Appeal, Second District, Division 1, California.

June 12, 1953.

Rehearing Denied June 29, 1953.

Petition by realty owners for writ of mandate to compel issuance of building permit. The Superior Court, Los Angeles County, ordered defendant to issue permit, and defendant appealed. The District Court of Appeal, Scott, J. pro tem., held, inter alia, that where realty owners submitted plans and application for building permit to deputy of person employed by city to process applications and issue permits for construction, deputy referred owners to city clerk, and city clerk informed owners that they could not get permit because of deed restrictions prohibiting use of realty by non-caucasians, owners were entitled to have plans and specifications processed and to have permit issued when owners had complied fully with provisions of amended building code and certain other requirements of city.

Remanded with direction to amend judgment and judgment affirmed as amended.

Doran, J., dissented.

1. Mandamus ⇐14(3)

Mandamus is never granted to compel the performance of an act until there has been an actual, as distinguished from an anticipated, refusal to act.

2. Mandamus ⇐14(3)

Where realty owners left plans and application for building permit with deputy who was assigned to represent person employed by certain city to issue permits for

construction, upon owners' return deputy referred owners to city clerk who told owners they would not be able to get permit, and deputy did not thereafter offer to accept owners' plans for processing, refusal to act was in effect a continuing refusal, and mandamus to compel issuance of permit was justified.

3. Mandamus ⇐14(3)

Conduct on the part of an officer or tribunal under a duty to perform signifying unequivocal intention not to do so amounts to a refusal to act justifying mandamus.

4. Mandamus ⇐154(2)

Whether mandamus petition states facts entitling plaintiffs to any relief must be determined on facts existing when petition is filed.

5. Mandamus ⇐12

The act which will be compelled by mandamus must be one to which the complaining party is entitled at the institution of his proceeding, and it is the refusal or neglect to perform an act which is enjoined as a present duty that serves as its foundation.

6. Mandamus ⇐28, 72

A writ of mandamus will issue in a proper case to compel the exercise of discretion but it will never issue to control discretion, either before or after the exercise thereof, and in a proper case, however, the writ will issue to correct an "abuse of discretion," which is not the exercise of discretion, but action beyond the limits thereof, and the writ will only issue where the act to be commanded is certain, definite, and fixed.

See publication Words and Phrases, for other judicial constructions and definitions of "Abuse of Discretion".

7. Municipal Corporations ⇐621.11

Where realty owners submitted plans and application for building permits to deputy of person employed by city to process applications and issue permits for construction, deputy referred owners to city clerk, and city clerk informed owners that they could not get permit because of deed restrictions prohibiting use of realty by noncaucasians, owners were entitled to have plans and specifications processed and to have permit issued when owners had complied fully with provisions of amended building code and certain other requirements of city.

8. Mandamus ⇐12

Mandamus will lie to force a particular action by an officer when the law clearly establishes petitioner's right to such action or where the law imposes upon an officer a specific duty which he refuses to perform because of erroneous conclusions as to his legal duties. Code Civ.Proc. § 1085

9. Mandamus ⇐16(1)

Mandamus will generally not lie where its effectiveness depends upon an act or cooperation of a third person not a party to proceedings.

10. Mandamus ⇐168(2)

In mandamus proceeding by realty owners, who had been referred by deputy of chief engineer employed by city to issue building permits to city clerk who informed owners that they could not obtain permit, to compel issuance of building permit, court would not assume that art jury whose approval of amended building plan was made by contract between chief engineer and city a condition precedent to issuance of permit, would fail or refuse to act or would abuse discretion vested in it by refusing to approve amended plans.

11. Municipal Corporations ⇐621.11

Person employed by city to process applications and issue permits for construction within city would have no right or duty to withhold building permit from realty owners after such owners had complied with prerequisites for its issuance.

12. Mandamus ⇐71

When an official is required and authorized to do a prescribed act upon a prescribed contingency, his functions are ministerial only, and mandamus may be issued to control his action upon the happening of the contingency.

13. Mandamus ⇐185

In action by realty owners to compel issuance of building permit, where court determined that owners were entitled to relief sought when they had fully complied

with provisions of amended building code and certain other requirements, if building plans as finally amended and submitted did not comply with restrictions as to set back lines, decision would not preclude appropriate legal action.

Donald Armstrong, Torrance, for appellants.

Loren Miller and Harold J. Sinclair, Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs are husband and wife who own vacant residential property in the City of Palos Verdes Estates, County of Los Angeles. They desire to construct on their property a single family residence.

A petition for a writ of mandate was filed in the trial court seeking to compel the issuance of a building permit to enable them to proceed with the construction. It named as principal defendant the Chief Engineer of the County Department of Building and Safety. He had been employed under contract with the City of Palos Verdes Estates to process applications and issue permits for construction within the city. The latter had adopted the Los Angeles County building code as its own. A deputy was assigned to represent defendant Fox in this matter and kept office hours in that city for that purpose.

Plaintiff husband left plans and application for permit with the deputy and upon plaintiff's return to get his building permit was told that he would have to see the city clerk, who in turn told plaintiff he would not be able to get a permit because of deed restrictions prohibiting the use of property in Palos Verdes Estates by non-caucasians. Plaintiff took his plans and left the office.

At the trial of this action the plans and specifications were introduced in evidence. It then appeared that changes in them were necessary to make them conform to the requirements of the building code. They were withdrawn and modified and were reintroduced in evidence. The trial court then found that they fully complied with all legal requirements, concluded that plaintiffs were entitled to have a permit and ordered defendant to issue one to them.

Defendant offers no excuse for the conduct of his deputy in referring plaintiff to the city clerk, or the conduct of the latter who "held an erroneous opinion concerning the legality of racial deed restrictions" and who "had no authority in the matter whatsoever".

[1–4] Mandamus is never granted to compel the performance of an act until there has been actual as distinguished from an anticipated refusal. Friedland v. Superior Court, 67 Cal.App.2d 619, 628, 155 P.2d 90. It is apparent that the referral by defendant's deputy was in effect a refusal to act. "Any conduct on the part of the officer or tribunal under a duty to perform signifying unequivocal intention not to do so amounts to a refusal." 55 C.J.S., Mandamus, § 33, page 66. Plaintiff was at that time entitled to have his plans processed or to have some legally sufficient reason stated to him why defendant refused to do so. Defendant concedes that the evidence clearly shows that the only person in the offices of the City of Palos Verdes Estates who was authorized to accept plaintiff's application and to act thereon was his deputy. It nowhere appears that defendant thereafter offered to accept plaintiff's plans for processing, and his refusal must be deemed to have continued up to the time when this action was commenced. "The petitioner's right to relief is determinable by the facts as they existed at the time the petition was filed". American Distilling Co. v. City Council, Sausalito, 34 Cal.2d 660, 666, 213 P.2d 704, 708, 18 A.L.R.2d 1247.

[5] "The act which will be compelled by *mandamus* must be one to the performance of which the complaining party is entitled at the institution of his proceeding. It is the refusal or neglect to perform an act which is enjoined by the law as a present duty that serves as the very foundation for the proceeding." McGinnis v. Mayor and Common Council of City of Santa Jose, 153 Cal. 711, 715, 96 P. 367, 368.

[6] "Among the rules by which courts are guided in the issuance of writs of mandate are the following: (1) The writ will

issue, in a proper case, to compel the exercise of discretion. (2) It will never issue to control discretion, either before or after the exercise thereof. (3) In a proper case, the writ will issue to correct an abuse of discretion. An abuse of discretion, however, is not the exercise of discretion but action beyond the limits of discretion. (4) It will issue only where the act to be commanded is certain, definite, and fixed. Where discretion has not been exercised, the definite thing commanded is to act. Where the limits of discretion have been exceeded, the definite command is to act within such limits." Browning v. Dow, 60 Cal.App. 680, 682, 213 P. 707, 708.

[7] Plaintiffs are now entitled to have their plans and specifications processed by defendant. When these conform to the provisions of the building code as amended to date, and when plaintiffs have complied with certain other requirements imposed, defendant should issue them a permit. In the time elapsed since the trial of this action it may well be that building code provisions have been amended, and plaintiffs are entitled to prompt and courteous treatment by defendant in modifying their plans so that in every detail they will conform to present code provisions.

[8] While it is the general rule that mandamus will not lie to control the discretion of the public official, meaning by that that it will not lie to force the exercise of discretion in a particular manner, mandamus will lie to correct abuses of discretion and to force a particular action by the officer when the law clearly establishes petitioner's right to such action. Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582. The writ will issue where the duty is one specifically enjoined by reason of an office, trust, or station, Code of Civil Proc. § 1085, or where the law imposes upon such officer specific duties which he refuses to perform because of an erroneous conclusion as to his legal duties, Hartsock v. Merritt, 94 Cal.App. 431, 271 P. 381, or where petitioner is entitled by law to a certain action. Inglin v. Hoppin, supra. Consolidated Printing & Pub. Co. v. Allen, 18 Cal.2d 63, 66, 112 P.2d 884.

Two other interesting considerations enter into the case. The first relates to the "Palos Verdes Estates Art Jury". The contract between defendant and the city provides: "County agrees that no permit shall be granted hereunder unless building plans for any building inspected shall first have been approved by the Palos Verdes Art Jury." Blueprints of original plans dated June 17, 1950, in evidence in this case, bear the stamp: "Palos Verdes Art Jury—design approved R.R.S. Oct. 12, 1950. The approval of this plan shall not be held to permit or approve the violation of any protective restrictions, amendments or ordinances of Palos Verdes Estates. Any deviation from approved plan must have approval of art jury prior to execution. A certificate of completion will be issued only subject to above."

The trial court undertook to dispense with the approval of the plans as amended by the Palos Verdes Estates Art Jury, because it found that the jury has only the right and power to approve design and color, and that the changes did not alter the design or color. It further found "that there is no necessity or authority of the said Art Jury to require a second approval of the aforesaid plans and specifications" (referring to those amended during the trial). This issue was not raised by the pleadings and the Palos Verdes Estates Art Jury was not a party defendant either as a body or as individual members thereof. They would in no way be bound by the judgment and without their approval defendant could not under his contract issue a permit. If it be asked whether the Art Jury was not an agency of the city council which was named as a party defendant, we are confronted with the trial court's conclusion that defendant city council had no function to perform and its judgment "that plaintiffs take nothing from defendant City Council of Palos Verdes Estates".

[9–12] Mandamus "will not generally be granted where its operative effect and the thing to be done depend upon the act, approval, or cooperation of a third person, not a party to the proceedings, since its issuance under such circumstances would

ordinarily be nugatory, the court having no power to coerce the action of such third person." (34 Am.Jur. 865.) The opinion of the trial court as expressed in its findings, after hearing the testimony from all interested parties, justifies the belief that approval by the Palos Verdes Art Jury of amended plans and specifications will not be withheld because plaintiffs' residence, when constructed, would not meet its requirements. We may not assume that the Art Jury will fail or refuse to act or will abuse the discretion vested in it. Issuance of the permit by defendant is merely the completion by him of the processing of plaintiffs' plans and he would have no right or duty to withhold the permit when plaintiffs have complied with the prerequisites for its issuance. When an official is required and authorized to do a prescribed act upon a prescribed contingency, his functions are ministerial only, and mandamus may be issued to control his action upon the happening of the contingency. 16 Cal.Jur. 813, Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 83, 87 P.2d 848.

[13] The second consideration relates to restrictions as to set back lines which the trial court found defendant need not notice nor enforce. We find no expressed resistance on the part of plaintiffs to restrictions which are legally proper and assume that plans as finally amended and submitted will be proper in those respects. If for any reason they are not, our decision in this case would not preclude appropriate legal action to declare and enforce rights not determined in these proceedings.

The case is remanded with direction to the trial court to amend its judgment so that the writ issued to defendant will require the latter to facilitate the processing of plaintiff's application for a building permit and to point out any amendments in plans and specifications necessary so that they will fully comply with present building code requirements, and that when these plans and specifications as amended have been approved by the Palos Verdes Estates Art Jury the defendant shall issue a permit to plaintiffs for construction of their residence. As thus amended the judgment is affirmed. Each party to bear its own costs on appeal.

WHITE, P. J., concurs.

DORAN, Justice.

I dissent. In my opinion the order should be reversed without qualification. Whether the plans and specifications were sufficient as originally presented was the only issue. The court found that they were not. In the circumstances the court exceeded its jurisdiction in assuming the functions of the officials vested with authority to determine the sufficiency of the specifications in the first instance. If another application is filed the requirements may not be the same.



118 Cal.App.2d 505

In re WEYMOUTH'S ESTATE.

KELLEHER v. WEYMOUTH.

No. 15608.

District Court of Appeal, First District, Division 1, California.

June 16, 1953.

Proceeding to obtain instructions for trustee. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered order instructing trustee, and trustee appealed. The District Court of Appeal, Bray, J., held that, upon appeal from probate court order instructing trustee, trustee would not be heard to complain that payments to life tenant of trust under probate court's formula would gradually become smaller as time went on in view of fact that neither life tenant nor the remaindermen, including trustee as a remainderman, were complaining.

Order affirmed.

1. Courts ⇐202(5)

Upon appeal from probate court order instructing trustee, trustee would not be heard to complain that payments to life

tenant of trust under probate court's formula would gradually become smaller as time went on in view of fact that neither life tenant nor the remaindermen, including trustee as a remainderman, were complaining.

2. Courts ⇐202(5)

Upon appeal by trustee from probate court order instructing trustee, question whether prior decree was binding upon all unborn and unascertained remaindermen in view of fact that no guardian ad litem had represented them at hearing preceding such prior order was moot because order appealed from confirmed, ratified, and continued first decree as to all parties represented at hearing preceding order appealed from, and at such hearing guardian ad litem represented such unborn and unascertained remaindermen.

3. Trusts ⇐271½

In proceeding to instruct trustee, merging of prior probate court's decree in subsequent probate court's order which provided that first decree was confirmed, ratified and continued as to all parties represented at subsequent hearing, was not error.

4. Trusts ⇐271½

In proceeding to obtain order instructing trustee, trustee, as well as all parties to proceeding, were bound by order interpreting will.

5. Trusts ⇐271½

In proceeding for order instructing trustee, where first decree provided for certain payments to be made life tenant for period prior to time of making such decree and second order did not refer to such period, trustee was to follow first decree in matters pertaining to time covered by such decree.

6. Courts ⇐202(5)

In proceeding for order instructing trustee, trial court's failure to answer question whether trustee could make emergency payments to life tenant in addition to regular monthly payments was not grounds for reversal in view of fact that life tenant, who had asked such question, was not complaining of such failure.

7. Courts ⇐202(5)

In proceeding to obtain instructions for trustee, where trust provided for monthly payments to life tenant if he was in need, and only clerk's transcript was before the district court of appeal, it would be assumed that the trial court had before it such evidence as might be needed in addition to that in transcript to support determination that life tenant was in need and would continue to be in need.

8. Trusts ⇐271½

Where spendthrift trust which trustor created before his death for benefit of trustor's brother provided for monthly payments to brother if he was in need, trustor's letter to trustee requesting that trustee accept statement from brother as factual relative to his being in need without investigation could not be considered upon issue of brother's need after trustor's death even though trustee had signed an acceptance of such letter during trustor's life.

9. Trusts ⇐271½

In proceeding to obtain instructions for trustee, where trust provided for monthly payments to life tenant if he was in need, and trial court had determined that life tenant was in need, question of effect to be given trustor's letter to trustee which asked trustee to accept life tenant's statement as factual relative to his being in need and which direction trustee accepted in writing, was moot.

10. Infants ⇐105

In proceeding to obtain instructions for trustee, where record showed appointment of guardian ad litem and participation of such guardian in proceeding, probate court's failure to recite such appointment in order instructing trustee was of no importance since it was not necessary to make such express finding to make order binding upon guardian.

11. Judgment ⇐677

To make order binding on parties represented at hearing which precedes order, it is not necessary to make an express finding in order to such effect.

12. Courts ⇐202(5)

Mere fact that date fixed by probate court for filing of trustee's account was pri-

or to expiration of time for appeal from order instructing trustee would not justify reversal of such order since appeal stayed time for filing account for reasonable period after determination of appeal.

Julian P. Beek, San Francisco, for appellant.

Reginald G. Hearn and Philip Adams, San Francisco, for respondent.

BRAY, Justice.

In this appeal by the trustee from a probate court order instructing trustee, appellant claims that the order is defective in form, unintelligible and ambiguous, and that the court failed to instruct on numerous questions asked.

Record.

Clarence R. Weymouth died testate in 1949. His will bequeathed 18 per cent of his estate to appellant as trustee under an agreement dated August 23, 1948, between decedent and appellant as trustee, setting up a spendthrift trust for his brother Ralph, and providing that upon Ralph's death the trust estate then remaining should vest in a class comprised of the surviving brother and sisters of decedent or their issue (of which appellant is one), and if none of these be living, in the University of California. Provision was made for investing and reinvesting the trust funds. Among other provisions was: "(c) The trustee shall estimate as nearly as may be from past performance of investment-trusts purchased, during the business cycle, the probable average value of the trust shares, yearly income, etc. The trustee shall assume that the life of the beneficiary will be ninety years (born July 8, 1884), and distribute to the beneficiary, monthly, *if in need,* such sums as will exhaust the trust fund at the age of ninety years." (Emphasis added.) Prior to his death and on August 31, 1948, the trustor sent the trustee a letter to the effect that the trustee was to accept any statement from Ralph "as factual relative to his being 'in need'" without investigation. She was asked "if agreeable" to sign an acceptance attached, which she did.

July 7, 1949, after the death of the trustor, Ralph wrote the trustee stating that he was in need of the monthly payments provided in the trust. November 2, 1949, the executor of decedent's estate petitioned for ratable distribution and asked a number of questions concerning the will and trust agreement. On December 22, 1949, a decree instructing executor and for ratable distribution, distributing certain assets to appellant trustee and instructing the executor was filed. Stipulations answering the executor's questions and approving this decree as to form were signed by the respective attorneys for the executor, the beneficiary, the members of the Weymouth family, and the trustee. The executor had suggested that the court appoint a guardian ad litem to represent remaindermen not yet ascertained or in being. Pursuant to the stipulation the court found such appointment to be unnecessary.

May 23, 1950, appellant petitioned for instructions concerning certain questions and asked whether a guardian ad litem should be appointed for the undetermined class remaindermen. Again the parties signed a stipulation approving the form of the decree instructing trustee [1] which the court rendered. It decided that the appointment of a guardian ad litem was unnecessary, that the beneficiary was in need and would continue in need, without investigation by the trustee, and should receive monthly payments unless and until otherwise ordered by the court.

July 13, 1950, a decree of final distribution was rendered distributing the balance of the 18 per cent of the estate to appellant trustee. December 17, 1951, appellant filed her second petition for instructions. This was followed by a petition by Ralph, the life tenant, for instructions to the trustee on additional questions. The court then appointed a guardian ad litem for the class remaindermen who were unascertained or unborn. Appellant filed a reply to this petition raising issues as to the questions asked by Ralph. The court filed a memorandum

1. Hereafter referred to as "first decree."

of opinion granting both petitions and instructing the trustee. April 16, 1952, a formal order instructing trustee was filed in practically the same form as the memorandum of opinion. This is the order from which the appeal is made.

The Order Instructing Trustee.

Apparently in a spirit of at all odds finding something wrong with the court's actions and the decree, appellant has made many specifications of error, some of them highly meticulous and none of them valid. She contends many of her and the life tenant's questions were unanswered and that the order is defective, ambiguous and unintelligible. She requests that this court reverse the order, although she suggests no better or other formula for the payments to the beneficiary than that worked out by the probate court, and send the matter back to the trial court with instructions how to answer the questions she contends were not answered.

[1] As to the order being defective, unintelligible or ambiguous, we do not find it so. Having in mind that the trustor desired the payments to the beneficiary to exhaust the trust fund on the assumption that the life tenant would live to be ninety, we think the probate court worked out an excellent and reasonable formula for so doing. The order found that the beneficiary was 65 on February 12, 1949, and thus the trust fund should be exhausted on February 12, 1974. It is unnecessary to set forth the court's formula here, other than to say that the value of the principal is to be computed on January 15 of each year. Appellant attacks the selection of this date as being an arbitrary date. She suggests no other date, and obviously whatever date is suggested would be an arbitrary one. The trustee seems to complain that the payments to the life tenant under the court's formula will gradually become smaller than those now being paid. Such fact is no concern of the trustee, as neither the life tenant nor the remaindermen (including appellant as a remainderman) are complaining.

[2, 3] Appellant had asked the court whether, because no guardian ad litem had represented them at that hearing, the first decree was binding on all of the unborn and unascertained remaindermen. The question was not specifically answered. But the question is moot for the reason that in the order appealed from the court provided that the first decree "is hereby confirmed, ratified and continued as to all parties represented at this hearing, save and except as modified in this order." As these parties were represented at the hearing on which this order is based, and by this order the decree is merged into it, they will, of course, now be bound. Appellant criticizes this merging of the decree and order. We can see nothing wrong in the adoption by reference of the prior decree. If any uncertainty develops as to whether any particular provision of the prior decree is modified in the order, it would be a simple matter for the trustee or any of the parties to petition the probate court for clarification. As a matter of practice, all of the questions which the trustee raises on this appeal could have been more expeditiously and inexpensively determined by a further petition for instructions in the probate court.

[4, 5] Curiously enough, after requesting the probate court to instruct her as to the proper method of interpreting the will, and after the court has done so, she now asks if she is to follow that interpretation or to make her own interpretation of the terms of the will. Obviously she, as well as all the parties, are bound by the order. The first decree provided for certain payments to be made the life tenant for the time prior to the making of that decree. As the second order in nowise referred to that period the trustee's question as to whether she should follow the decree is answered. In view of the fact that the payments to be made the beneficiary are based upon estimates of income made annually in advance, and those estimates might in a given year exceed the actual income, there will have to be adjustments accordingly. These cannot be spelled out in advance but can be adjusted or readjusted in the annual account of the trustee. The same is true of many of the contentions made, for example, the fact that in providing that the amount of trustee's and attorney's fees heretofore paid out of income should be charged to princi-

pal, and the life tenant reimbursed for the amount of those fees, such reimbursement might give the tenant more than his monthly installments entitled him to. We see no necessity for discussing these contentions specifically.

The order requires the trustee to prepare immediately an account which shall reflect the payments and adjustments ordered, and with that account questions concerning the propriety of investments and payments, if any have been unanswered or arise, may best be presented because the formula will then have been given a trial test.

[6] The court did not answer the question whether the trustee could make "emergency" payments to the life tenant, that is, payments additional to the monthly ones. We see no necessity for reversing the order for that failure, particularly as the life tenant who asked the question is not complaining. No request for an emergency payment has been made. If one is made, the trustee can petition the court for instructions and the court will be in a much better position to determine a concrete rather than an abstract question.

[7–9] The life tenant requested the court to determine if the letter of August 31, 1948, became a part of the testamentary trust. This question was not answered. However, in the stipulation of the parties at the time of the entry of the order and decree of ratable distribution and instruction, the parties agreed that the trust agreement at no time had been modified or altered. In the stipulated form of first decree it is stated that "Upon consideration of all of the evidence, including particularly the said affidavit of Ralph W. Weymouth on file herein, the Court finds and instructs the trustee that Ralph W. Weymouth was in need on February 12, 1949, has been in need continuously thereafter and is to be deemed to continue to be in need unless and until otherwise ordered by the Court." In the second order by providing a formula for monthly payments for the balance of his life, the court, in effect, has continued the determination that the life tenant's need exists and will continue to exist. (If at any time it does not continue to do so, the order can, of course, be changed.) Only the clerk's transcript is before us on this appeal. We must assume, if additional evidence were necessary to support such determination, that the court had such evidence before it. The law is clear that the letter cannot be considered. See Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal.2d 1, 193 P.2d 721; Simon v. Grayson, 15 Cal.2d 531, 102 P.2d 1081. The failure to determine the effect of the letter is moot, as the court made an actual determination of fact that the life tenant is in need.

[10, 11] The record shows the appointment of the guardian ad litem and his participation in the proceedings. Therefore the failure to recite such appointment in the order is of no importance nor is it necessary in an order to make an express finding that it is binding on the parties who were represented at the hearing.

[12] The fact that the date fixed by the court for the filing of the account was prior to the expiration of the time for appeal from the order would not justify a reversal of the order. The appeal stays the time for a reasonable period after the determination of the appeal.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

MARTINEZ et al. v. MARTINEZ et al.*

Civ. 19256.

District Court of Appeal, Second District, Division 2, California.

June 16, 1953.

Hearing Granted Aug. 13, 1953.

Action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser. The Superior Court of Los Angeles County, Percy Hight, J., in trial before court without jury, entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to sustain trial court's finding that seller orally promised not to compete with purchaser in San Diego County.

Affirmed.

1. Reformation of Instruments ⇐45(15)

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, evidence was sufficient to sustain trial court's finding that seller had orally promised not to enter into competitive business in San Diego County after sale.

2. Appeal and Error ⇐989

Upon appeal from judgment for plaintiff, in action before court without a jury, the District Court of Appeal would disregard all evidence which conflicted with and was contrary to trial court's finding upon which judgment was based.

3. Evidence ⇐265(8)

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, where seller, in his answer, expressly admitted soliciting buyer's customers, evidence was sufficient to sustain trial court's finding that seller had solicited buyer's customers.

4. Reformation of Instruments ⇐45(15)

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, evidence was sufficient to establish that seller agreed he would never re-engage in similar business in San Diego County. Business and Professions Code, § 16601.

5. Contracts ⇐215(1)

Where agreement for sale of ship supply business was indeterminate upon length of time during which seller would not re-engage in similar business in San Diego County, agreement would be construed to mean that seller was prohibited from re-engaging in like business for so long as buyer, or any person deriving title to the good will, carried on like business. Business and Professions Code, § 16601.

6. Reformation of Instruments ⇐45(15)

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, evidence was sufficient to sustain trial court's findings that seller's representations pertaining to refraining from entering similar business in San Diego County were known, or ought to have been known, by him to be fraudulent and that purchaser believes them and, in reliance thereon, executed the written agreement.

7. Trial ⇐395(6)

Trial court's finding that, except as found not to be true, all allegations in complaint are true is sufficient to sustain a judgment.

8. Appeal and Error ⇐1071(5)

In action by buyer against seller to reform written agreement for sale of ship supply business by adding covenant restricting seller's right to compete with purchaser, wherein allegations that seller was guilty of fraud and that mutual mistake of parties had been made relative to written agreement set forth inconsistent causes of action, each of which was supported by evidence, upon appeal, such inconsistencies were not grounds for reversal.

Alfred Einstein, V. Lustig, National City, and Stead & Boileau, Pomona, for respondent.

George W. Trammell, Long Beach, for appellant.

* Subsequent opinion 263 P.2d 617.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to reform a written agreement for the sale of a ship supply business in San Diego County, defendant appeals.

Facts: Plaintiff alleged that on or about January 3, 1948, plaintiff and defendant entered into an oral agreement for the sale of defendant's ship supply business to plaintiff; that in said oral agreement the parties stipulated that defendant would not thereafter reengage in the same or a similar business in San Diego County while plaintiff operated the same or while any purchaser of the business from plaintiff operated it; that a written agreement later executed by the parties did not contain such restrictive convenant and that the written agreement should be reformed so as to include it.

The trial court found that all of the grounds for reformation of the written agreement existed and rendered judgment directing its reformation.

Questions: First: *Was there substantial evidence to sustain the trial court's finding that:*

(a) Defendant in its oral agreement of January 3, 1948, for the sale of its business agreed with plaintiff not to thereafter enter into a competitive business in San Diego County?

[1,2] *Yes.* Plaintiff gave direct testimony that defendant at the time the oral agreement was made agreed he would not reengage in the same or a similar business in San Diego County. This testimony sustains the questioned finding of fact. We must of course disregard all conflicting and contrary evidence.

(b) Defendant solicited plaintiff's customers?

[3] *Yes.* In his answer defendant expressly admitted he had done so.* This admission sustains the questioned finding.

(c) Defendant's agreement to stay out of a similar business in San Diego "so long as the buyer [plaintiff] or any person deriving title to the good will carries on a like business" was inconsistent with plaintiff's claim that defendant would stay out of such business for a period of 10 years?

No. Plaintiff testified as follows, "a. * * * I said, 'Will you show me where you won't come back in the same business in San Diego County for a period of ten years?' He said, 'Right here, that means the good will, that means I won't come down forever. I am through with San Diego.' * * *"

[4,5] The testimony established the fact that defendant agreed he would never reengage in a similar business in San Diego County. Section 16601 of the Business and Professions Code provides that an agreement to stay out of business must be limited to a period so long as the buyer or any person deriving title to the good will carries on a like business. Where the agreement is indeterminate, as in the instant case, it will be construed to mean the vendor is prohibited from reengaging in a like business for the period permitted by law. (Mahlstedt v. Fugit, 79 Cal.App.2d 562, 566 [6], 180 P.2d 777; Gregory v. Spieker, 110 Cal. 150, 153 et seq., 42 P. 576.)

Therefore the trial court in its finding properly limited defendant's agreement to refrain from engaging in the same or a similar business for the legal period.

Second: *Did the trial court's finding that the representations made by defendant were known or ought to have been known by him to be fraudulent, and that plaintiff be-*

The answer read in part as follows:

"For an answer to paragraph III of the fourth cause of action, admits that on or about the first day of November, 1949, he reengaged in the ship supply business at 512 7th Street in the City of San Diego, under the fictitious firm name of Julian Ship Provisions; admits that in the conduct of his business in the City of San Diego, California, he has solicited business from persons or firms who, at the time of such solicitation, were customers of Plaintiff, or at some time prior thereto had been customers of Plaintiff; admits that he hired Mike Mericantante and that said Mike Mericantante is working for him in connection with the business he is carrying on in the City of San Diego."

lieved them and in reliance thereon executed the written agreement, find support in the evidence?

[6, 7] *Yes.* The trial court found that except as found not to be true, all allegations contained in plaintiff's second amended complaint were true. Such practice though not the best is proper and has been recognized as sufficient to sustain a judgment. (Alameda County v. Crocker, 125 Cal. 101, 103 et seq., 57 P. 766.)

Paragraph II of the complaint as amended contained the following allegations which were not found to be untrue. Therefore under the rule above stated they were found to be true under the finding of the trial court:

"That the phrase 'including the good will' stated in paragraph (1) of Exhibit A attached hereto was understood by the plaintiff Leonard Martinez and the defendant Julian Martinez, the parties who executed said Exhibit A, that the phrase meant that the said defendant Julian Martinez would not re-engage in the ship supply business or a similar ship supply business, the subject of the said Exhibit A, attached hereto, in San Diego County, so long as the buyer, Leonard Martinez, or any person deriving title to the good will from him, carries on a like business therein. That by reason of the mistaken belief of plaintiff Leonard Martinez, the contract as reduced to writing did not correctly contain or set out the agreement of the plaintiff Leonard Martinez and the defendant Julian Martinez in the particulars hereinabove specified. Plaintiff Leonard Martinez alleges on information and belief that the mistake as to the meaning of the phrase as aforesaid was mutual between both plaintiff Leonard Martinez and defendant Julian Martinez; that if defendant Julian Martinez did not share the mistaken belief of plaintiff Leonard Martinez as to the meaning of said phrase as aforesaid, then defendant Julian Martinez knew of the mistaken belief of the plaintiff Leonard Martinez in that regard. That plaintiff Leonard Martinez would not have executed said Exhibit A attached hereto unless the defendant Julian Martinez did agree not to re-engage in the ship supply business, like or similar to that described in Exhibit A, in San Diego County, so long as the buyer, Leonard Martinez, or any person deriving title to the good will from him, carries on a like business therein, and that the defendant Julian Martinez knew that plaintiff Leonard Martinez would not have executed said contract as reduced to writing if both plaintiff Leonard Martinez and defendant Julian Martinez had known it did not set out the true agreement and the true intention that the parties had agreed upon as aforesaid. That if defendant Julian Martinez did not share plaintiff Leonard Martinez' mistaken belief that the actual agreement of the parties had been reduced to writing, then the conduct of the defendant Julian Martinez in failing to advise plaintiff Leonard Martinez of said Exhibit A as reduced to writing not embodying fully the agreement of the parties was wrongful and fraudulent; * * *."

Third: *Was the judgment fatally defective because the trial court found in favor of plaintiff on inconsistent causes of action, to wit, that plaintiff was guilty of fraud and also that there was a mutual mistake of the parties relative to the written agreement?*

[8] *No.* Where there are inconsistent causes of action, each of which is supported by the evidence as in the instant case, on appeal the judgment will not be reversed because of such inconsistencies.

The rule is clearly stated in Baird v. Ocequeda, 8 Cal.2d 700, 703 [5], 67 P.2d 1055, 1057 thus, "The trial court found all of the allegations of the complaint as amended to be true. Defendants urge that the effect of this is to permit plaintiff to recover on asserted inconsistent theories of express and implied contract. Even if this be conceded, it is not fatal to the judgment. Examination of the record discloses that there is evidence to support a recovery on either theory. This being so,

the findings on the inconsistent theory may be disregarded as surplusage. Epstein v. Gradowitz, 76 Cal.App. 29, 31, 243 P. 877."

Affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 459

RICHARDSON v. WALTER LAND CO. et al.

Civ. 19509.

District Court of Appeal, Second District, Division 2, California.

June 12, 1953.

Action by real estate broker to recover commission for procuring loan for defendant land company. The Superior Court, Los Angeles County, Thurmond Clarke, J., rendered judgment for plaintiff, and the land company appealed. The District Court of Appeal, Fox, J., held that where plaintiff brought to the loan company a party who was ready, willing, and able to furnish money required on mutually acceptable terms and who entered into a valid and complete agreement to do so, plaintiff had earned his commission, regardless of fact that transaction was not consummated because of loan company's failure to proceed with its obligations under the contract.

Affirmed.

1. Evidence ⇐450(1)

Where language used in escrow instructions created an uncertainty and ambiguity as to what the agreement was, and where the action was between a party to the agreement and a third party, trial court properly resorted to oral evidence to ascertain the exact nature of agreement.

2. Appeal and Error ⇐931(1)

On appeal, evidence must be viewed in light most favorable to prevailing party.

3. Brokers ⇐86(1)

In action by real estate broker to recover commission for procuring loan for defendant land company, evidence sustained finding that broker provided a lender on terms which the land company had agreed upon, and that a complete agreement was reached on all essential terms of the transaction.

4. Brokers ⇐63(1)

Where broker employed to procure loan brought to borrower a party who was ready, willing, and able to furnish money required on mutually acceptable terms and who entered into valid and complete agreement to do so, broker had earned his commission, regardless of fact that transaction was not consummated because of borrower's failure to proceed with its obligations under the contract.

5. Brokers ⇐63(1)

Borrower which precluded by its own remissness the materialization of the loan, could not take advantage of such act to defeat its liability for commission due broker who procured lender on terms which borrower had agreed upon.

6. Appeal and Error ⇐1008(3)

An appellate court will adhere to the interpretation of a contract which is reasonable and supported by evidence.

7. Set-off and Counterclaim ⇐60

Statute providing that if defendant omits to set up a counterclaim upon cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against plaintiff therefor, has as its purpose the prevention of piecemeal litigation, and is procedural in character, and such statute does not wipe out or invalidate the obligation, but simply denies defendant relief in designated circumstances. Code Civ.Proc. § 439.

8. Brokers ⇐87

In action to recover commission on loan procured for borrower, fact that another broker, named as codefendant with borrower, to whom plaintiff had promised a share of the commission, failed to seek by counterclaim or cross-complaint to recover

such share, did not require that plaintiff's recovery be reduced by such amount, since court would not assume that plaintiff would deny the obligation, even though failure to assert claim might bar any later action to enforce it. Code Civ.Proc. § 439.

Murchison & Cumming, Los Angeles, for appellant.

Louis S. Edelberg, Los Angeles, for respondent.

FOX, Justice.

Plaintiff brought this action to recover a five percent commission for procuring a $65,000 loan for defendant The Walter Land Company. Judgment was rendered in plaintiff's favor for $3,250. Defendant appeals.

The Walter Land Company is a corporation and the owner of approximately 19 acres of land in Orange County. Bruce Murchison is president of the corporation but all of its stock is owned by Mrs. Grace Atherton. Early in 1951 it became necessary to pay off an existing trust deed of approximately $50,000. Murchison authorized Jacques LaSatier, a licensed real estate broker, to procure a loan of $65,000 secured by a trust deed on the property. LaSatier contacted plaintiff, who was also in the real estate business, relative to procuring such a loan. After inspecting the property plaintiff advised LaSatier of his inability to secure a loan of the amount desired solely on the security of the property. Subsequent conversations were had relative to additional security, resulting in LaSatier's supplying plaintiff with the name of a trust officer of a bank in Boston which held certain securities that belonged to Mrs. Atherton and suggesting that plaintiff telephone the bank official and determine the character of her securities. Plaintiff did this and was furnished a partial list of her stock holding having a market value of some $220,000. Plaintiff then informed LaSatier that he could arrange the loan if these stocks were pledged as additional security. LaSatier advised plaintiff that the securities would be so pledged. On that basis plaintiff secured a lender ready, able and willing to make the loan. On April 2, 1951, plaintiff, LaSatier, Murchison and Ralph Weiler, representing the lender, met at the Title Insurance and Trust Company in Los Angeles for the purpose of completing the agreement and arranging an escrow to carry it out. On that occasion the terms of the loan were agreed upon. This included an agreement on the part of defendant, through Murchison, to pledge as additional security the stocks, a list of which had been furnished plaintiff by the Boston banker, and that the Title Insurance and Trust Company, rather than the lender, would be the pledge holder. Escrow instructions for the purpose of carrying out the transaction were then prepared and signed by Weiler for the lender and by Murchison for the borrower. The lender's portion of the instructions contained this language: "Said note to be additionally secured by certain stocks, a list of which is to be approved by me." The borrower approved the lender's instructions but added "Subject to approval of pledge agreement for additional security by stock." The borrower did not provide a pledge agreement, nor did it approve or suggest any revision of a form of such an agreement which was sent to it by plaintiff. Defendant refused to pledge the stock and abandoned the transaction. It procured the loan through another broker on more favorable terms.

The court found that plaintiff produced a lender "ready, willing and able" to make the loan "on terms acceptable to the defendant corporation as borrower" and an escrow was opened, "duly signed and executed by borrower and lender to consummate the transaction."

Defendant contends that the parties had not agreed on all the terms of the loan hence there was no binding agreement and plaintiff was therefore not entitled to a commission. Proceeding upon the theory that the contract between the parties was embodied in the escrow instructions, it contends that the inclusion in the lender's escrow instructions of the sentence "Said note to be additionally secured by said stock, a list of which is to be approved by me" and the handwritten insertion in its own escrow instructions of the words "subject to approval of pledge agreement for additional security by stock,"

establishes the need of further negotiation between the parties before it may be said that a binding contract had been formed. In support of this assertion, it is argued that the lender is not obligated to make the loan until, by future agreement, the parties reach an accord as to how many shares of which particular stock, and the valuation thereof, is to be given as additional security, and as to who will serve as pledge-holder. This contention is untenable.

[1–3] As is proper where the language used in the escrow instructions creates an uncertainty and ambiguity as to what the agreement was, and particularly so where the action, as here, is between a party to the agreement and a third party, the trial court resorted to oral evidence to ascertain the exact nature of the agreement between defendant and the lender. Kern v. Henry, 138 Cal.App. 46, 51–2, 31 P.2d 454; Bonner v. Finney, 110 Cal.App. 518, 522, 294 P. 466; Broder v. Epstein, 101 Cal.App.2d 197, 199, 225 P.2d 10; Glover Co. v. Farinacci, 113 Cal.App. 183, 187, 298 P. 133. Under the axiomatic proposition that the evidence must be viewed in the light most favorable to the prevailing party, Van Amersfoort v. Young, 105 Cal. App.2d 22, 25, 232 P.2d 569; Wilbur v. Wilbur, 197 Cal. 1, 7, 239 P. 332, there is substantial evidence to support the trial court's finding that plaintiff had provided a lender on terms which defendant had agreed upon. There was testimony, obviously credited by the court, that the parties had entered into a binding agreement whereby Weiler would supply a loan of $65,000 to defendant for one year at an interest rate of 10 percent, secured by a note and trust deed upon property owned by defendant and additionally secured by the pledge of the stock previously referred to, a list of which Weiler had with him while negotiating the loan and which he had approved as collateral security. The evidence was that defendant would prepare the pledge agreement. Thereupon, escrow instructions were signed to effectuate this agreement, with reference made in both the lender's and borrower's instructions to the fact that the stocks were to be pledged as additional security upon the approval of a pledge agreement. The record shows that defendant refused to pledge the securities, as agreed, and did not take any steps to prepare a pledge agreement as contemplated. Instead, it gave written notice 10 days later of its rejection of the entire transaction.

[4–6] It is clear that under the evidence adduced plaintiff had earned his right to a commission. The right to a commission in a loan transaction, such as here involved, is governed by the same principles as those relating to the sale of real or personal property. That rule, in the absence of a special agreement to the contrary, is "* * * that a broker employed to sell real or personal property has earned his commission when, within the life of his contract, or any extension thereof, he has produced a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on the terms proposed by the seller, or has brought the seller and buyer together and thus enabled them to enter into a contract of sale, or has produced such a purchaser who has verbally accepted the seller's terms and offered to enter into a written contract embodying the said terms and binding upon both parties. In such cases the broker's right to commission accrues when the contract of sale is executed or when opportunity to make such contract is given the seller; and the broker becomes entitled to his commission even though the seller is unable or unwilling to complete the sale." Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542, 543. The evidence recited above demonstrates that plaintiff brought to defendant a party who was ready, willing, and able to furnish the money required on mutually acceptable terms and who had entered into a valid and complete agreement to do so. He had thus earned his commission, regardless of the fact that the transaction was not consummated by defendant's failure to proceed with its obligations under the contract.

Smith v. Schiele, 93 Cal. 144, 149, 28 P. 857; Carlin v. Lifur, 2 Cal.App. 590, 592, 84 P. 292; Barnes v. Osgood, 103 Cal. App. 730, 734, 284 P. 975; Pellaton v. Brunski, 69 Cal.App. 301, 307, 231 P. 583. The provision in the escrow that the list of stocks to be provided by the borrower as additional security was to be approved by Weiler does not necessarily mean that the kind, amount, and value of the stocks to be thus hypothecated were yet to be agreed upon. In fact, the evidence supports the inference that this provision was not inserted for that purpose since there is substantial evidence that the parties had already agreed on the stocks to be pledged. This provision could well have been inserted as a means of identifying the stocks for the escrow holder which the parties had agreed to pledge. Defendant having precluded by its own remissness the materialization of the contractual objectives, it cannot take advantage of such act to defeat its liability to plaintiff. Bewick v. Mecham, 26 Cal.2d 92, 99, 156 P.2d 757, 157 A.L.R. 1277; Overton v. Vita-Food Corp., 94 Cal. App.2d 367, 371, 210 P.2d 757; Showers v. Rober, 92 Cal.App. 171, 175–176, 267 P. 884. We must hold, therefore, that the trial court was warranted in finding upon conflicting evidence that a complete agreement had already been reached on all the essential terms of the transaction. An appellate court will adhere to the interpretation of a contract which is reasonable and supported by the evidence. Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Palmtag v. Danielson, 30 Cal.2d 517, 522, 183 P.2d 265.

Defendant makes the further contention that in any event plaintiff's recovery should be reduced $1,250. This argument is based upon plaintiff's testimony that he had agreed to pay LaSatier that amount; that the latter is a defendant in this action and did not seek by cross-complaint or counterclaim to recover his share of the commission; and that he has thereby waived it and is now barred from making any claim therefor.

[7, 8] It may well be that the failure of LaSatier to set up any claim for a portion of the commission would bar any later action therefor in view of the provisions of section 439, Code of Civil Procedure.[1] But the purpose of that section is to prevent piecemeal litigation. It is procedural in character and simply denies a defendant relief in the designated circumstances. It does not wipe out or invalidate the obligation. Plaintiff testified he had agreed to give LaSatier $1,250 as his part of the commission. Plaintiff has thus acknowledged under oath his agreement to pay LaSatier that amount in the event he collects this commission. We may not assume plaintiff will now deny this obligation and refuse to discharge it even though LaSatier might not be able, under the circumstances, to enforce payment. Thus plaintiff is only getting what he would have been entitled to if the performance of the agreement had not been prevented by defendant's conduct.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

1. Section 439 reads: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

118 Cal.App.2d 534

PEOPLE v. NOVEL et al.

Cr. 4995.

District Court of Appeal, Second District, Division 1, California.

June 17, 1953.

Hearing Denied July 15, 1953.

Robbery prosecution. The Superior Court, Los Angeles County, Thurlow T. Taft, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, White, P. J., held that where defendant had pleaded guilty to robbery charge in 1951 but had denied being armed with deadly weapon, and had requested that hearing on issue of his being armed and determination of degree of crime be continued until 1952, the 1951 proceedings amounted to partial hearing so that trial judge had jurisdiction to finally hear and determine the cause in 1952, though his assignment was only for 1951 or until he had completed and disposed of all causes and matters heard by him, and though any regular judge of superior court had authority to pass judgment in 1952.

Affirmed.

1. Judges ⇐25(2)

Where defendant had pleaded guilty to robbery charge in 1951 but had denied being armed with deadly weapon, and had requested that hearing on issue of his being armed and determination of degree of crime be continued until 1952, the 1951 proceedings amounted to partial hearing so that trial judge had jurisdiction to finally hear and determine the cause in 1952, though his assignment was only for 1951 or until he had completed and disposed of all causes and matters heard by him, and though any regular judge of superior court had authority to pass judgment in 1952.

2. Criminal Law ⇐1186(4)

Where defendant pleaded guilty to one count charging robbery and was placed on probation, fact that judgment and sentence on second count to which he also pleaded guilty were not pronounced within time prescribed by statute was an "error of procedure" and did not prejudice defendant or violate any of his legal rights. Const. art. 6, § 4½; Pen.Code, § 1191.

See publication Words and Phrases, for other judicial constructions and definitions of "Error of Procedure".

3. Criminal Law ⇐1137(2)

Where continuance of second count charging robbery was granted at request of defendant, concurred in by his counsel, defendant could not successfully contend that failure to pronounce judgment and sentence within statutory period after plea of guilty had prejudiced him in that the threat of sentence on such count was made an improper condition of probation on another count of robbery to which defendant had pleaded guilty and had been placed on probation. Const.art. 6, § 4½; Pen.Code, § 1191.

4. Criminal Law ⇐977(3)

Record showed that defendant's waiver of right to be sentenced within statutory period after plea of guilty to robbery charge had not been coerced by trial court when probation was granted upon guilty plea to another count of robbery.

Warner, Peracca & Cowan, by James O. Warner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County on March 29, 1951, and containing two counts, appellant was accused of the crime of robbery. It was further charged that at the time of the commission of each offense he was armed with a deadly weapon.

On April 16, 1951, before Judge Thurlow T. Taft, appellant pleaded "guilty as charged in Count 1 of the information" and denied being armed. As to Count 2 he entered a plea of "not guilty".

As to the issue of being armed as charged in Count 1 trial by jury was duly waived. Appellant was granted leave to file an application for probation. The hearing on said application, pronouncement of judgment and sentence as to Count 1, as well as the disposition of Count 2, the determining of the issue of being armed, and the fixing of the degree of the crime were set for May 14, 1951, upon which date, at the

request of appellant, the matters were continued to May 21, 1951.

On the last named date, appellant, by leave of court, withdrew his plea of not guilty theretofore entered to Count 2, was rearraigned, pleaded "guilty as charged in Count 2 of the information", and denied being armed at the time of the commission of the offense. Trial by jury of the issue of being armed was duly waived. It was stipulated that the issue of whether or not the appellant was armed, as alleged, could be determined by the court upon the transcript of the preliminary hearing, the probation officer's report and any other evidence that might be introduced at the hearing thereon. At the request of the appellant, joined in by his counsel, the date for determination of the issue of being armed, the fixing of the degree of the crime, and the pronouncing of judgment and sentence as to Count 2 were continued by Judge Taft to May 26, 1952. On Count 1, the court found that the appellant was not armed, determined that the crime was robbery of the second degree, ordered proceedings suspended, and granted the appellant conditional probation for a period of five years.

On May 26, 1952, as to Count 2, the hearing on the application for probation, the determination of the allegation of being armed, the fixing of the degree of the crime, and pronouncing of judgment and sentence were continued by Judge Taft to September 16, 1952. The conditions of the probation granted as to Count 1 were modified and the matter was continued for further hearing on September 16, 1952.

On September 16, 1952, at the request of the appellant, Judge Taft continued the matters to be determined as to Count 2 to December 16, 1952.

On November 10, 1952, the appellant appeared before Judge Borde for a hearing on violation of his probation as to Count 1, and the hearing was continued on motion of the appellant to November 24, 1952. On November 24, 1952, the matter was again continued by Judge Borde to January 19, 1953.

On December 16, 1952, as to Count 2, Judge Taft found the crime to be robbery of the second degree and that the appellant was not armed. Appellant was sentenced to the state prison for the term prescribed by law.

It is from the judgment entered on December 16, 1952, that appellant prosecutes this appeal.

An examination of the records of the Judicial Council of the State of California reflects that the Honorable Thurlow T. Taft, a Judge of the Municipal Court, City of Santa Monica, was assigned by the Chairman of the Judicial Council, to sit as a Judge of the Superior Court of Los Angeles County for the periods April 2, 1951 to June 30, 1951; July 2, 1951 to September 29, 1951; and October 1, 1951 to December 31, 1951, and "until he has completed and disposed of all causes and matters heard by him". It is conceded that Judge Taft was not assigned to sit as a judge of the superior court at any time during the year 1952.

It is first contended by appellant that Judge Taft had no authority to pronounce the judgment and sentence entered on December 16, 1952, because the term of his assignment as a judge of the superior court expired December 31, 1951.

Upon this appeal we are concerned only with the proceedings had in connection with Count 2 of the information. With reference to that count the record shows that on May 21, 1951, appellant pleaded guilty to the charge of robbery therein contained, but denied he was armed with a deadly weapon at the time of the commission of the crime. On the last mentioned date, at the request of appellant, or at least with his consent, the date for hearing the issue of his being armed and for determination of the degree of the crime, as well as the pronouncement of judgment and sentence was continued to May 26, 1952. At the time this order was made Judge Taft was regularly assigned as a judge of the superior court. On May 21, 1951, when the order of continuance to the 1952 date was made, it was stipulated that the above named issue might be determined by the court on the transcript of the preliminary examination, on the report and supple-

mental report of the probation officer, and "such other evidence as may be introduced by either party at that time in 1952".

It is the contention of respondent that the transcript of the preliminary examination and the probation officer's reports were thus introduced into evidence before Judge Taft on May 21, 1951, when he was a regularly assigned judge of the superior court, on the issues of being armed and the degree of the crime. That the matter was then continued for the introduction of further evidence and decision on the matters thus submitted. That the proceedings as herein narrated amounted to a partial hearing of such matters by Judge Taft. That the cause having been partially heard by him before the expiration of his assignment he was authorized to hear further evidence and make a determination as to the entire matter even though the term of his Judicial Council assignment had expired.

[1] We are satisfied that respondent's contentions must be sustained. Judge Taft's assignment for the year 1951 authorized and empowered him to act as a judge of the superior court not only during the calendar year 1951, but thereafter, "until he has completed and disposed of all causes and matters heard by him". The fact that the cause was continued after partial hearing to a time subsequent to the expiration of Judge Taft's assignment did not deprive him of jurisdiction to thereafter finally hear and determine it. In fact, it was his duty under said assignment to complete it. Gury v. Gury, 219 Cal. 506, 509, 27 P.2d 758; People v. Marshall, 209 Cal. 540, 546, 547, 289 P. 629. Though it be conceded, as urged by appellant, that any regular judge of the superior court did have authority to pass judgment on Count 2, nevertheless, that fact did not disqualify Judge Taft from so acting pursuant to the terms of his Judicial Council assignment.

[2] It is next urged by appellant that he suffered prejudice and violation of his legal rights because of the failure of the court to pronounce judgment and sentence within the time prescribed by section 1191 of the Penal Code. Appellant insists he suffered prejudice because of the failure of the court to pronounce sentence on Count 2 until more than a year after he pleaded guilty to the charge therein contained, in that, the threat of sentence on that Count was made an improper condition of probation on Count 1.

It is conceded that a new trial will not be granted because of the error here complained of unless an examination of the record in the trial court reveals that the error resulted in a miscarriage of justice, People v. Pollock, 31 Cal.App.2d 747, 761, 89 P.2d 128; People v. Haines, 64 Cal.App. 628, 630, 222 P. 183; People v. Howard, 10 Cal.App.2d 258, 260, 52 P.2d 283. The failure to impose sentence within the time specified by section 1191 of the Penal Code is clearly an error of procedure within the meaning of section 4½ of Article VI of our State Constitution.

We are satisfied that in the instant case the continuance, lengthy as it was, did not operate to the prejudice of appellant or violate any of his legal rights.

[3] The record shows that after appellant pleaded guilty to the charge of robbery contained in Count 2, which was at the same hearing that the court was to pass sentence and consider the application for probation on Count 1, the following transpired:

"The Court: Approach the bench. There is one matter I overlooked. (Counsel approaches the bench and an off-the record discussion had at bench)"

Thereupon, appellant was rearraigned on Count 2, entered a plea of guilty and denied the allegation that he was armed at the time of the commission of the offense. The deputy probation officer then informed the court that the accused had not been arraigned for sentence, whereupon the following occurred:

"The Court: That's right. I am going to continue it first. If it is at the request of the defendant, the court will continue sentence on Count II and the determination of the degree of the offense until Monday, May 26, 1952 at 10:00 AM. Is that at the request of the defendant?

"The Defendant Blanck: Yes, sir.

"The Court: And you join in the request?

"Mr. Bowler (Appellant's counsel): Yes, sir."

Thereupon, the court did so continue Count 2 and granted probation as to Count 1. Manifestly, the continuance as to Count 2 was granted at the request of appellant, concurred in by his counsel.

It is appellants contention that in the aforesaid "off-the record" discussion the judge indicated that he "did not have any intention of sentencing the defendant on Count 2 * * * the only purpose was to make it an additional condition of his probation. It would not be invoked unless the defendant did not make satisfactory progress under his probationary term under Count 1". But the record does not bear out that contention. It was on December 16, 1952, to which date the cause was continued at appellant's request that judgment and sentence was pronounced on Count 2.

We have carefully read the record in this cause. It presents a picture wherein appellant was given every opportunity to rehabilitate himself, a picture wherein the court and appellant's counsel, in the trial court, cooperated in every possible way to enable him to do so, but that he failed miserably. As stated by respondent, "While the appellant could have had sentence pronounced on Count 2 immediately and could have asked for probation on that count as well as Count 1, he chose not to take a chance of having probation denied as to Count 2, but rather, to ask for a long continuance instead, with the hope, perhaps, that such count would be dismissed if he succeeded on probation on Count 1. During the period between the plea of guilty and the sentencing, the appellant was under no restriction or supervision caused by Count 2."

To predicate a miscarriage of justice on the facts revealed by the record herein would challenge credulity and do violence to reason.

[4] Finally, appellant urges that the waiver of his right to sentence within the time specified in section 1191 of the Penal Code was not freely given but was virtually coerced by the court following the foregoing "off-the record" discussion at the bench when probation was granted, according to appellant, "Obviously, as a condition of obtaining probation on Count 1 of the information". This contention is untenable because it finds no support in the record. The court did no more than to indicate that if appellant desired the time for pronouncement of judgment and sentence on Count 2 set over for a year, such order would be made. As observed by respondent, "It does not appear from the record that the court would not have been willing to pronounce judgment and sentence at that time, and even granted probation on Count 2 along with Count 1, if the appellant had not wished a continuance. The court did not indicate what effect, if any, a failure to ask for a continuance would have on the application for probation on Count 1. The request for continuance appears from the record to have been made freely and voluntarily by the appellant, perhaps with the hope that he would get probation on Count 1 and hear no more of Count 2. However, such a motive for giving it does not make it a coerced request". See People v. Lamattina, 38 Cal.App. 82, 88, 89, 175 P. 484.

For the foregoing reasons the judgment is affirmed.

DORAN, J., and ROBERT H. SCOTT, J. pro tem., concur.

HESSION v. CITY & COUNTY OF SAN FRANCISCO.*

Civ. 15396.

District Court of Appeal, First District, Division 2, California.

June 11, 1953.

Rehearing Granted July 11, 1953.

Action against municipal corporation operating street railroad, for personal injuries sustained when railroad switchman riding atop box car moving across intersection was struck by trolley wires. The Superior Court, City and County of San Francisco, William F. Traverso, J., rendered judgment against municipal corporation and the municipal corporation appealed. The District Court of Appeal, Nourse, P. J., held that evidence raised question for jury as to whether defective condition of wires existed at time of accident and for such a period before accident that municipal corporation in exercise of ordinary care should have discovered such condition.

Affirmed.

1. Street Railroads ⇐117(3)

In action against municipal corporation operating street railway for personal injuries sustained when railroad switchman riding atop box car moving across intersection was struck by trolley wire, evidence raised question for jury as to whether defective condition of wires existed at time of accident and for such a period before accident that municipal corporation in exercise of ordinary care should have discovered and corrected such condition.

2. Estoppel ⇐62(4)

Municipality sued for injuries sustained when railroad company's switchman atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality, was estopped from urging, in support of its contention that switchman was gratuitous licensee, that operation of spur was not covered by municipality's permit to warehouseman for construction and use of spur because warehouseman had no right to assign permit to railroad company, where ordinance granting permit disclosed intention that railroad company would operate spur.

3. Street Railroads ⇐13

A municipality operates its street railway system in proprietary capacity and in doing so is normally under duty to exercise same degree of care and is liable for negligence in same manner as private corporations.

4. Street Railroads ⇐86(1)

A street railroad company must exercise reasonable care and diligence so to construct and maintain its trolley wire as to make it reasonably safe for passage of persons who have a right to pass under it.

5. Street Railroads ⇐85(1)

Where permit or franchise ordinance under which spur track was maintained gave railroad company the right to have its freight cars pass over spur and spur was in use when trolley wires were installed more than 35 years ago, passage of freight cars at intersection was as to municipality a known and rightful use of street to which in operation of municipal street railway the municipality had to give full consideration and to which municipality owed ordinary care not to endanger such use. Civ. Code, § 470.

6. Municipal Corporations ⇐685

A city grants right to construct, maintain and operate spur track over public street in its governmental capacity in the commercial and industrial interest of city which is indirectly served by transportation advantage to individual plant, rather than as a personal favor within rule that simple gratuitous licensee is owed lesser care in that such licensee is only the recipient of a favor.

7. Municipal Corporations ⇐763(1)

A city owes duty of ordinary care in maintenance of streets to employee of railroad maintaining and operating spur track over street under permit from city without regard to whether employee is invitee, licensee or trespasser. Civ.Code, §§ 470, 1714.

8. Municipal Corporations ⇐680(1)

A city under its police power over its streets may require permits for many uses.

* Subsequent opinion 265 P.2d 542.

9. Street Railroads ⇐82

A railroad company's violation of rules of Public Utilities Commission prohibiting operation of cars where there is insufficient clearance would not exonerate municipality violating Commission's rules prohibiting owner of wires from maintaining them with insufficient clearance over railroad tracks from liability for injuries sustained when switchman riding atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality.

10. Negligence ⇐136(25)

Generally, the reasonable foreseeability of intervening act is for jury where there is room for reasonable difference of opinion.

11. Street Railroads ⇐86(1)

The known danger to users of street of impaired clearance of wires over streets imposed on municipality sued for injuries sustained when railroad company's switchman riding atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality, the duty of reasonable inspection of wires.

12. Appeal and Error ⇐1064(1)

In action against municipality for injuries sustained when railroad company's switchman riding atop box car moving on spur track across intersection was struck by wires of street railway operated by municipality, instruction on requirements of Public Utilities Commission order which was not applicable to lines constructed when wires involved were constructed was not prejudicial to municipality in view of ordinance and general law making such requirements applicable.

13. Street Railroads ⇐86(2)

A municipality sued for injuries sustained when railroad company's switchman riding atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality was not relieved of duty of inspecting wires for minimum clearance required by Railway Commission by relying on contractor having constructed wires many years before under contract requiring the work to be done in conformity with requirements of Commission.

14. Appeal and Error ⇐232(2)

Propriety of exclusion of evidence will not be considered on appeal on a ground of admission not stated to trial court.

15. Witnesses ⇐198(1), 219(3)

An attorney or person in similar position is not incompetent to testify in the case of his client and does not become incompetent for the future when the privilege is asserted, and the privilege may be waived by the person in whose favor it exists at any time and only thereafter is the testimony of the witness also available to the opposing party.

16. Damages ⇐50

Traumatic neurosis is a basis for damages.

17. Damages ⇐130(3)

$7,500 to injured man who had 40 year life expectancy and who suffered physical injury, long and severe mental suffering, loss of job, loss of income, and loss of earning capacity by restriction of kind of work for which he was fit was not excessive.

Dion R. Holm, City Atty., City and County of San Francisco and George E. Baglin, Deputy City Atty., San Francisco, for appellant.

Hoberg & Finger, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action for personal injuries. When, on December 16, 1948 plaintiff as a member of a switching crew of the Western Pacific Railroad Company, hereinafter called the Company, was riding on top of a box car which was being moved along a spur track across the intersection of Potrero Avenue and Alameda Street in San Francisco, his face struck against a wire of the street railway operated there at that time by the City and County of San Francisco, hereinafter called the City. He sued the City because of negligence in the maintenance, control and operation of the wires at too low a level above the spur track, and

the Company because of negligent failure to provide him with a safe place to work and to warn him of the danger caused by said wires. Recovery against the Company was sought under the Federal Employer's Liability Act, against the City under the general law. After motions of defendants for directed verdicts had been denied the jury returned a verdict for the Company but one against the City for $7500. The City appeals. No appeal was taken from the judgment in favor of the Company.

At the intersection Alameda Street runs east and west, Potrero Avenue north and south. The municipal trolley cars ran on Potrero Avenue. The single spur track runs on Alameda Street in a westerly direction to the intersection and curves diagonally over the intersection to a warehouse at the southwest corner of the intersection. Approximately where the trolley tracks cross the spur track the two trolley wires, which provided the electric force for the trolleys, were supported by a set of two span wires both suspended from the same two poles located near the east and west curbs of Potrero Avenue. According to the scale map of the intersection (Plaintiff's Exh. 5) these poles were approximately 80 feet apart.

It is conceded by the City in its opening brief that respondent while on top of a box car which was being slowly pulled out of aforesaid warehouse across Potrero Avenue hit his nose against one of the wires of the municipal trolleys. It is there further conceded that under the General Orders of the Public Utilities Commission —formerly Railway Commission—Nos. 26, 26B, 26C, 26D, which constituted at least a standard of the care required, Polk v. City of Los Angeles, 26 Cal.2d 519, 542, 159 P.2d 931, the trolley wires should have been maintained with a minimum clearance of 22 feet above the railway tracks and that a lesser clearance would constitute a defective condition. No contention of contributory negligence of plaintiff is presented on appeal. Additional facts will be stated in connection with the assignments of error to which they pertain.

[1] Appellant's first contention is that the motion for a directed verdict should have been granted because plaintiff had failed to prove that a defective condition of the wires existed at the time of the accident and for such a period before the accident that the City in the exercise of ordinary care should have discovered and corrected it. The contention is without merit. The evidence supporting the verdict in this respect is as follows: The principal witness, Brown, at the time of the accident a foreman and since February, 1949, general foreman of the line department of the Municipal Railway testified to the effect that the wire system at the intersection was originally installed in 1913–1914, that in 1934–1935, when Potrero Avenue was widened, the State of California had the poles and wires reconstructed by a contractor, after which there were no other major changes before the date of the accident. Four days after the accident the witness measured the trolley wires (the wires which carry the electricity) at the intersection and found that the southbound (western) trolley wire was 19 feet 10 inches, the northbound (eastern) trolley wire 20 feet above the spur tracks. At the time of the trial he measured the spots where the supporting span wires had been attached to the poles and found that at the western pole the attachment had been 23 feet 10 inches, at the eastern pole 24 feet 4 inches from the ground. A span wire hung from one pole to another loops down in the center and a span of fifty or sixty feet will come down two or three feet or more. The trolley wires are suspended from the span wires and hang two or three inches under them. Between spans a trolley wire normally sags nine or ten inches. The witness knew and had in his possession the Public Utilities Commission's General Order No. 26D, which was in effect in December, 1948. He worked with it all the time. He was familiar with its provision which for wires required a minimum clearing of 23 feet 6 inches above steam railroad tracks, and also with an earlier General Order, 26B, in effect at the time of the reconstruction in 1935, which required a minimum clearance of 22 feet. He was one of the people respon-

sible for the lines being at the proper height. He had never measured the wires at the intersection prior to December 20, 1948, had made no inspection to determine whether they were not maintained contrary to the law and to his knowledge nobody else connected with the Municipal Railway had at any time made such inspection. The distance of only 20 feet above the railroad track did not comply with the order of the Public Utility Commission and was not safe so far as a man on top of a car was concerned. (Witness said on top of a *street* car but obviously meant on top of a railway car.) The City did not introduce any evidence which tended to contradict or rebut any part of Brown's testimony. There was furthermore a stipulation that the running board on top of the box car on which plaintiff was at the time of the accident was 14 feet 6 inches above the railroad tracks. Plaintiff was 6 feet two inches tall.

From the above evidence the jury could infer that the low level of the trolley wires found by Brown four days after the accident had existed at the time of the accident and long before that, since the reconstruction in 1935. The height at which the span wires were attached to the poles, 23 feet 10 inches at the western pole, 24 feet 4 inches at the eastern pole combined with the evidence that such span wires loop down strongly (2 or 3 feet or more at a width of 40 or 60 feet, whereas here the width was 80 feet) and that the trolley wires are still a few inches lower, permitted the jury to draw the inference that from the time at which the span wires were installed on the poles (in 1935) the trolley wires had been down as low as they were found to be after the accident, 19 feet 10 inches for the western trolley wire, 20 feet for the eastern one. These levels leave only clearances of 5 feet 6 inches and 5 feet 8 inches above the running board on which plaintiff was standing, whereas plaintiff is 6 feet 2 inches, circumstances which fully explain the accident which happened.

Appellant is the less in a position to attack the inference that the low level of the trolley wires had existed since their installation, because the City itself expressly took said position at the trial. In his opening statement its attorney said in part: "The evidence will show that the trolley wires and the span wires * * * are high there, twenty feet above the ground, and the evidence will further show that there was no sagging of the wires, that is the way the wires are constructed back in 1914, and there had been no change in all that time, there had been no sagging." Although "back in 1914" evidently was a mistake because of the undisputed reconstruction in 1935, it shows that the City was not aware of any recent sagging of the wires but that it ascribed the level of the wires at the time of the accident to the manner of installation as is borne out by the evidence stated before.

Evidently there had existed for many years a defective condition, which the City by simple measuring could and should have discovered and then corrected.

[2] Appellant next urges that even if a defective condition was proved to have existed on December 16, 1948, this would not cause responsibility of the City to the plaintiff because the plaintiff was at most a gratuitous licensee to which the City so far as the condition of the premises was concerned owed only the duty of abstaining from wilful or wanton misconduct, and was under no duty of inspection. This contention is based on the fact that for construction, maintenance or use of a spur track in San Francisco a permit of the Board of Supervisors is required, which permit must be temporary and revocable at the will of said Board (Ordinance 69 (New Series), Def. City's Ex. 3). Under said Ordinance said Board on July 20, 1910, granted to F. E. Knowles, the then owner of the warehouse at the intersection here involved, permission revocable at will to construct, maintain and operate a spur track from the tracks of "the Western Pacific Company" into said property (Ordinance 1255 (New Series), Def. City's Ex. 2). Said Ordinance particularly referred to section 8 of Ordinance 69, (New Series), supra, relating to the duties of "the railway operating any spur track on any public street" (also called "the operating railway"). On October 13, 1910, Knowles signed an assignment of said permit to Western Pacific Railway Company.

Appellant now intimates that Knowles had no right to assign the permit, that the assignee had no right to operate the spur track and that not Western Pacific Rail*road* Company, the party to the action below, but Western Pacific Rail*way* Company was the assignee. The argument is frivolous. The ordinance granting the permit shows on its face that, understandably, the intention had always been that a railway company, not Knowles, would operate the spur. The evidence moreover showed that on the ground of the stated assignment the City in 1914 when the street car tracks were laid, demanded and received from Western Pacific Railway Company all costs of constructing the crossing of the street car and spur tracks, and that thereafter the spur tracks remained in frequent use until the accident. It was further conceded at the trial that until the time of the trial the City had always taxed the Western Pacific as the owner of said spur track. When said concession was made no indication was given that the corporation taxed might be another than the one which operated the spur track on the day of the accident and which was a party to the action. Under these circumstances the City has evidently ratified the assignment and is estopped from urging that operation of the spur track by the Western Pacific Railroad Company was not covered by the permit. If the City had in any way intimated a doubt as to the identity of Western Pacific (which it itself incorrectly called "Western Pacific Company") certainly a showing would have been made that Western Pacific Railroad Company since a reorganization in 1916 was the successor of Western Pacific Railway Company (see Moody's Transportation, 1952, p. 375).

There remains the question whether the fact that the spur track was being operated under the above permit absolved the City from exercising ordinary care in the maintenance of the level of its trolley wires above said spur track. We answer said question in the negative.

[3–5] The City operates the municipal street railway system in proprietary capacity, Postal Telegraph-Cable Co. v. City and County of San Francisco, 53 Cal.App. 188, 190, 199 P. 1108, and in doing so is normally under duty to exercise the same degree of care and is liable for negligence in the same manner as private corporations. Peccolo v. City of Los Angeles, 8 Cal.2d 532, 536, 66 P.2d 651. "A street railroad company must exercise reasonable care and diligence so to construct and maintain its trolley wire as to make it reasonably safe for the passage of persons who have a right to pass under it * * *" (60 C.J. 410). The permit gave the Company the right to have its freight cars pass over the spur track so long as the permit was not revoked and the permit even imposed on the operating railway a duty to deliver freight cars of a connecting railway over it. The spur track was in use under said permit when the trolley wires were first installed, had been so in use for more than 20 years when the wires and poles were reconstructed and for more than 35 years when the accident happened. There can be no doubt that the passage of freight cars at the intersection was as to the City a known and rightful use of the street to which in the operation of its street railway the City had to give full consideration and to which it owed ordinary care not to endanger it. It is irrelevant in this respect whether the ordinance of the City under which the spur track was maintained is labeled a permit or a franchise, both equally mentioned in section 470, Civil Code.

[6–8] The position of the Western Pacific and of plaintiff as its employee is not the same as that of a simple gratuitous licensee on private property. The rationale of the lesser care due such a licensee is that he is only the recipient of a gift, a favor. (See § 342 Restatement of Torts, Comment (c).) The City granting the right to construct, maintain and operate a spur track over a public street does not do this as a personal favor but in its governmental capacity in the commercial and industrial interest of the City which is indirectly served by the transportation advantage to the individual plant. Symptomatic in this respect is section 7 of the Ordinance No. 69 (New Series) supra, which reserves to owners or users of adjacent properties or tracks the right to use the spur tracks for

which a permit is granted against payment of a proportionate share of the costs. Substantial duties as to maintenance and service are imposed on the operating railway. If the distinction of invitee and licensee is at all appropriate for such special situations the position of the Western Pacific might be considered more like that of an invitee with a right to be on the premises so long as the permit was not revoked. See Grant v. Sunset Telephone Etc. Co., 7 Cal. App. 267, 94 P. 368; Sills v. Forbes, 33 Cal.App.2d 219, 226, 91 P.2d 246. However, we prefer not to apply the distinction at all but to hold in accordance with Fernandez v. Consolidated Fisheries, Inc., 98 Cal.App.2d 91, 95–96, 219 P.2d 73 that under the general provision of section 1714 of the Civil Code appellant was liable for the injury caused by its want of ordinary care, as explained hereinbefore. In the Fernandez case the difficulties and defects of a distinction in required care according to a strict division of the persons to be protected into invitees, licensees and trespassers has recently been vigorously urged by the other division of this court, Presiding Justice Peters writing the opinion. Certainly where, as here, there are very special relations which cannot with any certainty be brought under either the category of invitee or licensee, the care required should not be decided on the basis of the affixing of an inappropriate label but on the basis of common sense applied to the actual facts. A rule which would deprive any user of public streets on the basis of a required revocable permit of the protection of ordinary care by the City in the maintenance of its streets and otherwise is unacceptable. The City under its police power over its streets may require permits for many uses. (19 Cal.Jur. 75). Suppose a taxi service was operated under such permit. Would there be any sensible ground for warding less protection to the user of such a taxi than to the user of a private automobile? Neither can the City be permitted to escape liability here by labeling plaintiff a licensee. Appellant relies mainly on Sincerney v. City of Los Angeles, 53 Cal.App. 440, 200 P. 380. The case is distinguishable on its facts because there the accident occurred when the cars of the railway company moving over its private right of way protruded over a sidewalk of the city illegally without any permission. If there is language in that opinion which does not square with our theory it is not binding on us.

[9, 10] Appellant next assigns as reversible error the refusal by the court of an instruction proposed by the City to the effect that defendant Company was bound by General Order No. 26D of the Public Utilities Commission prohibiting a railroad corporation from operating cars over tracks on which overhead clearances are less than 22 feet, and the giving of an instruction to the effect that a similar provision did not apply to said defendant. If this was error it was error prejudicial to plaintiff only, who has not appealed. "The City, as a joint tort feasor, has no legal right to complain that another joint tort feasor was improperly exonerated from liability, there being no right of contribution between joint tort feasors." Sullivan v. City & County of San Francisco, 95 Cal.App.2d 745, 755, 214 P.2d 82, 88. The City contends that it also was prejudiced because if the jury had been instructed on the above duty of the Company not to operate its cars under the existing condition the jury might have found that the negligence of Company was the sole proximate cause of the accident, thus exonerating appellant. This is not so. The rules which prohibited the owner of wires from maintaining them with an insufficient clearance above railway tracks and railroad companies from operating cars where there was insufficient clearance were both intended to prevent just such accidents as here happened. Both the City and the Railroad Company violated these safety rules for many years continuing until the moment of the accident. The negligence of each then constitutes a concurrent cause of the accident. "Where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as a superseding cause; but each of the two concurring acts of negligence will be held to be a proximate cause." Werkman v. Howard Zink Corp., 97 Cal.App.2d 418, 426, 218 P.2d 43, 48, and cases there cited. Moreover, "If the realizable likelihood that a

third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." Restatement of Torts, sec. 449; McEvoy v. American Pool Corp., 32 Cal.2d 295, 299, 195 P.2d 783. The possibility of a car being driven over the spur track was certainly one of the hazards which made the City negligent in maintaining the wires at too low a level. Although in general the reasonable forseeability of the intervening act is for the jury where there is room for reasonable difference of opinion, Restatement of Torts, sec. 453, Comment (a); McEvoy v. American Pool Corp., supra, here there is no room for such difference of opinion as undisputed evidence shows that these acts had openly occurred under a permit of the City daily for many years prior to and until the accident. If appellant was negligent, and it was correctly found to be negligent, its negligence was under these circumstances a cause of the accident as a matter of law. The above shows also that the court's refusal of the City's related proposed instruction No. 33 cannot have been prejudicial to the City.

[11] There was no error in the refusal of instructions as to absence of negligence in the use of appliances not obviously dangerous, used safely and without accident for a long time by a defendant who had no reason to know of any danger, because the known danger of impaired clearances, which led to rules as to minimum clearances recognized as applicable by the City, imposed on the City the duty of reasonable inspection (38 Am.Jur. 667), and the simplest inspection by measuring would have shown the dangerous condition which existed for many years, so that the City as a matter of law was not in the position of somebody who had no reason to know of the danger. The City can be said to have had constructive knowledge. Fackrell v. City of San Diego, 26 Cal.2d 196, 206, 157 P.2d 625, 158 A.L.R. 773; Perry v. City of San Diego, 80 Cal.App.2d 166, 170, 181 P.2d 98.

[12] Appellant points out that it was error to instruct on the requirements of General Order 95 of the Public Utilities Commission because that order, effective July 1, 1942, contained a provision that its requirements do not apply to lines constructed or reconstructed prior to its effective date, the line involved having been constructed in 1914 and reconstructed in 1935. The error was not prejudicial because the provisions stated to the jury as applicable as part of said ordinance were at any rate applicable to the City under the general law except a provision requiring *frequent* inspections of the line and one requiring a minimum clearance of 22 feet. The latter was concededly applicable to the City on the basis of other orders of the Public Utilities Commission, the former was not prejudicial because the City, which as stated before was under duty of *reasonable* inspection, had necessarily violated that duty, as one inspection by simple measuring would have shown the defect.

[13, 14] Appellant further complains that the court erroneously rejected the City's evidence relative to the reconstruction of the overhead system in 1935 by a contractor under contract with the State of California which contract required the work to be done conforming to the requirements of the California Railroad Commission. The materiality is not obvious as the amended complaint predicates the City's liability on the fact that it negligently owned, operated, maintained and controlled the wires at too low a level, not that it so constructed them. The only ground for materiality submitted by the City at the trial was that the reconstruction in the stated manner might constitute an excuse for the maintenance and operation of the wires by the City in violation of an order of the Railroad Commission. As reliance on the correct execution of the work by the contractor, whether contractor of the City or of the State, would not constitute an excuse for operation and maintenance without any inspection during many years when a simple one time measuring would have shown the defect, this only ground of materiality proposed was correctly rejected. The same ground is not repeated on appeal. Other grounds of materiality proposed on appeal need not be reviewed, as

appellant cannot complain that grounds of admissibility were not accepted which were not stated in the court below. Valentin v. Valentin, 93 Cal.App.2d 588, 593, 209 P.2d 654; Estate of Parkinson, 190 Cal. 475, 477, 213 P. 259.

[15] Prejudicial error is predicated on the court's allowing Dr. Catton to testify although when the City had tried to take Dr. Catton's deposition plaintiff had successfully interposed the claim of the attorney client privilege because Dr. Catton was an intermediate agent for communication between plaintiff and his attorneys. City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234, et seq., 231 P.2d 26, 25 A.L.R.2d 1418. The contention, not supported by any authority, has no merit. An attorney, or a person in a similar position, is not incompetent to testify in the case of his client, and does not become incompetent for the future, when the privilege is asserted. The privilege may be waived by the person in whose favor it exists at any time, and only thereafter is the testimony of the witness also available to the opposing party. Accordingly Dr. Catton was cross-examined at length.

With respect to the several assignments of error stated before it may be added that if with respect to any of them there has been some error, it has not resulted in a miscarriage of justice as appellant under all circumstances shown by the evidence should clearly be held liable for the negligent maintaining of its wires. Art. VI, § 4½ of the California Constitution.

Finally appellant contends that the damages in the amount of $7500 granted are excessive as a matter of law. Appellant does not give an analysis of the evidence supporting the award, but mainly contends that there were no special damages, that the physical injury plaintiff suffered was slight, that he was never confined to bed, that most of his complaints were subjective in character, and that his lower earnings were mainly attributable to slackness of times for the railroad, low seniority and plaintiff's turning to office work, which he preferred.

Plaintiff's medical expenses were paid under an insurance policy of his employer. The evidence favorable to respondent shows in part the following: Plaintiff when hit by the wire over the bridge of his nose was only knocked out for a moment and was soon able without assistance to get up from the top of the car, set the brake and to come down. A physician applied some methiolate to his face and he then continued to work and even worked a second shift that day. However at the end of the day his eyes were swollen, his neck was stiff and he had a severe headache. The trouble with neck and headache kept him from work for the next two days and also later prevented him from working double shifts and a few times from working at all. There was a definite sprain of the neck. An X-ray taken just before the trial showed a minute calcium deposit in the neck which had not been present on X-rays taken shortly after the accident, which new deposit was explained by one expert witness as corroborating that a ligament had there been actually sprained. Except for that little deposit there was no objective indication of disability at the time of trial. Dr. Catton who examined plaintiff a week after the accident saw symptoms as of shingles on left arm and chest, according to said witness attributable to damage to nerves and ganglia in the accident. Early in January a feeling of weakness in the left shoulder developed; plaintiff felt he could not hang on to the side of a freight car and had difficulty throwing a switch. Other nervous symptoms also developed over and above the severe headaches and stiffness of the neck; restlessness, sleeplessness and fear of dying, for which a few times a doctor had to be called in the night. The diagnosis was, according to Dr. Catton, traumatic neurosis of the anxiety type. There was no indication of malingering or of a litigation neurosis, but of a traumatic neurosis on the basis of a physical injury. Physical therapy for the several symptoms did not yield sufficient results. In April, 1949, plaintiff was forced to give up his work as a switchman and later he was notified by the Western Pacific that his services were no longer needed because he did not report to work. Two physicians testified that in his condition it was not safe for him to do switch work. At the time of the trial,

nearly three years after the accident, the several symptoms had decreased but not disappeared, and they were not expected to disappear completely. Since his dismissal appellant had done different kinds of work among which was work as a warehouseman; because of inability to handle heavy tires he transferred to a desk job with the same firm which paid $30 a month less than he received as warehouseman. If he had stayed with the Western Pacific he would in two years have attained regular status and earned $15.64 per day. His salary at the time of the trial amounted to $200 a month.

[16, 17] Traumatic neurosis was recognized in this state as a basis for damages as early as 1896. Sloane v. Southern Cal. Ry Co., 111 Cal. 668, 680, 44 P. 320, 32 L. R.A. 193. There was here evidence of physical injury, long and severe mental suffering, loss of a job, loss of income, and loss of earning capacity by restriction of the kind of work for which respondent was fit. He had a life expectancy of forty years. Under these circumstances we cannot say that the recovery of $7500 shocks the sense of justice and raises at once a presumption that it is the result of passion or prejudice, the degree of evident excessiveness required according to the rule in this state to permit an appellate court to set aside a damage award. (8 Cal. Jur. 834.)

The judgment is affirmed.

DOOLING, J., concurs.



BURR et al. v. SHERWIN-WILLIAMS CO. OF CALIFORNIA.*

Civ. 4633.

District Court of Appeal, Fourth District, California.

June 4, 1953.

Rehearing Denied June 29, 1953.

Hearing Granted July 28, 1953.

In action against manufacturer of insecticide, consignee-seller thereof, and sprayers-by-air thereof, for crop damage, the Superior Court, Kings County, W. G. Machetanz, Judge Assigned, entered judgment against the manufacturer, and the manufacturer appealed. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to sustain the verdict.

Affirmed.

1. Negligence ⇐134(2)

Negligence may be proved by circumstantial evidence in proper case.

2. Negligence ⇐121(2)

A res ipsa loquitur case is a circumstantial evidence case which permits jury to infer negligence from mere occurrence of accident or damage itself; first requirement being basis of past experience which will permit trier of facts to conclude that such events do not ordinarily happen unless some one has been negligent.

3. Negligence ⇐121(2)

Exclusive control by defendant of instrumentality causing injury is not an absolute requirement for application of doctrine of res ipsa loquitur.

4. Negligence ⇐121(2)

Although doctrine of res ipsa loquitur will not ordinarily apply if it is equally probable that negligence was that of some one other than defendant, plaintiff need not exclude all other persons who might possibly have been responsible where defendant's negligence appears to be the more probable explanation of accident.

5. Negligence ⇐121(2)

Fact that accident occurs sometime after defendant relinquishes control of instrumentality which causes accident does not preclude application of doctrine of res ipsa loquitur provided there is evidence that instrumentality had not been improperly handled by plaintiff or some third person, or its condition otherwise changed, after control was relinquished by defendant; but it must appear that defendant had sufficient control or connection with accident so that it can be said that he was more probably than not the person responsible for plaintiff's injury.

* Subsequent opinion 268 P.2d 1041.

6. Negligence ⇐121(2)

Doctrine of res ipsa loquitur may be applied even though defendant is not in better position than plaintiff to explain what occurred, if it appears more probable than not that injury resulted from negligence on part of defendant.

7. Negligence ⇐121(2)

Doctrine of res ipsa loquitur may be applied against several defendants where circumstances are such as to show a probability that all of them were negligent.

8. Negligence ⇐121(2)

As a general rule, res ipsa loquitur applies where accident or injury is of such nature that it can be said, in light of past experience, that it probably was the result of negligence by some one and that defendant is probably person who was responsible.

9. Negligence ⇐136(6)

In action against manufacturer of insecticide, consignee-seller thereof, and sprayers-by-air thereof, for crop damage, jury questions were presented, under evidence, as to whether sufficient facts had been established for application of doctrine of res ipsa loquitur as to all defendants and as to whether each defendant had offered sufficient explanation of his participation so as to avoid inference of res ipsa loquitur.

10. Negligence ⇐136(9)

Where evidence is conflicting or subject to different inferences, it is for jury, under proper instructions, to determine whether each of conditions necessary to bring into play rule of res ipsa loquitur is present.

11. Negligence ⇐138(2)

In action against manufacturer of insecticide, consignee-seller thereof, and sprayers-by-air thereof, for crop damage, instructions given sufficiently stated general rule in reference to what facts must be established before res ipsa loquitur doctrine is applicable. Code Civ.Proc. §§ 1958, 1959.

12. Negligence ⇐59

Manufacturer of article which is inherently or imminently dangerous or which, although not dangerous in itself, becomes so when applied to its intended use in usual and customary manner, is liable to any person, whether purchaser or third person, who, without fault on his part, sustains injury which is natural and proximate result of negligence in manufacture of article, if injury might have been reasonably anticipated; and in such case, liability does not depend on warranty, nor does it depend on privity of contract, but rather upon breach of public duty owing to all persons into whose hands article may lawfully come and by whom it may be used. Civ.Code, §§ 1735(1, 2), 2026.

13. Sales ⇐267

Recovery for breach of warranty may be sustained even though seller has printed disclaimer of warranty on container, if it is not shown that notice of nonwarranty came to buyer's attention. Civ.Code, §§ 1735(1, 2), 2026.

14. Sales ⇐441(1)

In action against manufacturer of insecticide, consignee-seller thereof, and sprayers-by-air thereof, for crop damage, jury was justified, under evidence, in permitting recovery against manufacturer for breach of implied warranty of fitness. Civ. Code, §§ 1735(1, 2), 2026.

15. Appeal and Error ⇐1068(3)

Defendant may not be heard to complain where there is sufficient evidence to support claim of general negligence, even though error may appear in instructions based on statutory liability.

Ray W. Hays, James N. Hays, Fresno, for appellant.

W. R. Bailey, Visalia, Wingrove & Brown, Meredith Wingrove, Lee G. Brown, Hanford, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents, husband and wife, owned approximately 135 acres of land planted to cotton. About July 16, 1949, Mr. Burr discovered that the crop was infested with insects. He requested the general manager of defendant Central Valley Cooperative, hereinafter referred to

as CVC, of which he was a member, to send a man to inspect his cotton. Defendant Chalace Patton, Jr., its field man, found it to be infested with cotton daubers and advised plaintiffs to spray with a DDT solution. Respondents purchased from CVC, as recommended, DDTOL 25% Emulsifiable, manufactured by defendant and appellant Sherwin-Williams Company, which material was delivered to CVC by it on consignment, to be paid for when it was sold. Patton made arrangements with defendant Rankin Aviation Industries to do the spraying. The product was contained in five new 30-gallon nonreturnable steel drums which had been delivered to CVC in 1948. These drums were transported to the airport unopened and were there opened and mixed with water by defendant Dale Fry, chief pilot for the Rankin Company. After mixing, the material was placed in the company's airplane and sprayed on the cotton. Streaked crop damage was immediately noticed. Thereafter some of the cotton plants withered and others grew abnormally. Production was adversely affected. Three experts examined the field and all agreed that it had been damaged by a chemical compound known as 2,4–D or one of its derivatives, which is a plant hormone and is also used as a weed killer. It has an adverse effect on broad-leaf plants, even in small quantities, such as one part per million.

Respondents were unaware of the cause of the damage and filed suit against the named defendants, including the appellant Sherwin-Williams Company, and predicated their complaint on the theory of the *res ipsa loquitur* rule and on a claim of negligence in the manufacture and supply of goods. Respondents produced by deposition and other evidence the testimony of the inspector for the Bureau of Chemistry of the State Department of Agriculture, who took samples from the five open drums in question and from two unopened drums at the warehouse of CVC, which drums contained the same lot number as those here in question. He testified that as a result of several tests there made the presence of a small amount of 2,4–D or 2,4,5–T was suggested. The chemist employed by CVC made similar tests and from samples he claimed he took from four of the drums he found they conformed with the statements contained in the label on the drums as to its contents, and that the presence of 2,4–D was not indicated. Appellant also produced its own chemist at the plant who testified there was no evidence of such contamination. The label on the drums recites: "Sherwin-Williams Products—DTOL 25% Emulsifiable is a solution of DDT in Xylene which can be used on plants when it is mixed according to directions * * *. It is especially adaptable for application by airplane and low-gallonage ground equipment". Then follows mixing directions and recommendations for use, with the following notation: "Caution: DDTOL 25% Emulsifiable should not be applied full strength to animals or plants. Use only according to directions. DDTOL 25% Emulsifiable should not be used on melons, cucumbers, squash. * * * Seller makes no warranty of any kind, express or implied concerning the use of this product. Buyer assumes all risk in use or handling, whether in accordance with directions or not".

Several instructions on the doctrine of res ipsa loquitur were given. The jury found in favor of respondents for $12,110.54, as against appellant Sherwin-Williams Company, and in favor of the remaining defendants.

The only questions presented on this appeal are (1) whether, under the facts established, the doctrine of *res ipsa loquitur* was applicable; (2) whether the proper instructions on that subject were given; (3) whether the jury was erroneously instructed concerning implied warranties; and (4) whether the evidence was sufficient to sustain the verdict.

[1] It here appears that respondents, owners of the cotton crop affected, intentionally caused their crop to be sprayed with an insecticide which, according to the normal experience and knowledge of such matters, was harmless to cotton. The plants so sprayed were unquestionably damaged by the actions of at least one of

the defendants and not by respondents' own actions or conduct. The damage was conclusively shown to have been caused by a plant hormone type of substance known as 2,4–D. Even though appellant referred to the fact that others had used the product without harm on cotton crops, when plaintiffs had their cotton crop sprayed with this insecticide it was severely damaged. The only question is which defendant or defendants, if any, were negligent by reason of such contamination. It must be conceded that the presence of a plant killer in a solution of DDT in its original labeled container, indicating that no such contamination is contained therein and which product is sold for the purpose of spraying broad-leaf plants, strongly indicates negligence on the part of the manufacturer. Proof of negligence by circumstantial evidence may be taken in a proper case. (Professor Prosser, on Res Ipsa Loquitur in California, 37 Cal.Law Review p. 183.) In Tingey v. E. F. Houghton & Co., 30 Cal.2d 97, 179 P.2d 807, although there was no mention of the doctrine of *res ipsa loquitur*, the manufacturer's plant manager in that case testified at length with respect to the manufacture of the product and the tests made to assure its proper composition for the purpose of its intended uses. The court there said, 30 Cal.2d at page 101, 179 P. 2d at page 810:

> "Although the testimony of the plant manager, if believed by the jury, would indicate that defendant exercised great care to prevent contamination, it is not sufficient as a matter of law, under all of the facts of this case, to compel a finding that the product was pure when shipped. * * * In passing on the credibility of witnesses and the weight to be given to their testimony, the jury is entitled to consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. * * *"

[2] A *res ipsa loquitur* case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence of the accident or damage itself. The first requirement is a basis of past experience which will permit the trier of fact to conclude that such events do not ordinarily happen unless someone has been negligent. There was undisputed testimony that DDTOL 25% Emulsifiable alone would not cause the symptoms and effects sustained by plaintiffs' cotton crop, all of which proof supports the proposition that the damage in this case was outside of common experience connected with the use of such DDTOL and led to the conclusion that a harmful foreign substance was present.

Practically the same contentions raised here, in reference to the application of the *res ipsa loquitur* rule, were raised in Pruett v. Burr, Cal.App., 257 P.2d 690, which involved the same operation but related to an adjoining owner. For further description of the factual background and statement of principles there decided, reference is made thereto.

[3–6] Having relied, in part at least, on the inference permitted under the doctrine of *res ipsa loquitur*, we must review the evidence in harmony with the principles laid down in Zentz v. Coca Cola Bottling Company, 39 Cal.2d 436, 440, 247 P.2d 344, insofar as it is here applicable. It was there stated, in reference to the contention that the instrumentality must be in the exclusive control of defendant before the doctrine is applicable, that the purpose of the requirement that the defendant must have management or control of the agency or instrumentality which caused the injury was to eliminate the possibility that the accident or injury was caused by someone other than the defendant and that its use is merely to aid the courts in determining whether, under the general rule, it is more probable than not that the injury was the result of defendant's negligence; that the requirement of control is not an absolute one and ordinarily the doctrine will not apply if it is equally probable that the negligence was that of someone other than the defendant, yet the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be

the more probable explanation of the accident; that the fact that the accident occurred sometime after the defendant relinquished control of the instrumentality which caused the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by the plaintiff or some other third person, or its condition otherwise changed, after control was relinquished by the defendant. However, in this connection, it must appear that the defendant had sufficient control or connection with the accident or injury so that it can be said that he was more probably than not the person responsible for plaintiff's injury. Another factor may be that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the injury may be accessible to the defendant but inaccessible to the plaintiff, and that the doctrine may be applied even though the defendant is not in a better position than the plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of the defendant. It then stated that the doctrine was applied in certain specific unusual situations where there was clearly a probability that one or more of several persons were negligent but where the plaintiff was unable to point out which of them was responsible for his injury, such as in Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, where a patient received injuries while unconscious and in the course of medical treatment. It was there held that all persons having any control over his body could be properly called upon to give an explanation of their conduct.

[7, 8] The Zentz case also stated that the doctrine may be applied against several defendants where the circumstances are such as to show a probability that all of them were negligent. It then concluded that, as a general rule, *res ipsa loquitur* applies where the accident or injury is of such nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible, that in determining whether such probabilities exist with regard to a particular occurrence the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened; and that all of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence. See, also, Knell v. Morris, 39 Cal.2d 450, 455, 247 P.2d 352.

In Cavero v. Franklin General Benevolent Society, 36 Cal.2d 301, 223 P.2d 471, where the defendant hospital, as well as doctors and a nurse anaesthetist were sued for the wrongful death of a child while having its tonsils removed, and where the jury exonerated the doctors and held the hospital liable, it was held that it was not error to give an instruction on the *res ipsa loquitur* rule as to all defendants, where the jury accepted the explanatory evidence exculpating the doctors but not the hospital.

In the present case it seems clear that the injury complained of would not have occurred without negligence by someone other than the respondent. It is equally clear that such injury was one that in the ordinary course of things does not happen and was, in all probability, due to the application of chemical spraying; that appellant, as well as the defendants were in a better position than respondent to explain what happened; that the chief evidence of the cause of the injury was accessible to defendants and not to respondent; that appellant had sufficient control or connection with the cause of the injury; that it was more probable than not that it was the one responsible for the injury to respondent's cotton crop and was the one called upon to give an explana-

tion of its conduct; and that the circumstances were such as to show probability that all of the defendants were negligent.

[9, 10] We therefore conclude that there was sufficient evidence to submit to the jury the question whether sufficient facts had been established for the application of the doctrine as to all defendants, and that it became incumbent upon each defendant to explain his participation therein if he or it sought to avoid the inference of *res ipsa loquitur*. Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* is present. Baker v. B. F. Goodrich Co., 115 Cal. App.2d 221, 252 P.2d 24.

[11] There is some question whether the instructions given on the subject were proper, under the facts related. Some of the instructions recite that "From the occurrence of the damage involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of defendants." The court then instructed the jury that those given instructions on res ipsa loquitur may "appear to be an exception" to the general rule that the mere happening of an accident is not sufficient to enable the plaintiff to recover but the burden is upon the plaintiff to show that the defendants were guilty of negligence which was a proximate cause of the injury. It then informed the jury that the instructions were based on a special doctrine of the law which may be applied only under special circumstances. Then followed certain conditions which must be established before the doctrine may be applied. This is followed by the statement that "When all these conditions are found to have existed the inference of negligence to which they give birth may support a verdict for the plaintiff in the absence of a showing by defendants that offsets the inference". This instruction is followed by one reciting that "* * * if you find it to be a fact that a chemical compound known as 2,4–D or 2,4,5–T, or a similar substance is not ordinarily contained in the spray material for cotton dauber control, and if you further find it to be a fact that the plaintiffs have been damaged and injured by the presence of such" material "applied to their growing cotton crop * * * then this fact, so found, causes an inference of negligence to arise and you are instructed that it is incumbent upon the defendants to explain how the loss occurred and by what reason they are not responsible for said damage." The statement in the instruction here given, which in part recites that "From the occurrence of the accident in this case, as established by the evidence, there arises an inference" has been criticized where the evidence shows that the application of the inference by the jury should be only permissive. Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 59 P. 2d 962; Hardin v. San Jose City Lines, Inc., Cal.App., 252 P.2d 46; Prosser, on Res Ipsa Loquitur in California, 37 Cal. Law Review, pp. 217, 231. Section 1958 of the Code of Civil Procedure provides that an inference is a deduction which the reason of the jury makes from facts proved, without an express direction of law to that effect. Section 1959 of the Code of Civil Procedure provides that a presumption is a deduction which the law expressly directs to be made from particular facts. In many of the reported cases it has been held that a permissible inference of negligence arises only upon the establishment of facts sufficient to support such an inference and the jury is permitted to accept the inference, i. e., it is not compulsory, and if it sees fit to find for the defendant, even if the inference does arise, it is free to do so. Exceptional cases have held that under a given set of facts, where the inference is strong it may be compulsory to accept the inference. Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Morris v. Morris, 84 Cal.App. 599, 258 P. 616; and Pillars v. R. J. Reynolds Tobacco Company, 117 Miss. 490, 500, 78 So. 365, 366. As distinguished from a permissible inference, a different rule seems to be applied to a presumption. The instructions given sufficiently state

the general rule in reference to what facts must be established before the rule is applicable. There was no request by defendants for additional instructions further qualifying this general rule. Under the facts here related no prejudicial error resulted in giving the instructions indicated. Mudrick v. Market Street R. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533; Prunty v. Allred, 73 Cal.App.2d 67, 165 P.2d 935; Hardin v. San Jose City Lines, Inc., supra; Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 239 P. 2d 671.

[12–14] As a fifth cause of action respondents allege that appellant breached the implied warranty of fitness mentioned in Civil Code, Sec. 1735, subdivision 1. The court instructed the jury in the language of subdivisions 1 and 2 of that section and that "If you decide that any of the provisions of the code section which I have just read to you are applicable, and further decide that an implied warranty was made by the manufacturer, that warranty runs with the goods to the ultimate consumer, there being no requirement of privity of contract between the ultimate consumer and the manufacturer. And if you further find that the manufacturer breached such warranty, then it is liable for the damage caused by such breach, regardless of negligence." The argument is that these given instructions were prejudicially erroneous because there was no privity of contract between appellant and respondents and that appellant made an effective disclaimer of any and all warranties by means of the printed label on the drums, citing Cliff v. California Spray Chemical Co., 83 Cal.App. 424, 430, 257 P. 99; 46 Am.Jur. p. 489; 22 Cal.Jur. 968. See, Charles Tomori & Son v. Globe Laboratories, 35 Cal.App.2d 248, 95 P.2d 173; and William A. Davis Co. v. Bertrand Seed Co., 94 Cal.App. 281, 271 P. 123.

Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799, was an action under section 1735 of the Civil Code, based on an implied warranty as to the quality of food. There the buyer purchased at a restaurant a sandwich which was wrapped and manufactured by defendant company. After taking the first bite the customer discovered it contained maggots. In an action against the manufacturer the defendant made the same contentions as made here. The court held that there was an implied warranty as to the quality of food as between plaintiff and defendant company. In the instant case the purchaser was purchasing the insecticide from the appellant through its consignee. Title to it did not pass to CVC when it was delivered but only upon sale by it to a purchaser. Such a sale is governed by the ordinary rules in reference to sale by consignment. Civ.Code, sec. 2026; 12 Cal. Jur. p. 411, sec. 1 et seq.; Brock & Co. v. Board of Supervisors, 8 Cal.2d 286, 65 P.2d 791, 110 A.L.R. 700; M. Shortell & Son v. Calnen, 102 Conn. 38, 128 A. 17; In re Renfro-Wadenstein, D.C., 47 F.2d 238.

The rule enunciated in the Klein case appears to be that a manufacturer of an article which is inherently or imminently dangerous or which, although not dangerous in itself, becomes so when applied to its intended use in the usual and customary manner, is liable to any person whether the purchaser or a third person who, without fault on his part, sustains an injury which is the natural and proximate result of negligence in the manufacture of the article if the injury might have been reasonably anticipated. In such case, liability does not depend on warranty nor does it depend on privity of contract. It is said in such cases that liability depends rather on a breach of a public duty owing to all persons into whose hands the article may lawfully come and by whom it may be used. 65 C.J.S., Negligence, § 100, page 622. This rule has been applied to food and drug cases intended for human consumption, and might properly be extended to chemicals which are contaminated and therefore unfit for the purposes for which they are compounded and the uses and purposes contemplated by the label under which they are sold.

The claim that an effective disclaimer of all warranties was made by reason of the printed label on the drums disclaiming

liability for all risk in connection with its use or handling is based on the holding in such cases as Couts v. Sperry Flour Co., 85 Cal.App. 156, 259 P. 108; and Sutter v. Associated Seed Growers, Inc., 31 Cal.App.2d 543, 88 P.2d 144.

In 22 Cal.Jur. p. 970, Sec. 50, wherein cases are cited supporting the rule, it is stated:

"Doubtless the seller may defeat the buyer's action by proof that the latter was informed as to the facts, or advised of a disclaimer of warranty, by means of printed notices, labels on packages, and the like. It is, however, incumbent on the seller to show that the notice came to the buyer's attention; and, if this fact is not established by the evidence, a recovery for breach of warranty may be sustained. * * * But, apparently, the seller is not invariably in the necessity of producing direct evidence to show that a notice of nonwarranty came to the buyer's attention; that is to say, the fact that the buyer was cognizant of the notice may be established by inference * * * the question as to knowledge should be submitted to the jury."

In the instant case there was no conclusive showing that the buyer was or ought to have been aware of the presence of the labels on the drums. The drums were stored in the consignee's warehouse, transported to the airfield by the consignee, the contents mixed, and sprayed by defendant Rankin at the consignee's request. It does not appear that respondents ever saw or ever had an opportunity to see any of such labels until after the damage was done. No instruction was offered by appellant on this subject.

Since the evidence would support a finding that the contents of the drums contained substances other than those indicated on the label, i. e., 2,4–D or its derivatives, which is conceded to be injurious to cotton plants, and since the jury might rightfully infer that appellant knew or should have known this fact and that appellant and its consignee represented it as being an appropriate insecticide for the purpose indicated, we see no reason why sec. 1735 of the Civil Code should not be held to be applicable if the jury, under proper instructions, so concluded.

[15] We perceive no prejudicial error in giving the instructions indicated, even though it may be argued they were to some extent erroneous. There is sufficient evidence to support the judgment under the claim of ordinary negligence. Kolberg v. Sherwin-Williams Co., 93 Cal.App. 609, 269 P. 975; Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013; Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481; Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345. Appellant may not be heard to complain where there is sufficient evidence to support the claim of general negligence even though error may appear in the instructions based on a statutory liability. Klein v. Duchess Sandwich Co., Ltd., Supra; Wells v. Brown, 97 Cal. App.2d 361, 217 P.2d 995; Nunneley v. Edgar Hotel, 36 Cal.2d 493, 500, 225 P. 2d 497.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

PEOPLE v. UNITED AIR LINES, Inc. *

No. 15549.

District Court of Appeal, First District, Division 1, California.

June 10, 1953.

Hearing Granted Aug. 6, 1953.

Proceedings on a complaint alleging incurrence by defendant of penalties of $2,000 a day for charging unauthorized passenger rates during a 69 day period. The Superior Court, County of San Mateo, Edmund Scott, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that carrier of passengers by air was not subject to statutory penalties imposed upon any public utility violating or failure to comply with rate order of Public Utilities Commission.

Affirmed.

1. Carriers ⇐20(1)

In public utility code section imposing penalties upon any public utility which violates or fails to comply with any provisions of the "Constitution" or of a specified part of the public utility code, etc., quoted word, appearing, as it does, in object of sentence, in no way changes or enlarges meaning of subject, "any public utility," and penalty section cannot, merely by virtue of use of quoted word therein, be deemed to make penalty applicable to a transportation company if such company is not a "public utility". Const. art. 12, § 1 et seq.; Public Utilities Code, §§ 2107, 2108.

2. Carriers ⇐4

Word "includes" is ordinarily used by way of illustration of enlargement rather than by way of limitation, but is used, in public utility code section defining term "common carrier" as including certain enumerated type of common carriers, as a word of limitation. Public Utilities Code, § 211.

3. Carriers ⇐20(2)

Carrier of passengers by air was not subject to statutory penalties imposed upon any public utility violating or failing to comply with rate order of Public Utilities Commission. Public Utilities Code, §§ 211, 216, 2107, 2113.

Everett C. McKeage and J. Thomason Phelps, San Francisco, for appellant.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin and Colin C. Kelley, San Francisco, Mayer, Meyer, Austrian & Platt, John T. Lorch and Edmund A. Stephan, Chicago, Ill., for respondent.

FRED B. WOOD, Justice.

Upon the direction of the Public Utilities Commission of California, the plaintiff on January 23, 1952 filed a complaint in the superior court alleging the incurrence by defendant, United Air Lines, Inc., of penalties of $2,000 a day for charging unauthorized passenger rates during a period of 69 days in 1951.

A general and special demurrer to the complaint was sustained with leave to amend. The complaint was amended. A similar demurrer to the amended complaint was sustained without leave to amend. Judgment for the defendant was entered thereon. The judgment recites that the plaintiff "informed the Court that it did not desire to further argue the matter but was willing to submit the same on the argument on the demurrer to the original complaint" and "that in case the demurrer was sustained it might be sustained without leave to amend." Plaintiff has appealed from the judgment.

In the amended complaint plaintiff alleges that the commission[1] has jurisdiction over the intrastate rates of all transportation companies, common carriers and public utilities operating within this state insofar as the intrastate operations of such agencies may be concerned; that defendant was and is engaged in the intrastate transportation of passengers by air within this state, holding itself out to and offering and furnishing such transportation for compensation generally to the public and to the members thereof indifferently; that defendant is a transportation company, a common carrier, and a public utility by

1. In this opinion "commission" means "Public Utilities Commission of California" unless otherwise indicated.

* Subsequent opinion 268 P.2d 745.

virtue of and within the contemplation of Article XII of the Constitution and of chapter 11 of Part I of Division I, §§ 2101–2113, of the Public Utilities Code of this state; that by decision dated March 14, 1950, the commission found that one-way fares of $9.95 and $9.99 for air line coach class service between Los Angeles and San Francisco were reasonable (49 Cal.P.U.C. 494); that on March 30, 1950, defendant filed with the commission its intrastate local passenger fares tariff No. 7, effective April 29, 1950, specifying a rate of charge of $9.95 for one way daily air coach service between Los Angeles and Oakland or San Francisco and for round trip air coach service between those points a charge of twice the one-way fare, which tariff of rates was accepted and permitted by the commission; that on March 1, 1951, defendant raised its rate of charge for such transportation without prior showing before the commission that the increase was justified, and on and after said date to and including May 8, 1951, defendant without prior or any authorization of the commission did on each of 69 days, March 1 to May 8, 1951, charge and receive for said transportation $11.70 for said one-way service and $23.40 for said round trip service; that by its decision reported in 50 Cal. P.U.C. 563, effective May 9, 1951, the commission authorized the defendant to publish, file and maintain a one-way daily coach fare of $11.70 for transportation of passengers between said points; that by reason of such conduct defendant has incurred a penalty to the people of the state in the sum of $2,000 for each day's violation of law during the period March 1 to May 8, 1951, inclusive, a total penalty of $138,000.

The commission's decision of April 24, 1951, cited in the amended complaint and discussed by the parties in their briefs, shows that prior to March 1, 1951, this defendant and several other air carriers applied to the commission seeking authority to make the indicated fare increase but commenced charging the proposed increased rate prior to the granting of their applications by the commission. Concerning the occasion for starting to charge the increased rates prior to commission approval of those applications, the commission said, "At the hearing and in their briefs the three carriers [California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc.] urged various extenuating circumstances. Primarily they challenged the Commission's power to regulate in any respect the activities and business of air transportation companies. They contended, and offered evidence to establish, that the fare increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the companies construed to be tantamount to a demand. They asserted that in any event the $11.70 fare is fully justified, and, without waiving their objection that the Commission lacks jurisdiction, introduced financial and other evidence designed to support the assertion." (50 Cal.P.U.C. 563 at 566.)

The commission, in its 1951 opinion and decision, discussed the jurisdictional question and concluded that it had jurisdiction over the rates of transportation companies by air, jurisdiction conferred by certain provisions of Article XII of the state Constitution. It authorized the three air lines mentioned to charge and collect the proposed increased rate (effective 15 days after the date of the decision), ordered them to make reparation wherever possible to passengers paying coach fares in excess of the fares reflected by tariffs previously filed, and admonished them that they may not in intrastate commerce between points in this state raise any rate of charge except upon a showing before the commission that an increase is justified, nor make any unreasonable charges, nor discriminate in charges or facilities, "nor in any other manner violate any of the provisions of Article XII of the Constitution * * * applicable to transportation companies." (Defendant herein petitioned for a writ of review, which was denied by the State Supreme Court, without written opinion, July 31, 1951; United Air Lines v. Public Utilities Comm., 37 Cal.2d 1, following page 633. Defendant's petition for a review by the Supreme Court of the United States was denied January 7, 1952, for want of

a substantial federal question; 342 U.S. 908, 72 S.Ct. 304, 96 L.Ed. 679.)[2]

The sole issue upon this appeal is whether or not this defendant by charging the increased rates mentioned, during the period March 1 to May 8, 1951, incurred penalties which under certain circumstances the provisions of § 2107 of the Public Utilities Code by its terms imposes. That section declares that "Any *public utility* which violates or fails to comply with any provision of the *Constitution* of this State or of this part [§§ 2101 to 2113; the Public Utilities Code], or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."[3] (Emphasis added.)

[1] The key words in this section are "public utility." Unless defendant is a "public utility," as that term is used in § 2107, it cannot be subject to the penalty which that section imposes.[4]

For a definition, we turn to § 216 of the code. It states that "'Public utility' includes every common carrier, toll bridge corporation, * * * [and a number of types of corporations other than transportation companies] * * * where the service is performed for or the commodity delivered to the public or any portion thereof. * * *"

Here the key words are "common carrier," defined in § 211 of the code as follows: "'Common carrier' includes: (a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder * * * [several types of car corporations] * * * operating for compensation within this State. (b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State, except as provided in Section 212. 'Inland waters' as used in this section includes all navigable waters within this State other than the high seas. (c) Every 'passenger stage corporation' operating within this State. (d) Every highway common carrier and every petroleum irregular route carrier operating within this State."

[2] In this definition of "common carrier" there is no specific mention of common carrier by air. It is true that this enumeration of carriers is preceded by the word "includes," which ordinarily is used by way of illustration or enlargement, not by way of limitation. Oil Workers International Union v. Superior Court, 103 Cal.App.2d 512, 570, 230 P.2d 71, and cases

2. We cite these rulings as a part of the antecedent history of this case. The questions whether the commission's decision in 50 Cal.P.U.C. 563 is res judicata and, if so, what issues it finally determined, are not before us.

3. § 2108 of the code states that every such violation is a separate and distinct offense, "and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

4. During oral argument counsel for plaintiff expressed the view that the clause of § 2107 in which the word "Constitution" appears makes the penalty applicable to a "transportation company" which violates any provision of Article XII even if such company is not a "public utility" within the meaning of that term as used in the code.

Logic is against such a view. The word "Constitution," appearing, as it does, in the object of the sentence, in no way changes or enlarges the meaning of the subject, "any public utility." Especially so in view of the fact that such a change is not necessary to give meaning and effect to the phrase in which the word "Constitution" occurs. Numerous transportation agencies that are included in the code concept of "public utility" are subject to the constitutional mandates and prohibitions as well as to those expressed in the code.

Moreover, it would have been easy to broaden the subject of the sentence in § 2107 by adding "corporation or person" to "public utility," as was done in § 2113 of the code, when the legislature was dealing with contempt of any order of the commission.

there cited. Here, however, it appears that "includes" is used as a word of limitation. The enumeration of several types of common carriers (railroad, street railroad, vessels, passenger stage corporations, highway common carriers) suggests an intention to include only the carriers specifically mentioned. The history of this section, which finds its prototype in subdivision (*l*) of section 2 of the Public Utilities Act of December 23, 1911, Stats. 1911, Ex.Sess., ch. 14, p. 18, at pp. 19–20, compels such a conclusion.

To get the full significance of this history, we start with the state Constitution of 1879, which imposed certain obligations upon carriers for hire and used certain terms in referring to them. Section 21 of Article XII prohibited discrimination in charges or facilities for transportation by any "railroad or other transportation company". Section 22 of Article XII gave the railroad commission power to establish rates of charges for transportation of passengers and freight by "railroad or other transportation companies"; implemented by the power to examine books of such companies, issue subpoenas and other process, hear and determine complaints against such companies, take testimony, and punish for contempt. Section 19 of Article XII declared that no "railroad or other transportation company" shall grant free passes or tickets at a discount to any public officer other than a railroad commissioner. Section 17 of Article XII said: "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control." Section 18 used the expression "railroad or canal company"; section 20, "railroad company or other common carrier".

An Act of April 15, 1880, evidently designed to implement these provisions of the new Constitution, followed the pattern set by these sections of Article XII, in the terms which it used. Thus, the 1880 act used the term "transportation companies," defining it, somewhat narrowly, to mean and include companies operating railroads (other than street railroad) or steamboats from port to port or upon the rivers and inland waters. Stats. 1880, ch. 59, § 14, p. 45, at 48. However, section 12 of this Act was designed to implement the constitutional powers and duties of the railroad commission to the full extent of the constitutional grant, without limitation as to types of companies affected. P. 48.

The Railroad Commission Act of March 19, 1909, continued to use the expression "transportation company," enlarging it to include "railroads operated for commercial purposes, express companies, sleeping car companies, and companies operating vessels engaged in carrying freight or passengers on the waters of this state." Stats.1909, c. 312, p. 499; § 11, p. 501.

The Railroad Commission Act of February 9, 1911, followed much the same pattern. Stats.1911, Reg.Sess., c. 20, p. 13. In section 9 it declared: "All railroad and other transportation companies, owned or operated by any individual, company, * * * or association are hereby declared to be common carriers, and under the jurisdiction, * * * of the commission and subject to the provisions of this act." P. 16. But it continued to define "transportation company" as meaning and including certain specified kinds of companies, adding several types of car companies. § 13, p. 17. It imposed a penalty of $500 to $2,000 per day for willful failure by any railroad or other transportation company to comply with certain requirements of the statute or failure strictly to observe any rate established by the commission. § 41, p. 36.

At the special election held in October, 1911, the voters approved amendments to sections 20, 21, 22, and 23 of Article XII of the Constitution. These amendments enlarged the membership of the Railroad Commission from three to five, made the members appointive instead of elective, and to some extent enlarged the constitutional grant of power to the commission, including the power to order reparation to any shipper for excessive or discriminatory rates charged him. In so doing it retained the use of the expression "railroad or other transportation company" when dealing with the direct grant of constitutional power to the commission. Significantly, these amendments used a different form of ex-

pression when conferring "plenary power" upon the Legislature to confer additional powers upon the commission. The 1911 amendment to section 23 declared that every private corporation, individual, or association owning or operating a "commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, * * * for the transportation or conveyance of passengers * * * express * * or freight * * *, or for the transmission of telephone or telegraph messages, or for the production, * * * or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, * * * to or for the public, *and every common carrier,* is hereby declared to be *a public utility subject to such control and regulation* by the railroad commission *as may be provided by the legislature,* and *every class* of private corporations, * * * *hereafter declared by the legislature to be public utilities* shall likewise be subject to such control and regulation." (Emphasis added.)

[3] We may assume, for present purposes, that "common carrier" as thus used in section 23 meant the same as defined in section 17 of the same article: "All railroad, canal, and other transportation companies". We may further assume, for the purpose of discussion, that airline transportation companies were included in this definition of common carrier;[5] and hence, that a common carrier by air is a "public utility" which section 23 gives the legislature power to subject to the control and regulation of the commission. Has the legislature done so, with this type of transportation company? The answer is furnished by the Public Utilities Act of December 4, 1911, the first statute on this subject enacted after the adoption of the 1911 constitutional amendments. Stats.1911, Ex. Sess., c. 14, p. 18. Of prime significance, is the fact that the expression "transportation company" was neither defined nor used in that act. We there find the same pattern that now obtains in the code. "Common carrier" was defined by subdivision (*l*) of section 2 of the Act as including certain specific types of transportation agencies (such as railroad corporations, street railroad corporations, car corporations, corporations operating vessels) without the use of "transportation company" or other generic term. "Public utility" was defined in subdivision (bb) of section 2 of that Act as including every common carrier and certain specific types of agencies (such as pipe line, gas, electric, telephone, telegraph, and water corporations, wharfingers and warehousemen) without the use of "transportation company" of similar expression. In each of those subdivisions, the definition expressly applied to the term defined "when used in this act," a limitation now expressed in § 203 of the code.

It would seem, therefore, that the absence of the term "transportation company" from the code is no accident; that it is the result of an intentional act of exclusion. This fact, coupled with the specific enumeration of carriers in the statutory definition of "common carrier," suggests that the legislature, soon after the 1911 amendment of the Constitution, adopted the policy of not exercising its "plenary" power over any new type of "transportation company" (such as a stage line, truck line, or air line) until that type of transportation shall have been in operation long enough for the legislature to determine how much, if any, regulation and control over it should be given the commission in addition to that directly conferred by the Constitution.

Not inconsistent with this view was the construction placed upon the statute by the commission and approved by the court in Western Ass'n of Short Line R. R. v. Railroad Comm., 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455, decided in December, 1916. The question at issue was whether or not common carriers by truck or stage upon the highways, operating between cities in this state, were subject to the jurisdiction of the commission. The court held that jurisdiction over such carriers, as "transporta-

5. The defendant herein does not in this proceeding question that it is a "transportation company" as that term is used in the Constitution and, as such, is subject to the jurisdiction which the Constitution directly confers upon the Commission over such companies.

tion companies," was conferred by section 22 of Article XII of the Constitution.

Concerning the lack of statutory regulation of carriers by stage or truck (methods of transportation that were relatively new in 1916), the court said: "We agree with the construction placed by the commission upon the legislative enactments and with its conclusion that the Legislature inadvertently failed or deliberately declined to make a specific grant of power to the railroad commission to regulate the affairs of these classes of transportation companies. We need not here repeat the convincing reasoning of the commission in this behalf, since doubtless its views will find expression in its own official reports, and it is sufficient for the purposes of this determination to express our concurrence in and with them." 173 Cal. at page 804, 162 P. at page 391.

The history of statutory changes on this subject since 1911 indicates adherence to a policy of the legislature not to exercise its "plenary" power over new types of transportation until experience might demonstrate a need therefor.

An act adopted in 1917 imposed certain requirements upon the owners and operators of stages and trucks when functioning as common carriers. It placed them under the regulation and control of the commission. Stats.1917, c. 213, p. 330.

The definition of "common carrier" in the Public Utilities Act was enlarged in 1927 to include passenger stage corporations, Stats.1927, c. 42, p. 72 at 73, adding § 2¼ to the Act of 1915; in 1933, to add freight forwarders, Stats.1933, c. 784, p. 2083 at 2085, amending § 2 of the Act; in 1935, to include highway common carriers, Stats.1935, c. 664, p. 1830 at 1831, adding § 2¾ to the Act; and in 1949, to add petroleum irregular route carriers, Stats.1949, c. 1399, p. 2440 at 2441, amending § 2¾ of the Act.

Note should be made of a Supreme Court decision rendered in 1943 which held constitutional a certain city ordinance concerning taxicab service. We refer to In re Martinez, 22 Cal.2d 259, 138 P.2d 10. The court found that the legislature had not yet put taxicabs under the jurisdiction of the commission. After quoting the pertinent features of the statutory definitions of "common carrier" and "public utility," the Court said: "Nowhere in the quoted provisions of the Public Utilities Act, nor in its other provisions, do we find any reference to taxicabs or taxicab companies. Each of the many agencies designated in subdivisions (dd) and (*l*) is specifically mentioned and described in detail or is included in groups carefully described in the act. If the Legislature had intended to include taxicabs it would not have omitted reference to them while including detailed descriptions of all other agencies covered by the act, some of which perform similar services. Moreover, references in other parts of the act to common carriers 'subject to the provisions of this act' indicate a legislative intention not to include all common carriers." 22 Cal.2d at page 262, 138 P.2d at page 11.

The court did not mention section 22 of Article XII of the Constitution, which by its own terms puts "railroad and other transportation companies" under the jurisdiction of the commission to a limited extent. Section 22, perhaps, was deemed inapplicable because it refers to compensation for transportation of passengers or freight "between the points named in any tariff of rates" established by the commission, and the city ordinance in question was "confined in its effect to service performed within the city". 22 Cal.2d at page 262, 138 P.2d at page 12.

We note in passing that section 2113 of the code, relating to contempt of the commission and its power to punish such a contempt, is broader in its application than section 2107. Section 2113 applies to every "public utility, *corporation, or person*". That may well include a common carrier by air to the extent that such a carrier, viewed as a "transportation company," may be subject to the jurisdiction which section 22 of Article XII of the Constitution confers upon the commission. Our attention has been called to no other provision of the Public Utilities Act portion of the code which directly or indirectly mentions common carriers by air.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

118 Cal.App.2d 489

ROST et al. v. BRYSON et al.

Civ. 19306.

District Court of Appeal, Second District, Division 1, California.

June 15, 1953.

Action was brought to recover money had and received. The Superior Court of Ventura County, Walter J. Fourt, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Scott, J. pro tem., held that where escrow agreement provided that escrow agent should act as agent for seller and buyers of liquor store, and that agent should pay creditors of seller on direction of seller out of funds deposited by buyers with agent, and directed that agent pay broker who handled sale "out of seller's funds" when all purchase money had been deposited in escrow, and all purchase money was deposited in escrow, and agent paid broker, Superior Court properly refused to permit buyers to recover from agent amount paid by agent to broker.

Judgment affirmed.

1. Escrows ⇐10

Where escrow agreement provided that escrow agent should act as agent for seller and buyers of liquor store, and that agent should pay creditors of seller on direction of seller out of funds deposited by buyers with agent, and directed that agent pay broker who handled sale "out of seller's funds" when all purchase money had been deposited in escrow, and all purchase money was deposited in escrow, and agent paid broker, court properly refused to permit buyers to recover from agent, in action for money had and received, amount paid to broker. Civ.Code, §§ 1636, 1641, 1652.

See publication Words and Phrases, for other judicial constructions and definitions of "Out of Seller's Funds".

2. Contracts ⇐154

Where one construction would make contract unusual and extraordinary, and another construction, equally consistent with language employed, would make it reasonable, fair, and just, latter construction must prevail.

3. Contracts ⇐147(1)

A contract must be so interpreted as to give effect to mutual intention of parties as it existed at time of contracting, so far as intention is ascertainable and lawful. Civ.Code, § 1636.

4. Contracts ⇐143

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Civ.Code, § 1641.

5. Contracts ⇐162

Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to repugnant clauses, subordinate to general intent and purpose of the whole contract. Civ.Code, § 1652.

6. Appeal and Error ⇐1008(3)

Where construction given an instrument appears to be consistent with true intent of parties, as shown by attendant facts and circumstances, another interpretation will not be substituted on appeal, though it seems equally tenable.

Edward Henderson, Ventura, Margaret Keller, Ventura, of counsel, for appellants.

Hal V. Hammons, Jr., and Robert R. Willard, Ventura, for respondents.

SCOTT, Justice pro tem.

Plaintiffs appeal from an adverse judgment in their action against defendant for money had and received.

Defendant does business as an escrow agent, and when plaintiffs undertook to purchase from its owner, one Berman, a liquor store known as "Art's Bottle Shop", defendant was selected to handle the escrow.

Instructions provided that certain money was to be deposited by plaintiffs with defendant as the purchase price. A total of $10,000, was to be paid into escrow, the final payment due January 31, 1951. The agreement provided in part as follows: "The parties hereto agree that Bryson Escrow Company shall act as escrow agent for the

parties, it being understood that such escrow agent shall in no case be liable for or cause to be made or make any examination or report of any state, county or city taxes, nor shall said escrow agent be liable for the payment of any social security tax, unemployment tax, sales tax, federal tax or any other tax which may be levied or leviable against said business or any other parties hereto, unless an actual claim has been filed against this escrow, and the seller will display to said buyer proper receipts and clearances showing payment of all of the above for which said seller may be liable and all of which shall be to the satisfaction of said buyer. The escrow agent shall, however, upon direction of the seller make payment of any claim for any of the above items, and shall pay the same from the funds so held by him or deposited with him when properly presented to him for payment. Out of the purchase price or consideration, you will pay the approved claims of the bona fide creditors of the licensee as shall file claims with you within ten days after the recording of the notice. Licensee will cause any unapproved claims to be withdrawn from escrow by the claimant. If the purchase price for the transfer of the license and the consideration for the other property involved herein is not sufficient to pay said claims in full, you will distribute said total consideration pro-rata to such creditors within a reasonable time after the completion of the transfer of said license. However, prior to such pro-rata distribution, licensee will obtain and deposit herein the consent of creditors to such pro-rata distribution.

"In the event of the full payment of creditors licensee will cause any unapproved claims to be withdrawn from escrow by the claimant or you will hold the amount of such claims or bills plus 50% thereof."

and: "Hold the Bill of Sale and other documents and cash deposited until February 1, 1951 at 10:00 o'clock A.M.

"At the expiration of said time, unless bills of creditors have been filed in excess of the funds deposited, deliver said Bill of Sale to the buyer and deliver to seller, or order, the documents to which they may be entitled.

"After all bills are paid or adjusted, pay the balance by your check to Arthur Berman.

"Pay commission of $1350 to Ed Gerhardt at time all purchase money has been deposited in escrow, out of seller's funds."

On January 29, 1951, after the full $10,000, had been deposited in the escrow, defendant paid $1,350, to Ed Gerhardt, who was the business opportunity and real estate broker who had arranged the deal.

Creditors of the seller Berman had presented claims in excess of the total amount of $10,000, deposited so that eventually an assignment for their benefit was made by Berman. The deal was withdrawn from the escrow handled by the defendant on March 29, 1951, and was consummated elsewhere between Berman's assignee and plaintiffs on May 21, 1951.

Plaintiffs brought suit to recover from the defendant the amount thus paid to the broker, claiming that the money deposited by plaintiffs had not become available for such payment. The trial court found in favor of defendant.

As above noted, the instructions provided that the commission should be paid "at time all purchase money has been deposited". There is no dispute that such deposit had been made. Plaintiffs contend, however, that the phrase "out of seller's funds" required defendant to wait until other provisions had been complied with and seller was entitled to the balance of the money on deposit.

A reading of the escrow instructions does not show that the seller, Berman, was to deposit any money with defendant in escrow, although the parties did agree to share escrow costs. Funds to pay the broker were to come from money deposited by plaintiffs. Defendant was authorized to pay other claims as noted in the portion of escrow instructions set out above, and to pay them out of money plaintiff had deposited as part of the purchase price. These were claims, not against plaintiffs but against the seller.

[1] The trial court found, in effect, that the words "out of seller's funds" meant that the broker's commission should be charged against funds that the seller would otherwise receive, and did not require that title to that money should have passed to the seller. That construction, in light of other language used in the escrow instructions was not unreasonable.

We do not find that any injustice follows this interpretation. Plaintiffs wanted to buy a liquor store. The broker secured an agreement from the owner to sell it to plaintiffs for a price which was $2,000 less than the asking price. Although difficulty was encountered because of seller's creditors, this was eventually resolved and plaintiffs secured the business they desired.

Plaintiffs made no provision in the new escrow for Gerhardt to get his money. Whatever money was available was used to pay off creditors of the business so that plaintiffs could have it, freed from those obligations. Thus buyers (plaintiffs), seller, and creditors have all benefited. Justice would seem to require that the broker be paid for his service which thus benefited plaintiffs and the others.

In evaluating plaintiffs' claim that they have been wronged, we note that plaintiffs have relieved seller Berman from any liability to repay this money paid by defendant to Gerhardt. When the sale was finally consummated between plaintiffs and Berman's assignee that agreement recited: "Each of the parties hereto hereby acquits, discharges and releases the other from any and all liabilities, credits, debts, causes of action of any kind or nature whatsoever, arising out of or in connection with the cancellation of the said escrow #1398, at the Bryson Escrow Company, Ventura, California, to date hereof."

Cases cited by appellants in resisting the trial court's construction of the contract are readily distinguishable from the instant case.

We observe that in the case of Shreeves v. Pearson, 194 Cal. 699, 708, 230 P. 448, 451, it says: "The phrase 'close of the escrow' is expressly and repeatedly used in relation to the performance of these conditions to be by each of said parties respectively performed." In the instant case buyers (plaintiffs) did not require as they did in the case of creditors' claims, that the escrow agent (defendant) should pay the broker his commission "upon direction of seller", out of funds deposited with him by the buyer, but they did direct him to pay the broker "at time all purchase money has been deposited in escrow". In other words the direction of the seller was included in the escrow instructions.

The factual situation was substantially different in Montgomery v. Bank of America, 85 Cal.App.2d 559, 193 P.2d 475, where the escrow agent altered a deed without authority and then delivered the void deed prematurely.

In Hastings v. Bank of America, 79 Cal. App.2d 627, 180 P.2d 358, the intended purchaser of real property deposited money in escrow toward the purchase price. The seller, after having agreed thus to sell the property, disposed of it to another purchaser, but wanted to keep the money deposited in escrow, to which they had not acquired title. In the instant case title to the business eventually passed to the buyers and the money paid to the broker was in fact paid out of sellers' funds in the sense that it was money that otherwise would have gone to seller or his creditors.

Watts v. Mohr, 86 Cal.App.2d 256, 194 P.2d 758, sheds no light on the case now before us, it being an action for specific performance in which the acts of the parties and not of the escrow agent were the basis of the controversy.

[2] But, as is said in the final case referred to by appellants, "A principle of construction well settled is that where one construction would make a contract unusual and extraordinary, and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." Stoddart v. Golden, 179 Cal. 663, 665, 178 P. 707, 708, 3 A.L.R. 1060.

[3] A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of con-

tracting, so far as the same is ascertainable and lawful. Civil Code, § 1636.

[4] The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Civil Code, § 1641.

[5] Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract. Civil Code, § 1652.

[6] "Where the construction given an instrument appears to be consistent with the true intent of the parties as shown by the attendant facts and circumstances, another interpretation will not be substituted on appeal though it seem equally tenable." Wilson v. Brown, 5 Cal.2d 425, 428, 55 P.2d 485, 486.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 529

DELK v. MOBILHOMES, Inc.

Civ. 19232.

District Court of Appeal, Second District, Division 1, California.

June 17, 1953.

Action for injuries against builder by employee of company which moved ready built homes made by builder to purchasers' lots. The Superior Court, Ventura County, Charles F. Blackstock, J., rendered judgment for builder and employee appealed. The District Court of Appeal, Scott, J. pro tem., held that where equipment was backed down into loading pit to receive house, cribbing block at southwest corner sank slightly due to moist condition of ground from rain and seepage from cesspool, and beam fell on employee but such moist condition was obvious to senses of smell and sight and had existed for two or three weeks previous to accident, builder was not liable.

Judgment affirmed.

1. Negligence ⚖32(2.10)

Employee of company which moved ready built house to purchaser's lots was an invitee of builder of houses and builder owed employee duty to exercise ordinary care to provide him with a reasonably safe place in which to work.

2. Negligence ⚖52

If there is danger attending upon work which an invitee is asked to do and such danger arises from causes or conditions not readily apparent to the eye, it is duty of owner to give such person reasonable warning of such danger.

3. Negligence ⚖66(2)

Where equipment was backed down into loading pit to receive ready built house, cribbing block at southwest corner of pit sank slightly due to moist condition of ground caused by rain and seepage from cesspool and beam fell on employee but such moist condition was obvious to senses of smell and sight and had existed for two or three weeks previous to injury, builder was not liable for injuries sustained by employee of transporter of houses to purchasers' lots.

4. Negligence ⚖32(1)

The owner of premises is not insurer of safety of his invitees and he becomes liable for injuries suffered on his property solely by reason of his superior knowledge of existing danger to invitees who may enter his grounds while in ignorance of peril.

5. Negligence ⚖52

An inviter is not required to give invitee warning of obvious danger, but is entitled to assume that invitee will perceive that which would be obvious to him on ordinary use of his own senses.

6. Negligence ⚖136(25)

In action against builder of houses by employee of transporter of houses for injuries sustained when cribbing block in southwest corner of loading pit sank caus-

ing beam to fall on employee, evidence that builder failed to properly fill in cess pool in southeast corner of loading pit was insufficient to take to jury question whether builder's negligence in filling in such cesspool was proximate cause of accident.

7. Negligence ⇐56(1.3)

It is a basic element in every right of recovery that a defendant's negligence must contribute to injury and must be proximate cause of injury.

8. Trial ⇐142, 178

A motion for directed verdict for defendant may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legal inference which may be drawn from that evidence, result is determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff if such verdict were given.

Garibaldi & Cummins, Los Angeles, for appellant.

Moss, Lyon & Dunn, by Sidney A. Moss, and Henry F. Walker, Los Angeles, for respondent.

ROBERT H. SCOTT, Justice pro tem.

Plaintiff appeals from a judgment entered upon a directed verdict in favor of defendant in an action for personal injuries.

Defendant constructed ready built homes. Plaintiff's employer, Tegland Transportation Company, moved them to purchaser's lot. To facilitate loading of the houses a pit had been dug at the south end of the factory with a ramp at the south end of the pit so that equipment could back down into the pit to receive the load. The pit was 300 feet long—running north to south—and was 22 feet wide. In the process of loading one of these homes, and while it was on its way from the factory to the truck and dollies on which it was to travel, the house had reached a place where it was held up by the following supports: (1) Four cribbing blocks—one at each corner, resting on the ground; (2) Four jacks, one being placed on top of each cribbing block; (3) Two steel "H" beams running parallel and each resting on two of the jacks, with paper placed between the jacks and beams to keep them from slipping off each other. The house then rested on top of the beams.

On the day of the accident the cribbing block at the southwest corner sank slightly into the ground, the jack resting on it tilted and the beam dropped far enough to hit and injure plaintiff who was under the house, on his way out after doing some work there.

Plaintiff had been a house mover for eight weeks, and in that time none of the jacks had slipped. There was evidence that in this case the cribbing block sank because the ground was moist.

[1, 2] In doing the job on the day of the accident plaintiff was an invitee of defendant, and the latter owed plaintiff a duty to exercise ordinary care to provide him with a reasonably safe place in which to work. Lamar v. John & Wade, Inc., 70 Cal.App.2d 806, 809, 161 P.2d 970. If there is danger attending upon the work which an invitee is asked to do and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724.

[3] Evidence was presented which would support a finding that the soil on which the blocks rested was sandy loam, and that the bearing capacity was decreased by dampness. Because of this the blocks would bear less weight and would sink more readily if weight were applied when the ground was moist than would be the case if it were dry.

Plaintiff testified that on the day of the accident the ground appeared to be about the same as on previous occasions when he had helped move a house—neither wetter nor drier. In addition to moisture from rain there was seepage or water running over from a cesspool (referred to as cesspool No. 2). This had been going on for two or three weeks prior to the accident. Plaintiff's fellow workmen had complained

of this unpleasant condition and it was known to defendant.

The trial court properly held that the evidence was, as a matter of law, not sufficient to establish negligence on the part of defendant because of the presence of moisture in the ground, whether it was due to rain or to the cesspool. The condition was obvious to the sense of smell as well as to the sight of both parties, it had existed for two to three weeks while house moving operations had proceeded in the same manner as on the day of the accident and without mishap, the ground appeared no wetter—and perhaps drier than before—on the day in question. In fact there was nothing in that condition which required defendant to go out and say to plaintiff: "Don't move any houses today—the ground is too moist." Such an admonition might well have evoked the response: "My boss says that you build the houses and we will move them. That is his business and if he thinks the ground is too moist he will take proper precautions or tell me to wait until it dries out." After the accident the same blocks and jacks were moved two to three feet right in the pit and the house moving operation was completed.

[4, 5] "The owner of premises is not an insurer of the safety of his invitees. He becomes liable for their injuries suffered on his property solely by reason of his superior knowledge of the existing danger to invitees who may enter his grounds while in ignorance of the peril." Perbost v. San Marino Hall-School, 88 Cal.App.2d 796, 803, 199 P.2d 701, 705. Assuming there was danger attending upon the work which the plaintiff was invited to do, that danger was as obvious to plaintiff as to defendant. An inviter is not required to give an invitee warning or notice of obvious danger but is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26.

[6] There was one other claim of negligence which related to another cesspool, No. 3, which had been encountered in the process of excavating for the loading pit. It was located in the southeast corner of the pit. Cesspool No. 3 had been filled in but the earth fill had not been tamped nor had any other thing been done to pack it down, except to run the machine over it. This was probably insufficient to make the earth in the fill as firm as that surrounding it. The evidence is clear that the cribbing block at the south*east* corner of the loading pit was *not* the one which sank into the earth and caused the tilting of the jack. The beam resting on that jack did not fall. The block in that corner bore its load properly. It was the block in the south*west* corner on the other side of the pit away from the filled cesspool which sank slightly and resulted in injury to plaintiff. There is no evidence which could support a finding that any negligence of defendant in not properly filling cesspool No. 3 was a proximate cause of the accident or of any injury to plaintiff.

[7] In Petersen v. Lewis, 2 Cal.2d 569, 42 P.2d 311, 313, the supreme court affirmed the judgment of the trial court entered pursuant to a directed verdict in favor of defendant and said: "By proving the negligence of the defendant without in some way fastening that negligence to the injury, a case is not made out." Among other cases it cites Puckhaber v. Southern Pacific Co., 132 Cal. 363, 364, 64 P. 480, where it is said: "It is a basic element in every right of recovery that a defendant's negligence must contribute to the injury,—must be the proximate cause of the injury. By proving defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. * * * And unless the negligence is connected with the injury the case stands exactly as if no negligence had been proven."

[8] A motion for a directed verdict for defendant may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legal inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient sub-

stantiality to support a verdict in favor of plaintiff if such verdict were given. Martin v. Food Machinery Corp., 100 Cal.App.2d 244, 252, 223 P.2d 293.

We are unable to discover in the record any evidence sufficient to support a verdict for plaintiff. When it can be said as a matter of law that no reasonable conclusion is legally deducible from the evidence other than would sustain a verdict for the defendant, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a trial court is justified in taking the case from the jury and rendering the decision itself. Docherty v. Key System, 80 Cal.App.2d 888, 889, 184 P.2d 33.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 653

CALIFORNIA COMPENSATION INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 19166.

District Court of Appeal, Second District, Division 3, California.

June 23, 1953.

Rehearing Denied July 13, 1953.

Hearing Denied Aug. 20, 1953.

Proceeding to recover compensation for injuries sustained by carpenter while working on church property. The Industrial Accident Commission made an award of compensation, and the insurance carrier of the church petitioned for review of award. The District Court of Appeal, Shinn, P. J., held that when employee was one of several carpenters who were church members, and practice was for them to donate Saturday work to church, but carpenters remained under direction and control of foreman on such days, carpenter who was injured on Saturday was nevertheless an employee and entitled to compensation.

Award affirmed.

1. Workmen's Compensation ⇐255

Carpenter who was working at church of which he was a member and to which he and other carpenters ordinarily donated their Saturday work, who was injured on Saturday when his services were donated, was nevertheless an employee and entitled to compensation and not a volunteer, when he remained under control and direction of foreman at all times, with sole exception as to hours to be donated, notwithstanding fact that he was not paid for his services, since there was no substantial difference between donation of work and donation of services.

2. Workmen's Compensation ⇐265

Generally, the test of compensability of an injury is whether employee at time of injury was engaged in work which reasonably would have been expected of him, and which he should have expected to do under the terms of his employment.

3. Workmen's Compensation ⇐1439

In proceeding for compensation for carpenter injured while working on church property pursuant to arrangement whereby Saturday services, the day of injury, were usually donated to church, evidence sustained finding that carpenter was an employee on the Saturday in question and not a mere volunteer, even though services were donated.

Kearney, Scott & Clopton, Los Angeles, for petitioner.

Kenneth Sperry, Long Beach, for respondent Smith.

Edmund J. Thomas, Jr., Alvin L. Dove, San Francisco, for respondent Industrial Accident Commission.

SHINN, Presiding Justice.

The insurance carrier of the First Church of the Brethren petitions for review of an award of compensation to respondent Clarence O. Smith for injuries received while he was working on church property as a carpenter.

The matter was partially heard and was referred to respondent commission for the purpose of completing the record which the court considered to be then inadequate for a disposition of the matters in issue. 251 P.2d 348. A transcript of additional evidence has been furnished and filed as a part of the record.

In 1949, the First Church of the Brethren, Incorporated, was constructing a church building. Some of the work was contracted, but the carpentry work, with a minor exception, was done by members of the church.

These members were paid an hourly wage of $2.125, except upon days when they donated their services. This was usually on Saturdays, although some services were given without compensation on other days. It was a common practice among the carpenters to give some services free when they were not otherwise employed. It was the policy of the church membership and management to have the carpentry work done by members who were carpenters, and a principal reason was that while such members were paid wages at current rates they were expected to and did donate some of their services. There was no agreement with the several carpenters as to the extent of the donated services; each gave free time as he found to be convenient and when he was not otherwise employed. The work at all times was under the supervision of a foreman who directed the workmen and who was obeyed by them. This was true with respect to the work on Saturdays when the men were not being paid, as it was on other days. No work was done except under the supervision of the foreman. Mr. Smith did extensive work on the church for which he was paid, and a substantial amount of work on Saturdays and other days, for which he was not paid. He was injured on a Saturday by a fall. The foreman had sent him up to install molding around the spires, and it was in this work that he fell.

After due investigation and examination the insurance carrier commenced to pay Smith compensation at the rate of $27.93 per week. When the parties were unable to agree to a settlement for permanent disability, Smith filed an application with respondent commission, in October, 1951. Up to that time he had received $2,709.21 as compensation. Extended hearings were had thereafter, and as a result an award was made in March of 1952, of $30 a week to July 1, 1951, $12,000 payable at the rate of $30 per week beginning July 9, 1951, and thereafter a life pension of $18.46 per week, less any sums paid on account of permanent disability indemnity, and the insurer was ordered to furnish Smith medical, surgical and hospital treatment.

The sole question in the case is whether an employer-employee relationship existed at the time of Smith's injuries. The petitioner contends that Smith's services were donated, that he was a mere volunteer, and in no sense an employee. We think the employer-employee relationship did exist and that the injury was compensable.

[1] The carpenters were at all times under the direction and supervision of the foreman, on the days for which they were not being paid as well as on other days. The church had as much control over them as any other employer would have, with a single exception as to the hours that would be donated. The carpenters were in no sense independent contractors. They undertook to do nothing other than what they were told to do and were subject to control and direction as to how they should do it. This was potent proof that they were employees. Riskin v. Industrial Accident Comm., 23 Cal.2d 248, 144 P.2d 16. The fact that they were not paid for all of their services did not alter their relationship. In fact, Smith suggested to the foreman and the church treasurer that, if they would prefer, they might pay him for his work on Saturdays, or other donated work, and that he would contribute the wages earned to the church. This plan was not acceptable because of the bookkeeping that might be entailed. If the wages had been paid and then donated, there would have been no basis for a controversy, but we see no substantial difference between a donation of wages and the donation of Smith's services.

[2, 3] Generally the test of compensability is whether the employee at the time of the injury was engaged in work which would reasonably have been expected of him, and which he should have expected to do under the terms of his employment. Satchell v. Industrial Accident Comm., 94 Cal.App.2d 473, 210 P.2d 867. In the present case the nature of the relationship was a question of fact, and we think there is no room for doubt that the evidence fully supports the finding of the commission that Smith was an employee and not a mere volunteer. The fact that he was not paid for every day he worked is immaterial if there was a mutual understanding that some time would be donated as an incident to his employment. There was a general understanding that the duties of the carpenters were not confined to the days when they would be paid, and it would seem that a carpenter who worked on Saturdays was in substantially the same position as that of a workman who was paid for a given number of hours and worked overtime, for which payment would not be expected. Since the evidence supports the finding that Smith was an employee, the authorities which hold that a mere volunteer is not an employee have no application.

The award is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 479

SAVAGE v. SOX et al.

No. 15323.

District Court of Appeal, First District, Division 1, California.

June 15, 1953.

As Corrected June 29, 1953.

Hearing Denied Aug. 13, 1953.

Application for peremptory writ of mandate to compel Civil Service Commission to reinstate plaintiff to his position of steam engineer in city hospital, from which he had been removed for alleged violation of instructions of his superior as to manner of opening steam valve, which resulted in a serious explosion. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Bray, J., held that evidence sustained determination of Director of Public Health that plaintiff had disobeyed his superior's instructions as to manner of opening valve.

Judgment affirmed.

1. Administrative Law and Procedure ⇐683

Upon review of decision of Superior Court upholding determination of local administrative agency, power of appellate court begins and ends with inquiry whether there is any substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the Superior Court.

2. Municipal Corporations ⇐218(8)

Director of Public Health, when hearing proceedings for removal of city civil service employee on ground that he had disobeyed his superior's instructions, was entitled to disregard testimony of employee as to his conduct, when such testimony conflicted with that of employee's superior and another employee, and in view of employee's interest.

3. Mandamus ⇐168(4)

In proceedings on application for peremptory writ of mandate to compel Civil Service Commission to reinstate plaintiff, a steam engineer, to his position in a hospital, wherein it appeared that removal had occurred after explosion of steam valve which plaintiff's superior testified had resulted from failure of plaintiff to follow instructions with reference to opening valve, evidence warranted determination of Director of Public Health, hearing removal proceedings, that plaintiff had disobeyed his superior's instructions with reference to opening of the valve.

4. Mandamus ⇐168(4)

In proceeding on application for peremptory writ of mandate to compel Civil Service Commission to reinstate plaintiff

to his position of steam engineer in hospital, from which he had been removed after hearing before Director of Public Health, because of alleged failure of plaintiff to follow instructions of his superior as to manner of opening steam valve, from which serious explosion resulted, record did not warrant conclusion that Director of Public Health had exhibited an unfair attitude towards plaintiff.

5. Constitutional Law ⇐50

Constitutional provision pertaining to separation of the departments of government applies to the powers of the state government, and not the local governments to be created by the Legislature. Const. art. 3.

6. Municipal Corporations ⇐177

Constitutional provision precluding Legislature from providing other inferior courts in cities where a municipal court is established, did not preclude chartered municipality from creating a local Civil Service Commission, and Director of Public Health, vested with judicial or quasi-judicial powers to hear proceedings for removal of civil service employees. Const. art. 6, §§ 1, 11, amended in 1950; art. 11, §§ 8, 8½.

7. Courts ⇐42(3, 5)

Purpose of 1950 amendment to Constitution limiting inferior courts to municipal courts and justice courts was to reduce number of inferior courts in state, and not to interfere in any manner with quasi-judicial powers of boards and officers who were not courts in the sense contemplated by such provision. Const. art. 6, §§ 1, 11, amended in 1950; art. 11, §§ 8, 8½.

8. Municipal Corporations ⇐218(9)

A plaintiff who was removed from his civil service position as steam engineer in city hospital after hearing before Director of Public Health was not entitled on appeal to a trial de novo of charges against him. Const. art. 6, §§ 1, 11, amended in 1950; art. 11, §§ 8, 8½.

Joseph T. Curley and Marvin C. Hix, San Francisco, for appellant.

Dion R. Holm, City Atty., and William F. Bourne, Deputy City Atty., San Francisco, for respondents.

BRAY, Justice.

Appeal from a judgment denying plaintiff's application for a peremptory writ of mandate to compel the San Francisco Civil Service Commission to reinstate plaintiff after being removed by it from his position.

Questions Presented.

1. Insufficiency of the evidence.
2. Alleged unfairness in the trial.
3. Was plaintiff entitled to a court trial de novo?

Facts.

This case comes up on a settled statement. Plaintiff for 18 years was a civil service employee of San Francisco and was in the permanent position of steam engineer in the San Francisco Hospital. A valve in the steam line at the hospital burst, causing considerable damage. Thereafter, pursuant to charter provisions, charges against plaintiff were brought and heard before Dr. J. C. Geiger, then Director of Public Health. No question is raised as to the regularity of those proceedings. The charges were as follows:

"1. Inattention to duties in that you failed to comply with instructions of the Chief Operating Engineer on November 22, 1950.

"2. Incompetence in that your action in not following instructions in opening the main steam valve on the boiler header caused the turbine stop valve to be blown off resulting in considerable damage to the hospital property."

It will be observed that while there are two specifications in the charges, they both resolve themselves into the one charge of failing to follow the chief engineer's instructions. Thierbach, the chief engineer, testified that on the day in question, around 9 a. m. he gave plaintiff orders to open up the main valve on the turbine steam line. At the same time he warned plaintiff to be careful about draining the line properly; that there was a possibility that it was full of water and he should "take all the time

he needed to warm it up," and to see to it that the line was drained before he opened the valve. It is necessary to open the line slowly, for if there is water in the line, the condensation of steam by turning on the water "might form a slug * * * and there might be a weakness in the valves, and the steam in back of the water cause an explosition when it hit the valve, not an explosion, like a hydraulic ram, the impact." Even without water in the line, a too rapid opening of the valve would cause water to form with the same result. Thus, whether or not there was water in the line the valve must still be opened slowly. Thierbach then left. When notified that the valve had blown he immediately returned and saw what had taken place. If plaintiff had seen to it that the line was drained before he opened the valve there would have been no trouble. Dr. Geiger then asked him: "Your instructions were not carried out? Mr. Thierbach: Completely disobeyed." On cross-examination Thierbach was asked: "You are assuming he disobeyed orders because the valve cracked? Mr. Thierbach: From the evidence shown, I could see what happened." There were two drain valves but Thierbach did not know whether they were open at the time he gave the instructions. They were open when he returned. (Plaintiff testified and the evidence shows that they were open at all times.)

Engineer Hughes testified that he heard Thierbach tell plaintiff "to be careful * * see all lines were drained before opening the big valve, and take it easy." Hughes then went down to the engine room. Plaintiff came down the ladder from the boiler room (where the steam line was) and spoke to him and then the valve burst. This was 9:15 or around that time. Thierbach gave the order around 9:10 or 9:05. There could not have been more than five or ten minutes between the giving of the order and the explosion. The valve had been on the line about 12 years. Plaintiff had it off, repacked it and put in a new gasket the day before.

Two charts were introduced, one showing that the valve blew about 9:20, the other about 9:30. There was evidence that the charts were not always accurate.

Plaintiff testified that he had overhauled the valve the previous day. On the morning in question he noticed a little water dripping from the flanges. Both drains were open. Plaintiff has been opening valves for 18 years,—knew how to do it. He always did it slowly. Thierbach told him to open the valve. Plaintiff in the presence of Hughes told Thierbach there was too much water in the line and asked if he could shut the valve on the hot side. Thierbach told him to leave it open. It was standard practice as well as that of plaintiff to first open the valve half a turn, then fully open it, taking from two to five minutes in the operation. This time plaintiff opened it half a turn, then in about half a minute, another half turn, then in about three-quarters of a minute, three-quarters or maybe a turn. This took probably five minutes. Then about 20 minutes later he opened the valve full open. Plaintiff then went down to Hughes and stated that he did not like the line, the traps were not working right, and complained that someone had cut the by-passes on the traps. Plaintiff stated this was bad practice. Hughes said they were not needed. It was then the valve blew. Plaintiff followed Thierbach's instructions. The valve had been on the line 10 or 15 years. Had plaintiff opened the valve quickly there would have been water hammer. There was none. The explosion took place 10 to 15 minutes after he opened the valve. With both drains open the cold side could not drain very well and that was why he wanted to close the hot side drain but Thierbach would not let him. Thierbach and Hughes denied that plaintiff had said anything about wanting to close the hot side drain or that Thierbach had told plaintiff to leave it open.

Junior Operating Engineer Thorne testified plaintiff told him he was going to open the valve. The explosion took place 20 or 25 minutes thereafter. He noticed plaintiff pointing out the drains to Thierbach but did not hear the conversation.

One Fitch, an engineer apparently called by plaintiff, testified that the hot side drains should be closed as otherwise the cold side would not drain very well. The accident could have happened without any water in

the line at all. The accident conceivably could happen without anyone being to blame. Perhaps the putting in of the gasket the day before might have put a strain on the valve that was not there before. Something always happens when steam is turned into a cold line.

Plaintiff's record was introduced showing that on one occasion in 1937 he had disregarded instructions; on one occasion in 1948, he was inattentive to duties and had failed to cooperate with the surgical personnel; and in 1949 he was suspended for 10 days for failure to follow the instructions of the chief engineer and was warned that he would be discharged if another incident occurred.

Based on this evidence Dr. Geiger found plaintiff guilty of the charges preferred and ordered him dismissed from the service of the Department of Health. On appeal to the Civil Service Commission it sustained the dismissal and later denied a petition for reconsideration. Thereafter plaintiff filed a petition for a writ of mandate in the superior court. On the hearing of the alternative writ plaintiff offered the testimony of one Hancock to prove that he had opened the drain valves just before plaintiff came on duty and offered himself as a witness to prove the cause of the explosion. The court refused to admit the offered evidence on the ground that it was not offered at the Geiger hearing. Plaintiff testified as to his earnings subsequent to his dismissal. Defendants then offered a transcript of the Geiger proceedings. It was admitted in evidence. The court then found that there was substantial evidence to support Dr. Geiger's determination that the explosion was due to plaintiff's failure to follow his superior's orders and denied a peremptory writ.

1. Was The Evidence Insufficient?

[1–3] It is well settled that in a review of the decision of the superior court upholding the determination of a local administrative agency, "the power of the appellate court begins and ends with the inquiry whether there is any substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the superior court." Corcoran v. San Francisco etc. Retirement System, 114 Cal.App.2d 738, 251 P.2d 59, 60. The only issue before Dr. Geiger was whether plaintiff disobeyed Thierbach's instructions to open the valve slowly. In view of plaintiff's interest and particularly of the conflict between him and Hughes and Thierbach, which conflict Dr. Geiger obviously decided against him, Dr. Geiger had the legal right to disregard his entire testimony as to what he did. This leaves the evidence as follows: Hughes testified that only 10 minutes at most elapsed from the time Thierbach instructed plaintiff to open the valve and the explosion. While Thierbach was not examined as to what length of time it takes to open a valve "slowly," his testimony as an expert was that based on the time shown by the chart, "From the evidence shown, I could see what happened," plaintiff had disobeyed his instructions to be careful to see that the line was drained before he opened the valve, and had he properly drained the line the explosion would not have occurred. In a sense, the opinion of plaintiff's superior as to what happened in his absence seems to be rather small evidence upon which to discharge an employee after 18 years' service. However, we cannot say that the opinion of an expert to the effect that had the line been properly drained and the valve opened slowly the explosion would not have occurred, and based on the time taken to open the valve as shown by the evidence, he could tell that plaintiff did not properly drain the line, is not substantial evidence. Moreover, Hughes testified that the explosion occurred "Right when Mr. Savage came off the boiler from opening the valve," while plaintiff contends that the explosion did not take place until 10 or 15 minutes after he opened the valve. Another matter which Dr. Geiger was entitled to consider on the question of whether plaintiff obeyed instructions was this: Plaintiff's expert Fitch testified that the hot valve should be turned off to permit the line to drain properly. Plaintiff testified also that he felt that it should have been done but that Thierbach instructed him not to do it. Dr. Geiger found, in effect, based on Thierbach's and Hughes' testimony, that Thierbach did not so instruct. Thus plaintiff

practically admits that he did not properly drain the line and thereby disobeyed instructions so to do.

2. Alleged Unfairness.

[4] Plaintiff claims that Dr. Geiger exhibited an unfair attitude towards him. The record does not support this contention. While in one or two instances Dr. Geiger was more abrupt than the circumstances warranted, plaintiff was not prevented from getting in all the evidence he offered, nor did such abruptness injure plaintiff. On one occasion Dr. Geiger referred to interruptions by both plaintiff's counsel and the personnel officer as "acrimonious debates" and on another Dr. Geiger told plaintiff not to teach him physics, when plaintiff was explaining the change of water into steam and its effect. The hearing was conducted by a layman and in a layman's manner, asking for conclusions. However, in each instance the witness gave answers setting forth the facts. No objection was made to the form of the questions nor was cross-examination ultimately curtailed.

3. Limited Trial De Novo.

[5, 6] Plaintiff contends that the well established rule set forth in La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Corcoran v. San Francisco etc. Retirement System, supra, 114 Cal.App.2d 738, 251 P.2d 59, and in other cases, to the effect that in a review of the action of a local administrative board or officer exercising quasi-judicial powers there is no trial de novo, is no longer in effect because of the amendment in 1950 to section 1, article VI, of the Constitution. It is contended that this rule is based upon the determination that such boards and officers were in the nature of quasi-inferior courts permitted by the then language of section 1 to the effect that the judicial power of the state shall be vested in "* * such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county." The 1950 amendment struck from the section the above language and substituted "municipal courts, and justice courts." Article XI, section 8½, provides that in a city and county when the municipal court is established "there shall be no other court inferior to the superior court * * *." There is a somewhat similar provision in section 11, article VI, as amended in 1950. Thus, there can be no courts below the superior courts other than the two last mentioned. Therefore, says plaintiff, no longer do local administrative boards and officers have quasi-inferior court status and a review of their proceedings requires a limited trial de novo as in the case of statewide administrative boards and officers.[1] To give local boards and officers quasi-judicial powers would, says plaintiff, violate article XI, section 8, of the Constitution requiring charters to be consistent with and subject to the provisions of the Constitution. The giving of such powers would be inconsistent with article III which separates the departments of government of the State of California and provides that no person charged with the exercise of functions appertaining to one department shall exercise functions appertaining to either of the others, unless expressly directed or permitted by the Constitution. Further, says plaintiff, the giving of such powers would be inconsistent with the Constitutional provisions heretofore mentioned prohibiting courts below the justice courts. As early as 1868 in People ex rel. Attorney General v. Provines, 34 Cal. 520, it was pointed out that this article applies to the powers of the *state* government, not the local governments to be created by the Legislature. The court referred to the reason and policy which dictated this article III. In England where the powers of government were divided into but two departments—King and Parliament—the power of the earlier Kings to both declare and execute the law led to frequent abuses, with which the framers of American Constitutions were familiar and against which

1. For the rule applicable to them see Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557, 59 P.2d 119; Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457; Thomas v. California Emp. Stab. Comm., 39 Cal.2d 501, 247 P.2d 561.

they sought to provide a safeguard by separating the judicial from the executive and legislative powers, so far as it could be done without stripping either of the latter of such judicial powers as are indispensable to the proper and efficient working of their own functions. "The mischief, however, against which they sought to provide, did not come from inferior or subordinate officers, but from the higher grades, in whose hands the first and leading powers of the Government were vested. So far as the former were concerned, they were sufficiently under the control of the latter. Abuse of power could not come from the former in such measure as to destroy or overthrow the liberties of the people, except by the direction or connivance of the latter. To surround the latter with checks was a sufficient protection against the former. Hence, the framers of American Constitutions were content with checks upon the latter, leaving the former, as we consider, to be regulated by the Legislative Department." 34 Cal. at page 537.

"Moreover it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government." County of Mariposa v. Merced Irr. Dist., 32 Cal.2d 467, 476, 196 P.2d 920, 926.

In Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, at page 59, 110 P.2d 513, 517, we stated: "The question as to whether by charter provision local boards, such as a Civil Service Commission, may be invested with judicial fact finding powers seems never to have been seriously questioned in this state." We pointed out that article VI, section 1, refers to the judicial power of the *state* only, and that local boards and officers are governed by special constitutional provisions, such as the broad provisions of article XI, section 6, of the Constitution dealing with "the powers of chartered cities. That section, so far as pertinent herein, provides that, 'Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered * * * to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters * * *'. Moreover, Article XI, section 8½, sub. 4, provides that, 'It shall be competent in any charter framed in accordance with the provisions of this section * * * for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and *employees* whose compensation is paid by such city or city and county * * * shall be elected or *appointed* * * *'. Obviously, a civil service system is strictly a municipal affair. Under these provisions a chartered city or city and county may lawfully confer *quasi* judicial power on boards or commissions dealing strictly with municipal affairs, such as the power to determine facts, and, if such finding is made, the courts may interfere only where the board acts arbitrarily, capriciously, or fraudulently. * * * We, therefore, conclude that by charter provision a city or city and county may lawfully confer on local boards dealing with strictly municipal affairs judicial or *quasi* judicial power." 43 Cal.App.2d at pages 60, 61, 110 P.2d at page 517.

[7, 8] The quasi-judicial power of local boards and officers in determining disciplinary matters in connection with employees, has been upheld upon two theories: (1) that of cases like the Dierssen case, supra, 43 Cal.App.2d 53, 110 P.2d 513, applying the home rule provision of the Constitution, and (2) that of such cases as Standard Oil Co. v. State Board of Equal., supra, 6 Cal.2d 557, 59 P.2d 119, applying the former language of article VI, section 1 of the Constitution. The purpose of the 1950 amendment to that section as shown by the arguments to voters was to reduce the number of inferior courts in the state, not to interfere in any wise with the quasi-judicial powers of boards and officers who are not courts in the sense of that section. See Chinn v. Superior Court, 156 Cal. 478, 482, 105 P. 580. While in such cases as Drummey v. State Bd. of Funeral Direc-

tors, 13 Cal.2d 75, 87 P.2d 848, it has been held that because of the separation of powers required by article III of the Constitution state boards in proceedings to revoke licenses do not have the quasi-judicial powers which prevent a trial de novo on review, it is interesting to note that they do possess such powers in proceedings for the issuance of licenses. The power exerted in this case is a purely municipal affair and the voters in reducing the number of inferior courts never intended to, nor did they, in any way interfere with the rights granted municipalities, counties and cities and counties in the other portions of the Constitution. The elimination of the power of the Legislature to provide other inferior *courts* than the municipal and justice courts still left the Constitutional provisions under which the charter of a city and county could lawfully confer quasi-judicial powers on boards or commissions dealing strictly with municipal affairs. Without the former wording of section 1, article VI, and with the present inhibitions against the establishment of any inferior court other than the municipal and justice, there is nothing inconsistent between a charter so providing and the present provisions of the Constitution. Such a charter is "consistent with and subject to this Constitution". Art. XI, § 8.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



118 Cal.App.2d 604

PEOPLE v. WARD.

Cr. 4830.

District Court of Appeal, Second District, Division 2, California.

June 22, 1953.

Motion to vacate judgment of conviction of one who had pleaded guilty to murder charge. The Superior Court, Los Angeles County, Philip H. Richards, J., entered order overruling the motion, and movant appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that in absence of showing that judgment would not have been entered if court had possessed knowledge of existence of specified fact, the motion would not lie.

Affirmed.

1. Criminal Law ⇐997

Motion to vacate judgment of conviction on ground, inter alia, that court was without jurisdiction to enter judgment was the equivalent of a petition for writ of error coram nobis, and, therefore, did not lie to correct error of law or to redress irregularity that might be corrected by means of appeal or on motion for new trial.

2. Criminal Law ⇐997, 998

Neither motion to vacate judgment of conviction nor petition for writ of error coram nobis is available except where extrinsic fraud has deprived petitioner of trial on merits.

3. Criminal Law ⇐997

Petition for writ of error coram nobis may be used where no other remedy exists to obtain relief from judgment that was rendered while there existed some fact which would have prevented rendition of judgment if trial court had known it and which through no fault of petitioner was not then known to court.

4. Criminal Law ⇐997

Writ of error coram nobis serves limited purpose of correcting errors of fact not otherwise correctible, but is not to be invoked if another adequate remedy is available.

5. Criminal Law ⇐997

In absence of showing that judgment of conviction would not have been entered on guilty plea if court had possessed knowledge of existence of specified fact, motion to annul judgment would not lie.

6. Criminal Law ⇐997

Acquittal of person who allegedly shot murder victim would not warrant annulment of accomplice's conviction on guilty plea.

7. Stipulations ⇐17(1)

Person who entered guilty plea to murder charge would be presumed to have heard and approved stipulation made in his presence in open court that court might consider evidence introduced in trial of co-defendant for purpose of fixing degree of crime.

8. Criminal Law ⇐273

Guilty plea constituted confession of every factor comprising charge contained in pleading.

9. Criminal Law ⇐997, 1186(4)

Defendant did not suffer detriment by stipulation that court might consider evidence adduced at codefendant's trial for purpose of determining degree of murder of which defendant pleaded guilty and for which he received life sentence, and was not entitled to vacation of judgment of conviction. Const. art. 6, § 4½.

10. Indictment and Information ⇐130

Valid charge of murder in indictment was not affected by presence of accusation of robbery by codefendant, even if joinder of such offenses were error. Pen.Code, § 954.

Thomas L. Griffith, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant seeks to vacate the judgment convicting him of the murder of one Nixon whose death resulted from the discharge of a gun in the hand of another. The sole basis for his demand is the asserted denial of his right to due process of law as provided by the Fourteenth Amendment to the Federal Constitution and by the Constitution of California. Art. I, sec. 13.

An information was filed in two counts. Count I charged appellant and one Richardson with having murdered Nixon on February 23, 1951. Count II accused only Richardson of having committed robbery, but includes two prior felonies of defendant Ward.

Both men filed motions under section 995 [1] of the Penal Code, after waiving reading of the information. Six days later both appeared while their counsel argued the motions. On May 1, 1951, appellant filed his demurrer of "improper joinder of causes," under section 954 of the Penal Code. On the same day the men appeared before Judge Cunningham and both pleaded "not guilty" and Richardson's motion for a separate trial was denied, and the joint trial set for June 4. On that day, at the request of defendants, the cause was continued to June 7 but evidently before leaving the courtroom, appellant, with his counsel present, changed his mind, withdrew his plea and entered one of guilty to count I and admitted two prior convictions and two terms of penal servitude. While Ward and his counsel were before the court, it was "stipulated that the Court may consider the evidence introduced in the trial of the Co-defendant Armstead Richardson for the purpose of fixing the degree of the crime as to Defendant James C. Ward." On June 28 the court found appellant guilty of murder in the first degree and sentenced him to San Quentin for life.

Five months and twenty days after entry of judgment, appellant filed his notice of motion for an order annulling it on the grounds that (1) the court was without jurisdiction to render such judgment for the reason that he was jointly charged with Richardson who was tried on a charge of robbery wholly unconnected with the murder charge; (2) the judgment violated sections 954 and 1098 of the Penal Code [2], the

1. This section requires the dismissal of an information in the absence of certain formalities, or where the accused has been indicted or committed without probable cause.

2. Section 954: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court

codefendant having been acquitted on the murder charge; (3) the trial and acquittal of Richardson was tantamount to having placed appellant in jeopardy, Sec. 1023, Penal Code[3]; (4) such actions were void and deprived appellant of due process of law.

[1–4] The motion to vacate the judgment filed by appellant is the equivalent of a petition for writ of error coram nobis. People v. Cook, 97 Cal.App.2d 284, 285, 217 P.2d 498. It does not, therefore, lie to correct an error of law or to redress an irregularity that may be corrected by means of appeal or on motion for a new trial. Neither of such conventional devices was invoked by appellant. Neither such motion nor a petition for writ of error coram nobis is available except where extrinsic fraud has deprived the petitioner of a trial on the merits. It can be used where no other remedy exists, to obtain relief from a judgment that was rendered "while there existed some fact which would have prevented" rendition of the judgment if the trial court had known it and which through no fault of the petitioner was not then known to the court. People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13; People v. Ward, 96 Cal.App.2d 629, 632, 216 P.2d 114; People v. Martinez, 88 Cal.App.2d 767, 771, 199 P. 2d 375. It serves a limited purpose of correcting errors of fact not otherwise correctible, but is not to be invoked if another adequate remedy is available. Id.

[5, 6] Resort to the motion to annul the judgment was, therefore, wholly unjustifiable. No showing is made now that the judgment would not have been entered if the court had possessed knowledge of the existence of a specified fact. That Richardson's acquittal of the murder charge would have warranted the annulment of appellant's conviction is not supportable on any legal principle. It is, of course, for appellant, an unhappy denouement, that, while he and his codefendant plotted the crime against Nixon, and Richardson fired the shot that snuffed out the life of their victim, the active agent of the murder goes free while appellant must languish in prison for life. But with a lawyer by his side, with a possible death sentence awaiting his conviction, it cannot be said that he acted unwisely in saving a few crumbs of existence rather than risk his life. He pleaded guilty to murder because he knew he stood by his coassassin while the latter fired the gun, and his counsel must have laid before him the consequences of conviction after a contested trial.

[7] Appellant contends that because he did not personally approve, and because the trial court did not ask him to verify the announced stipulation, the court lost jurisdiction to proceed. While brevity marks

may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other court. (Am.Stats.1951, ch. 1674, § 45.)"

Section 1098: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant."

3. Section 1023: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

the record of the proceeding when the stipulation was made in open court, it is nonetheless valid. The stipulation encompassed no more than that the court might determine the depth of appellant's depravity from the proof adduced on the trial of Richardson. But at the same time the stipulation left to the court the duty of fixing the degree of his guilt after having heard the proof at Richardson's trial. Because the judge and the clerk are presumed to have performed their duties, Code Civ. Proc. sec. 1963, subd. 15, appellant is presumed to have heard and approved the stipulation made in his presence in open court.

[8] His plea constitutes no less than a confession of every factor comprising the charge contained in the pleading. People v. Outcault, 90 Cal.App.2d 25, 29, 202 P.2d 602. Hearing evidence on a plea of guilty is encouraged by the humane doctrine that a full disclosure of the facts might "temper the winds to the shorn lamb." It obviously produced the result hoped for. The life of appellant was spared.

The crime for which Richardson was tried and in which the evidence of appellant's offense was recorded was not a misdeed "wholly disconnected with appellant." It was, indeed, the identical crime to the commission of which appellant had pleaded guilty in open court.

[9] Also, the plea of guilty was free of every vitiating influence. Appellant was not asked to plead guilty. No inducements were offered. Neither in the record nor in appellant's brief is there the slightest intimation of a fact that questions the guilt of the accused. On the contrary, he was free to choose his course; he was advised by capable counsel, shown every courtesy by the court and the prosecution. He moved in obedience to his own conclusion as to what would be best for himself. Having done so, having risked his chance of acquittal for a certain term in prison, he may not approach this court with the expectation that merciful hands will unlock the cell in which he voluntarily imprisoned himself. See People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657. The only disadvantage that could have resulted from the court's considering the evidence received on the trial of Richardson for the murder of Nixon was to send appellant to the gas chamber instead of the pentitentiary and possibly ultimate freedom. Since the judgment gave appellant a life term in prison instead of death, it cannot be said that he suffered any detriment as a result of the stipulation. Since his chance for total exoneration was not bedimmed or impaired by the stipulation, there is no reason for vacating the judgment. Const. Art. VI, sec. 4½.

Appellant artfully arrays the authorities defining "due process" to show that he was "entitled to a judicial trial"; that there should have been an impartial tribunal with jurisdiction; that a judgment obtained in violation of the Fourteenth Amendment is null and void. But there is no incident to prove that his rights in any respect were violated. He had counsel at every stage of his experience with the court. Having failed to prove he was cheated of his constitutional right by any kind of evidence, People v. Dunlop, 102 Cal.App.2d 314, 316, 227 P.2d 281, his appeal is without support.

[10] Appellant contends that because the Penal Code, sec. 954, provides that an information "may charge two or more different offenses *connected together in their commission*," a reversible error was committed by reason of the fact that the crime of robbery by Richardson on February 21 was joined with the charge of murder by both defendants on February 23. Both men demurred to the information for improper joinder. The order overruling that demurrer was not questioned by an appeal. Such joinder, if erroneous, does not invalidate the indictment as a whole. The valid charge of murder is not affected by the presence of the accusation of robbery (count II). People v. Bundte, 87 Cal. App.2d 735, 746, 197 P.2d 823. The information correctly accuses appellant of murder in language that is too clear to be misunderstood. He pleaded guilty to the charge with full knowledge of the consequences. He was just as guilty after the stipulation that the court make use of the evidence of the murder as he had been before.

Complaint is made that appellant was not advised with respect to his rights to appeal. There is no statute requiring a trial court to advise a convicted prisoner on the matter of appeal. All constitutional and statutory regulations on that score relate to the trial of the accused. No suggestion is made that the trial court failed properly to advise appellant of his legal rights. Not only was he represented by counsel, but all proper measures were applied to the end that his conviction resulted from his own plea in open court adapted to the written law.

The motion to set aside the judgment has no support in fact or in law. Order affirmed.

McCOMB and FOX, JJ., concur.



118 Cal.App.2d 442

JURA et al. v. SUNSHINE BISCUITS, Inc.

Civ. 4644.

District Court of Appeal, Fourth District, California.

June 11, 1953.

Rehearing Denied July 6, 1953.

Hearing Denied Aug. 6, 1953.

Action to recover on contract for purchase price of figs and fig paste sold by plaintiffs to defendant. The Superior Court of Fresno County, Arthur C. Shepard, J., entered judgment from which plaintiffs appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that plaintiffs and defendant had terminated the original agreement by mutual consent, and had entered into a new agreement for sale and delivery of the merchandise involved.

Judgment affirmed.

1. Sales ⇐359(1)

In action on contract to recover purchase price for figs and fig paste sold by plaintiffs to defendant, wherein contract relied on was evidenced by letter of plaintiffs to which defendant replied on March 31, 1947, evidence supported finding that parties had terminated the agreement of March, 1947, by mutual consent, and had entered into a new agreement for sale and delivery of merchandise involved, as contended by defendant.

2. Trial ⇐396(3)

Where plaintiffs brought action on contract to recover purchase price of figs and fig paste sold to defendant, answer of defendant which denied that delivery of merchandise was made pursuant to contract evidenced by letters of parties, and which alleged that prior to the delivery of figs under such agreement, parties entered into oral contract altering and modifying original contract, was sufficiently broad in its allegations to present to court the interpretation of the agreements of the parties, and to enable it to consistently find that the parties terminated their original contract by mutual consent and entered into a new agreement.

3. Contracts ⇐255

A consideration is required in order to extinguish the obligations created by a written contract.

4. Sales ⇐89

Oral modification of bilateral contract by which plaintiffs were to sell figs to defendant, when modified before performance by either side, and by freeing plaintiffs from their obligation to sell their crop to defendant, and defendant from his obligation to buy, was supported by sufficient consideration to extinguish the obligations created by the written contract.

5. Principal and Agent ⇐123(3)

In action on contract to recover purchase price of figs and fig paste sold by plaintiffs to defendant, wherein defendant contended that original contract had been modified by subsequent oral agreement, evidence warranted finding that plaintiffs' manager, who had purportedly made the modifying agreement, was authorized to enter into such oral agreement binding the plaintiffs.

Meux & Gallagher, Fresno, for appellants.

David E. Peckinpah, Denver C. Peckinpah, and Charles F. Hamlin, Fresno, for respondent.

MUSSELL, Justice.

This is an action on contract to recover the purchase price for figs and fig paste sold by plaintiffs and appellants (who were fig growers and producers of sliced figs and fig paste) to defendant and respondent Sunshine Biscuits, Inc., a corporation, engaged in the business of manufacturing crackers and cookies. In a letter to defendant company, dated March 7, 1947, Jura Farms offered to sell its 1947 crop of figs, estimated at 800 tons, to defendant at a price computed by adding to the average sweat box price paid to growers for the 1947 crop of Adriatic figs, plaintiffs' actual cost of processing said figs, plus a profit of one cent per pound for processing, less 2½% brokerage discount. On March 31, 1947, defendant replied to this letter, stating, among other matters, "It will be in order for you to book 800 tons of Adriatic figs for our account this coming season on the basis outlined in your letter".

Plaintiffs allege that pursuant to this agreement the Jura Packing Company, between the 12th day of January, 1948, and the 6th day of August, 1948, delivered to defendant 800 tons of fig paste and sliced figs of the 1947 crop and defendant paid to plaintiffs the sum of $121,568; that the average sweat box price paid to growers for the 1947 crop of figs was 7¾¢ per pound; that the actual process cost was 4¢ per pound; that the total price defendant agreed to pay for said figs was the sum of $204,000, leaving a balance due of $82,432.

Defendant, in its answer, denied that the exchange of letters in March, 1947, constituted an agreement; admitted delivery of the 800 tons of figs referred to in the letters and denied that any of said merchandise was delivered pursuant to the alleged contract of March 31, 1947. Affirmative defenses were also set up in the answer: (1) that prior to the delivery of any merchandise under the terms of the March 31, 1947, written contract, the parties thereto voluntarily entered into an oral agreement to alter and modify the original obligation between them, with intent to extinguish the old obligation and that such oral agreement was fully executed; (2) that the parties entered into an oral agreement to substitute a new obligation between them with the intent to extinguish the old obligation and that such oral agreement was fully executed; (3) that on or about January 1, 1948, appellants orally agreed to accept as full accord and satisfaction of their claims under said contract a different price for said figs and fig paste than as provided in the exchange of letters of March, 1947, and that such oral agreement was fully executed. Defendant also pleaded estoppel and that an account was stated between the parties.

The trial court found that on or about March 31, 1947, the parties entered into a written agreement wherein they agreed to the terms as stated by plaintiffs in their complaint; that plaintiffs never delivered any merchandise to defendant under or pursuant to the written agreement of March 31, 1947; that during the month of October, 1947, or thereabouts, and before any deliveries were made under the March, 1947, agreement, the parties thereto entered into an agreement terminating said contract by mutual consent; that at the time of such termination it was understood and agreed that the plaintiffs would thereafter sell to defendant such quantities of Adriatic fig paste and sliced figs from the 1947 crop as the defendant might order, the price to be agreed upon by the parties; that said parties did not at said time intend to enter into a binding contract for the sale and delivery of any merchandise; that from time to time thereafter and up to August 6, 1948, plaintiffs sold to defendant quantities of paste and sliced figs of the 1947 crop at prices then and there agreed upon by the parties; and that defendant paid in full the prices agreed upon. Plaintiffs appeal from the judgment for defendant which followed.

It is argued that the findings are not sustained by the evidence. This argument is without merit. There is no dispute as to the execution of the letters of March, 1947, the delivery and sale of 800 tons of merchandise and the payment of $121,568 therefor by defendant.

Concerning the terms of sale, Albert Simpson, head of the general purchasing department of defendant corporation, testified that nothing was done by the parties following the exchange of the March, 1947, letters until some time in September of that year when Mr. Weatherford, plaintiffs' agent, called him by telephone and reported on the condition of the 1947 crop, stating that there was a tremendous crop in 1947, and as a result, the market price was "on the down side"; that Weatherford said "Simpson, Sunshine has to be protected on prices, regardless of the March letters". In a letter to defendant, dated December 27, 1947, Weatherford, in discussing the situation, stated that they were in a bad spot; that they would have to make the best of a bad situation and suggested that they get together on their own business; that profit was out and they had forgotten it entirely. After setting up cost figures, Weatherford stated "Well, this is our cost figure, Mr. Simpson, just how far will you go along on this thing. We certainly would like to get the actual cost of packing out of it if it is possible to do so. We are sure that we can eventually work out some plan to supply you with figs that will be most advantageous to you as well as ourselves and we are not losing sight of these future plans for a moment". Mr. Simpson further testified that Mr. Weatherford called him by telephone several times, giving reports and asking for shipping instructions; that in these telephone conversations Weatherford stated "We are going to take care of Sunshine—you are our account—forget all about the March arrangements. Profits are out the window"; that as a result of the telephone conversations and the December letters, a conference was held in New York in January, 1948, Mr. Weatherford, Mike Jura (one of the partners) and Simpson were present at this meeting. Mr. Weatherford there stated "Simpson, we are here to work out a mutual arrangement on our figs"; that after being asked by Simpson what they would do on the price situation, Weatherford stated "I would rather leave that in your hands. We have told you that you are our number one customer—and I have told you that we are going to take care of you on a competitive basis—you know more about the price situation on figs than we do"; that Simpson then stated that he was getting price quotations from the coast; that he felt that the figs set aside would be used but that he was not in a position to promise complete disposition of them but that he would be happy to work with them on such an arrangement; that Weatherford replied "We want to go along with you on such an arrangement. We want to go along with you. Where you know the price, put them up to us and we will fill the orders". Simpson further testified that the contract of March, 1947, was abrogated and repealed and that Weatherford said "Don't you worry, that March, 1947, contract is out".

The testimony of Mr. Simpson is corroborated by evidence that plaintiffs accepted individual purchase orders for the 1947 fig crop, which orders contained price stipulatons inconsistent with the March, 1947, agreement; that plantiffs submitted invoices corresponding to defendant's individual purchase order prices rather than in accordance with the March contract; that at the time plaintiffs filed their complaint herein, no account receivable was set up on their books to indicate that any sum was due in connection with any of these deliveries; that defendant submitted and plaintiffs endorsed voucher checks in payment for the merchandise listed on each of defendant's orders at the prices therein specified and each voucher contained the statement "If settlement as above is not satisfactory, return without alteration for correction"; that the final summary of shipments made and prices charged, which plaintiffs furnished defendant, contained no unsettled price problems; that plaintiffs paid a brokerage allowance to defendant based on the prices specified in defendant's purchase orders; that plaintiffs delayed making any claim for further payment from the time shipments were completed in August, 1948, at the time of the present action, which was filed on November 1, 1951.

[1] The evidence was sufficient to support the trial court's findings that the parties terminated the agreement of March, 1947, by mutual consent and entered into a

new agreement for the sale and delivery of the merchandise involved.

[2] It is claimed by plaintiffs that the findings are contrary to any affirmative defense pleaded in the answer. However, the answer contains a denial that the delivery of the merchandise was made pursuant to the agreement of March, 1947, and a denial that defendant agreed to pay the sum of $204,000 for the figs involved. It is alleged in the answer that prior to the delivery of figs or fig paste under the March agreement, the parties entered into an oral agreement to alter and modify the original contract; that this oral agreement was entered into voluntarily and in consideration of the mutually beneficial business relations between the parties; that the price to be paid for each shipment under the oral agreement was set by mutual agreement of the parties shortly before each particular shipment was made; that it was agreed that the prior written contract was to be extinguished by the new agreement; that the new agreement was fully executed by both parties; that plaintiffs orally agreed to accept as full accord and satisfaction of its claims under the March contract a different price for the merchandise involved than that provided in the written contract; that plaintiffs are estopped to deny the prices agreed upon, the invoices rendered and the acceptance of payment therefor; that the indebtednesses evidenced by such invoices became accounts stated and were received as such and were paid in full by defendant; that defendant was not indebted to plaintiffs in any sum whatsoever. The pleadings on the part of defendant were sufficiently broad to present to the court the interpretation of the agreements of the parties. The findings are of ultimate facts and within the issues presented by the pleadings. Central Heights Improvement Co. v. Memorial Parks, Inc., 40 Cal. App.2d 591, 610, 105 P.2d 596.

[3, 4] It is next argued that, assuming that there was an oral agreement to terminate the contract of March 31, 1947, there was no valid consideration to support such an agreement. This argument is without merit. It is true, as plaintiffs contend, that there must be a consideration to extinguish the obligations created by a written contract, Sistrom v. Anderson, 51 Cal. App.2d 213, 219, 124 P.2d 372, but in the instant case the March, 1947, agreement was a bilateral contract which had not been performed by either side. Under the terms of the oral agreement plaintiffs were freed of their obligation to sell the 1947 crop to defendant and defendant was not obligated to buy it. As is stated in 6 Williston on Contracts, Rev.Ed., page 5170:

> "If the parties to a bilateral contract agree to rescind or modify it, there is no difficulty in regard to consideration, whether the agreement to rescind is made before or after a breach of the original contract, so long as neither party has completely performed or been discharged from his obligation. The promise of one party to forego his rights under the contract is sufficient consideration for the promise of the other party to forego his rights."

And in Sass v. Hank, 108 Cal.App.2d 207, 215, 238 P.2d 652, 658, it is said:

> "The mutual rescission or abrogation of a written contract may be effected by an oral agreement whether executed or not, in which event section 1698 of the Civil Code has no application. Grant v. Aerodraulics Co., 91 Cal.App. 2d 68, 75, 204 P.2d 683. It is true, as appellants assert, that such agreement must be supported by a sufficient consideration, but such consideration is present here in the form of the mutual cancellation of executory contractual rights. When such is the case each party has suffered a legal detriment in giving up such rights and the consideration is adequate. Grant v. Aerodraulics Co., supra, 91 Cal.App.2d [at page] 76, 204 P.2d 683; Sistrom v. Anderson, 51 Cal.App.2d 213, 219, 124 P. 2d 372; Rest. Contracts, sec. 406."

It is apparent from the record before us that plaintiffs considered the defendant their "number one customer" and were anxious to work out arrangements for the purchase of future crops by the defendant. Plaintiffs state in their letter to defendant, dated December 27, 1947, "your business

means very much to us and we will go all out to hold it" and "we are sure that we can eventually work out some plan to supply you your figs that will be most advantageous to you as well as to ourselves and we are not losing sight of these future plans for one moment". The arrangement worked out at the January, 1948, conference was that defendant would purchase plaintiffs' figs on a competitive basis. Under the circumstances shown, it appears that there was sufficient consideration to support the oral agreement of the parties.

Finally, it is contended that Weatherford, the agent of plaintiffs, had no power to rescind or terminate the written contract of March, 1947. We cannot agree with this contention. As was said in State Finance Co. v. Hershel Calif. F. P. Co., 8 Cal.App.2d 524, 528, 47 P.2d 821, 823:

> "The authority of the agent to modify a provision of a contract may be inferred from the evidence that he was empowered to do certain things, as in this case to change the parties to whom the money was to be paid. There is evidence in the record from which an inference may be drawn that the principal knew of the oral modification. There is no evidence to show that the modification was repudiated. Actual authority has been conferred upon the agent by the principal, and ostensibly this authority had been communicated to the interested third parties. Civ. Code, §§ 2316 and 2317. '* * * The extent of an agent's authority, and the ratification of an unauthorized act, may be proved by circumstantial evidence, as from the fact that the agent signed contracts, checks and generally managed the business of his principal. * * * The existence of an agency, like the extent of an agent's authority, is a question of fact.' 1 Cal. Jur., p. 696."

[5] A finding that Weatherford was authorized to enter into the oral agreement binding the partnership is amply supported by the evidence. He was employed as manager of plaintiffs' packing plant and was in charge of the processing and sale of the figs and fig paste. He wrote practically all the correspondence and made all deals with prospective buyers. All of defendant's dealings with plaintiffs were with Weatherford or Mike Jura (deceased partner of plaintiffs). The agreement terminating the March, 1947, contract was ratified by Jura at the conference of the parties held in New York in January, 1948, and by the subsequent acts of plaintiffs in supplying defendant with figs and fig paste at prices inconsistent with the exchange of letters of March, 1947.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



118 Cal.App.2d 526

PURDY v. CARLSON et al.

Civ. 4706.

District Court of Appeal
Fourth District, California.

June 16, 1953.

Action by landlord against tenants, involving interpretation of option clauses in two leases executed by the parties. The Superior Court, Orange County, Robert Gardner, J., entered judgment unfavorable to tenants, and they appealed. The District Court of Appeal, Mussell, J., held that clauses providing that tenants could have option to purchase premises for not less than a stipulated figure, and further providing that if, at time of exercise of option, value of premises was greater, tenants would have first refusal to purchase premises in event landlord should desire to sell, in which case landlord was required to notify tenants in writing of terms and conditions of any bona fide offer to purchase by any third person, after which tenants would have ten days within which to purchase upon such terms and conditions, did not give tenants an unconditional option to purchase premises for the stipulated sum, but gave only the right to purchase in event that landlord desired to sell.

Affirmed.

1. Landlord and Tenant ⇐92(1)

Provisions of purchase option clause contained in one paragraph of lease must be read together to determine meaning of clause.

2. Landlord and Tenant ⇐92(1)

Lease clauses providing that tenants would have option to purchase premises for not less than a stipulated figure, and further providing that if, at time of exercise of option, real estate value was greater than such figure, tenants would have first refusal to purchase in the event landlord should desire to sell, in which case landlord was required to notify tenants in writing of terms and conditions of any bona fide offer to purchase by a third person, after which, for period of ten days, tenants would have option to purchase upon such terms and conditions, did not give tenants an unconditional option to purchase property for the stipulated figure, but gave only the right to purchase in event that landlord desired to sell.

Launer, Chaffee & Launer, Walter B. Chaffee, Fullerton, for appellants.

Blodget & Blodget, Santa Ana, for respondent.

MUSSELL, Justice.

This is an appeal by cross-complainants from portions of a judgment rendered against them in an action involving the interpretation of option clauses in two leases executed by the parties.

The record consists of a settled statement on appeal. It appears therefrom that in August, 1947, plaintiff Purdy leased two parcels of real property in Orange county to the defendants. The lease on the parcel described as the "Wilshire property" contained the following provision:

> "It is further understood and agreed by and between the parties hereto that the lessee shall have the option, at any time during the first three years of this lease or during any extension thereof, to purchase said premises as hereinafter specified for lawful money of the United States; the price thereof is to be not less than Twenty Thousand Dollars, and if, at the time of the exercise of the option said real estate value is greater, Lessee shall have a first refusal to purchase said real property in the event Lessor should desire to sell the same, and in such event, Lessor shall notify Lessee in writing of the terms and conditions of any bona fide offer to purchase said real property by any third person, and thereafter for a period of ten days Lessee shall have an option to purchase said real property upon such terms and conditions. The net rent paid in excess of upkeep, interest and taxes shall be credited on purchase price."

The lease on the second parcel, known as the "Spadra property," contained an option provision identical with the quoted provision in the "Wilshire property" lease except for the amount set forth therein, which was $35,000.

The trial court found that both leases had been renewed to July 31, 1953, and were in full force and effect; that a controversy existed between the parties as to the meaning of the option provisions of said leases and concluded that the said option provisions should be construed to mean that plaintiff is under no obligation whatsoever to defendants to sell said premises unless plaintiff desires to sell the same; and that in the event plaintiff desires to sell the premises, he must offer to sell the same to defendants at a price equivalent to the highest bona fide offer that he can obtain from any third party.

The judgment provided, in part, that defendants (cross-complainants) under the terms and provisions of said leases have no option to purchase either of the parcels of real property involved except as follows: That in the event cross-defendant (plaintiff) desires to sell said premises during the term of said leases, he shall not sell the same without having first offered to sell them to cross-complainants at the highest bona fide offer that cross-defendant is able to obtain from any third party. This appeal is from this provision of the judgment and the sole issue here involved is, as stated by appellants, "Does the option clause give

the Carlsons an absolute option to purchase the property regardless of Purdy's desire to sell, or does it merely give the Carlsons the right to purchase only in the event that Purdy desires to sell?"

[1] The question of the interpretation of the option clauses in these leases is one of law and as stated by appellants, no factual controversy was presented to the trial court. Our conclusion is that the trial court correctly interpreted the questioned provisions of the leases. The option clause in each of the leases is contained in one paragraph heretofore quoted and its provisions must be read together to determine its meaning. Falkenstein v. Popper, 81 Cal. App.2d 131, 133, 183 P.2d 707.

Since both option clauses are the same except as to the sum named therein, we shall refer only to the provisions of the "Wilshire" lease.

[2] In the first sentence of the option clause of the "Wilshire" lease we find the following provision: "It is further understood and agreed by and between the parties hereto that the lessee shall have the option, at any time during the first three years of this lease or during any extension thereof, to purchase said premises *as hereinafter specified* for lawful money of the United States." (Emphasis ours.) The words "as hereinafter specified" clearly indicate that the remaining portions of the paragraph limit and prescribe the terms of the option. Continuing—"the price thereof is to be not less than $20,000.00." This provision does not fix any definite price to be paid in the event of the exercise of the option. An option has been defined as an agreement by which an owner invests another with the exclusive right to buy certain property at a stipulated price, within a limited time. Beran v. Harris, 91 Cal.App. 2d 562-564, 205 P.2d 107. Under the remaining terms of the paragraph, the stipulated price can only be determined in the event that the lessor should desire to sell the property. In the event that the lessor obtained a bona fide offer to purchase by a third party, lessees have an option to purchase for a period of ten days at the price contained in such offer submitted by such third party.

It seems clear to us that the clause involved does not give the lessees an unconditional option to purchase the property for the sum of $20,000; that the option is expressly conditioned upon the lessor's desire to sell, in which event he is entitled to determine the price to be paid for the property by a bona fide offer made therefor by a third party. Lessee was then given ten days' notice to meet the price thus established.

Several letters exchanged between the parties are set forth in the settled statement. However, the agreement speaks for itself and the letters do not contain any modification of its terms. The settled statement shows that in November, 1951, Purdy brought suit against the Carlsons for declaratory relief, to quiet title to the property conveyed by the leases herein and for unlawful detainer. The Carlsons filed a cross-complaint for declaratory relief with respect to the clauses in the leases relating to the options to purchase. A trial was had on March 19, 1952, and no appeal was taken by Purdy from the judgment therein rendered in favor of the Carlsons with respect to the issues raised by Purdy's complaint.

It is further set forth in the settled statement that the sole issue on appeal is the correctness of the trial court's ruling on the Carlson's cross-complaint. We conclude that this issue was properly decided by the trial court.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

118 Cal.App.2d 511

ARGUELLO ESTATE PROTECTIVE ASS'N et al. v. CROFTON et al.

Civ. 19476.

District Court of Appeal, Second District, Division 1, California.

June 16, 1953.

Action for declaratory relief and accounting by alleged assignees of one half interest in rents and profits from land against landowners wherein one landowner died and his executor was substituted as party defendant. The Superior Court, Los Angeles County, Carl A. Stutsman, Daniel N. Stevens, Judges, rendered judgment for assignees and executor appealed. The District Court of Appeal, Doran, J., held that where trial court by interlocutory judgment confirmed assignees' ownership to one half interest in rents and profits from land before landowner's death but accounting and substitution of executor as party defendant did not take place until after death of landowner, assignees did not have to present to deceased landowner's estate a creditor's claim.

Judgment affirmed.

1. Pleading ⇐398

Any defect in pleadings, or variance between pleading and proof in reference to corporate or noncorporate status of association, would not be deemed fatal where it did not appear that such matter misled adversaries to their prejudice.

2. Pleading ⇐404, 430(2)

Any defect in pleadings or variance between pleading and proof in reference to corporate or noncorporate status of association which with individual plaintiffs brought suit as assignees of one-half interest in rents and profits from land against landowners was waived where no objection was made at trial.

3. Appeal and Error ⇐1036(4)

Fact that alleged assignees of one-half interest in rents and profits from land did not file supplementary complaint naming executor of landowner who died during trial as party defendant in assignees' action for declaratory relief and accounting against landowners was harmless particularly in view of fact that executor filed answer which by reference incorporated original answer of deceased.

4. Executors and Administrators ⇐224

A claimant of specific property cannot properly be called a creditor within statute requiring creditor's claim to be filed in probate proceedings. Probate Code, § 707.

5. Executors and Administrators ⇐224

Where trial court by interlocutory judgment confirmed ownership of alleged assignees to one-half interest in rents and profits from land during lifetime of one of landowners, but accounting and substitution of executor as party defendant did not take place until after landowner's death, assignees were not required to file creditor's claim with deceased landower's estate. Probate Code, § 707.

6. Executors and Administrators ⇐223

Statute requiring filing of claim for damages for conversion in probate proceedings does not have retroactive effect and would not apply in action by assignees of one-half interest in rents and profits from land against landowners for declaratory relief and accounting wherein one of landowners died after interlocutory judgment confirming assignees' ownership but before accounting and substitution of executor as party defendant. Probate Code, § 707.

Clifford Thoms and David L. Sefman, Los Angeles, Montgomery G. Rice, Los Angeles, of counsel, for appellant.

J. Marion Wright, Owen E. Kupfer and Wapner & Wapner, Los Angeles, for respondent.

DORAN, Justice.

The original complaint for declaratory relief and accounting was filed on June 10, 1947 during the lifetime of Juan B. Bandini, who filed an answer and was represented by counsel during all proceedings prior to Mr. Bandini's death on February 3, 1950. The gist of the complaint is that Juan B. Bandini was one of the heirs of Santiago and Pilar Arguello who were grantees of certain land by original grant from the Mexican Government; that plaintiffs, by virtue of assignment, are vested

with an undivided one-half interest in all moneys, rents, issues, profits and benefits which might result from the use, occupation, lease or sale of the described lands, and that plaintiffs are entitled to an accounting in respect to such profits.

The case was tried in June, 1949 and Judge Carl A. Stutsman decided in favor of the plaintiffs, respondents herein. By interlocutory decree the defendant heirs, including Juan B. Bandini, were ordered to render an accounting as to rents received. Following Mr. Bandini's death on February 3, 1950, letters testamentary were issued to John W. Bandini, and on June 19, 1951, as a result of a contested motion, the trial court ordered the substitution of such executor in place of Juan B. Bandini, deceased. The executor was thereafter granted permission to file an amended and supplementary answer, which raised as a special defense, the fact that plaintiffs had failed to file a creditor's claim in the Bandini estate. This accounting phase of the case was then tried before Judge Daniel M. Stevens who rendered judgment against the estate in the sum of $15,450.

[1, 2] Appellant's first contention is that "The complaint fails to state a cause of action in favor of plaintiffs or any of them against Juan B. Bandini or against this appellant", the executor of the Bandini Estate. Among other things, appellants complaint that a certain "Confirmation and Substitution Contract", attached as an exhibit to the complaint, refers to the Arguello Estate Protective Association as a corporation, and that the complaint fails to show that the individual plaintiffs ever became vested with any rights thereunder. It is further insisted that plaintiffs possess no rights because such contract "superceded and replaced all previous agreements and contracts".

As respondents' brief states, the trial court expressly found that Arguello Estate Protective Association "is an unincorporated association", and that the decedent Juan B. Bandini had "duly assigned, transferred and set over unto plaintiffs and to their predecessors in title, for valuable considerations, an undivided one-half interest in and to all moneys, rents, issues and profits".

The pleadings appear to state a cause of action. The findings of fact cover the pleaded issues and fully support the judgment for declaratory relief and accounting. Any defect in the pleadings, or variance between pleading and proof in reference to corporate or noncorporate status of the Association, or other subjects, cannot be deemed fatal unless it be made to appear that such matter "has misled the adverse party to his prejudice." Stebinger v. Warden, 109 Cal.App.2d 200, 201, 240, 240 P.2d 334, 336. Also, any such variance would be waived unless the objection were duly made at the trial, and the record herein fails to show such an objection. Likewise, the record discloses no prejudicial effect in reference to any of appellant's substantial rights.

[3] Appellant insists that the proceedings substituting the executor of the Bandini Estate in place of the defendant Juan B. Bandini who had died subsequent to entry of judgment establishing liability and ordering an accounting to determine the amount thereof, were irregular. As hereinbefore stated, a motion for such substitution was duly made and granted, and thereafter the executor filed an amended and supplementary answer and participated in all proceedings.

The trial court found that "during the pendency of this action, the defendants * * * Juan B. Bandini * * * have died and that their respective legal representatives have been duly and regularly substituted in this action by the order of court". Any irregularity in the substitution procedure, or the fact that plaintiffs did not file a supplementary complaint naming the substituted executor as a party defendant, must be deemed harmless to appellant, particularly in view of the fact that the estate filed an answer which by reference incorporated the original answer of Juan B. Bandini.

What may be designated as appellant's main contention is the objection that respondents failed to file a supplementary complaint alleging the presentation to the estate of a creditor's claim, and a rejection thereof. Appellant insists that the filing of such a claim "is essential to litigation

against an estate". It is conceded that no such claim was ever filed by respondents.

The plaintiffs' cause of action herein is based upon ownership resulting from the assignment of a one-half interest in rents and profits. During the lifetime of Juan B. Bandini, the trial court by interlocutory judgment confirmed plaintiffs' alleged ownership and determined Bandini's liability, ordering the usual accounting for the purpose of ascertaining the exact amount of accrued rents and profits. This accounting did not take place until after the death of Mr. Bandini and the substitution of appellant executor by court order. As mentioned, the Bandini Estate filed an answer and actively participated in the accounting trial.

Plaintiff's action was correctly denominated as one for "Declaratory Relief and Accounting", and there is nothing in the record to indicate that the issues were tried upon any other theory. The plaintiffs were not claiming any moneys belonging to the Bandini Estate but merely sought a judicial ascertainment of the extent of a half ownership of rents and profits, moneys which never became any part of the estate.

The trial court found that no claim had been filed with the estate for these rents and profits, and that the period for filing claims had expired. A conclusion of law follows: "that the provisions of California Probate Code, Section 700 and following, relating to the filing of creditors' claims in estates of decedents, have no application to the plaintiffs' cause of action and plaintiffs were not required to file creditors' claims in the probate proceedings".

A survey of the cases and analogy to be drawn therefrom, indicates that the trial court's conclusion was correct and that appellant's contentions cannot be sustained. Probate Code, Section 707, provides that "All claims arising upon contract, whether they are due, not due, or contingent * * * must be filed or presented within the time limited in the notice or as extended by the provisions of Section 702 of this code; and any claim not so filed or presented is barred forever". This section was amended in 1949, long after the filing of plaintiffs' action, to include "all claims for damages for physical injuries or death or injury to property or actions provided for in Section 574 of this code," which latter named section relates to actions for conversion.

Appellant argues that "since the claims of plaintiffs arose, if at all, upon contract", and no claims were filed in probate, there can be no recovery. Cited in support of this assertion is Hays v. Bank of America, 71 Cal.App.2d 301, 162 P.2d 679, an action for overtime wages, where it was held that the filing of a claim was necessary since the action was "based on contracts of employment, or at least were contingent thereto". Since plaintiffs in the present case are not seeking to recover wages of any kind, the Hays case is of no particular assistance. Likewise, other cases such as Lesser v. Pomin, 3 Cal.App.2d 117, 39 P.2d 451, and Joost v. Castel, 33 Cal.App.2d 138, 91 P.2d 172, although involving recovery of rentals, were in no manner similar to the present situation where the rentals were not due from the decedent but had been collected from other persons, lawfully belonged to plaintiffs and were withheld by the estate which owned no interest therein.

[4, 5] Although there appear to be no California cases which deal with the exact factual situation here involved, it has been held, as in McKay v. Security etc. Bank, 35 Cal.App.2d 349, 96 P.2d 376, 380, that "A claimant of specific property cannot properly be called a creditor and need not present any claim." That case involved a non-negotiable note, payable out of a one-third interest in oil royalties, and in so ruling the court said: "The filing of the claim against the estate of decedent is immaterial to our consideration. At no time was the contention made by plaintiff that he had any right to receive payment * * * from the general estate of the decedent or from any fund other than the portion of the oil royalties conveyed by the note and the order. * * * Estate of Dutard, 147 Cal. 253, at page 256, 81 P. 519, at page 520." This reasoning may well apply to the present controversy where plaintiffs claim nothing from any estate

funds. The appellant's attempts to explain and distinguish such decisions from the present case are not persuasive.

[6] A further contention is presented that "if plaintiffs' claims are for damages for conversion, they come specifically under Probate Code, Sections 707 and 574 and were barred" by failure to file a creditors' claim, the 1949 amendment having included actions for conversion. Prior to such amendment the filing of a claim in conversion cases was not required.

The respondents' brief answers this argument by noting that the action was instituted in 1947 before such amendment had been enacted, and that therefore, as said in National Automobile & Casualty Co. v. Ainge, 34 Cal.2d 806, 810, 215 P.2d 13, 16, the requirement "is immaterial in the present action, however, since it [the amendment of Section 707] does not purport to have retroactive effect." This holding is followed in Casey v. Katz, 114 Cal. App.2d 391, 250 P.2d 291, 292, where it is held that the 1949 amendment to section 707 of the Probate Code, "is not to be given retroactive effect so as to apply to actions which had been commenced before it became operative".

The judgment is affirmed.

WHITE, P. J., concurs.



PEOPLE v. MORTON.*

Cr. 2878.

District Court of Appeal, First District, Division 1, California.

June 15, 1953.

Hearing Denied July 9, 1953.

Defendant was convicted on three counts of burglary, one of attempted burglary, and two of prior felony convictions. The Superior Court of the County of Alameda entered judgment accordingly, and defendant appealed. The District Court of Appeal, Peters, P. J., held that admission of the testimony which constituted basis for one of the two charged prior conviction constituted prejudicial error, and that judgment would be reversed and entire cause remanded with instructions to grant district attorney time to determine whether he desired to dismiss charge in reference to the challenged prior conviction, in which event trial court would resentence defendant on counts of which he was convicted, or whether district attorney desired not to dismiss such charge, in which event trial court would grant new trial of entire cause.

Judgment reversed, cause remanded.

1. Criminal Law ⇐1202(1)

Determination, under Habitual Criminal Statute, whether conviction of defendant in sister state constitutes one of prior felonies enumerated in such statute, requires strong showing by the prosecution of similarity between the crimes; and reasonable doubt must be resolved in favor of defendant. Pen.Code, § 644(a).

2. Criminal Law ⇐1202(3)

The obvious and proper way of proving conviction of prior felony, for purposes of Habitual Criminal Statute, was by a certified copy of the commitment or judgment and not by a mere sister state prison card about which court knew nothing except that whoever made card out was of opinion that accused had been convicted of crime designated by the symbol "HBL". Pen.Code, § 644(a).

3. Criminal Law ⇐1202(4, 7)

In prosecution under Habitual Criminal Statute, where certified Tennessee prison card, bearing symbol "HBL" which allegedly indicated accused had served sentence for housebreaking and larceny, was objected to only on ground that testimony on card constituted no evidence at all of an enumerated prior felony conviction, such objection would be interpreted as including best evidence objection, and, therefore, the overruling of such objection constituted prejudicial error. Pen.Code, § 644(a).

4. Criminal Law ⇐1202(7)

Where prejudicial error had been committed in conviction of defendant, under

* Subsequent opinion 261 P.2d 523.

Habitual Criminal Statute, for prior felony conviction, defendant was entitled either to a dismissal of the charge based on prior conviction, or to a new trial on all issues, and, therefore, entire cause would be remanded with instructions to grant district attorney time to determine whether he desired to dismiss charge in reference to prior conviction, in which event trial court would resentence defendant upon other counts of which he was convicted, or whether district attorney desired not to dismiss charge on prior conviction, in which event trial court would grant new trial of entire cause. Pen.Code, § 644(a).

George Nye, Public Defender of Alameda Co. and Rudolf H. Michaels, Asst. Public Defender, Oakland, for appellant.

Edmund G. Brown, Atty. Gen. and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with four counts of burglary, with one count of attempted burglary, and with having suffered two prior felony convictions in Tennessee for which terms had been served. One of the burglary counts was dismissed at the trial. After a trial before the court without a jury defendant was convicted on the three remaining burglary counts, of the charged attempted burglary (all of the first degree), and of the two charged prior felony convictions. Based upon the two priors, he was adjudged to be an habitual criminal, and sentenced to serve consecutive terms upon each of the four counts of which he had been convicted. He appeals from that portion of the judgment adjudicating him to be an habitual criminal, from that portion of the judgment finding that defendant had suffered one of the two charged prior convictions, and from the order denying his motion for a new trial.

The case is presented on a partial reporter's transcript limited substantially to the evidence relating to the challenged prior conviction. The prosecution attempted to prove this prior through the testimony of a sergeant of the sheriff's office assigned to the bureau of identification. He qualified as an expert in fingerprint identification, and testified that the fingerprints of defendant matched those on a fingerprint record card certified to be from the files of the Tennessee State Penitentiary. That card purported to show that the person whose fingerprints were there shown had served a term in the state prison of Tennessee after a conviction of "HBL." The sergeant was then asked if he was familiar with the "use of those particular initials in criminologists' reports such as this" and he replied that he was familiar, that "The Federal Bureau of Investigation puts out a Bulletin of Standardized Abbreviations, and 'HB' is, as near as my memory stands, correct for the abbreviation for housebreaking, and 'L' is the desired abbreviation used for larceny." It was the theory of the prosecution, sustained by the trial court, that this evidence proved that defendant had been convicted in Tennessee and served a term for "housebreaking-larceny," and that "housebreaking" under Tennessee law is the equivalent of burglary under California law. It is admitted that "larceny" under Tennessee law may not be a felony under California law.

[1] The parties argue at some length over whether "housebreaking-larceny" is identical with any felony in this state set forth in section 644(a) of the Penal Code. It is, of course, the law that before an accused can be adjudged an habitual criminal under section 644(a) of the Penal Code, he must first be convicted in this state of one of the enumerated felonies set forth in that section. Here, "burglary of the first degree" is such a felony that is enumerated in the section, so that this first requirement has been met. The second requirement is that the accused previously have been at least twice convicted, and have served separate terms for each conviction, of certain enumerated felonies, one of which is burglary. Where the prior has been suffered in another state there must be proof that the out-of-state felony comes within the definition under California law of one of these enumerated felonies. In re McVickers, 29 Cal.2d 264; In re Bramble, 31 Cal.2d 43, 187 P.2d 411; In re Seeley, 29 Cal.2d 294,

176 P.2d 24. In ascertaining whether the out-of-state prior would have been one of the enumerated felonies, the courts have required a strong showing by the prosecution of similarity, and reasonable doubts must be resolved in favor of the accused. In re McVickers, 29 Cal.2d 264, 176 P.2d 40; People v. Ralph, 24 Cal.2d 575, 150 P.2d 401; In re Bertrand, 61 Cal.App.2d 183, 142 P.2d 351.

[2] We do not find it necessary to determine whether "HBL" means housebreaking with intent to commit larceny, in which event it would be burglary under California law, or means housebreaking and a separate and distinct larceny. In the latter event it is by no means clear that housebreaking, considered alone, necessarily falls within the California definition of burglary. The fact that such confusion exists emphasizes the real defect in the proof of this prior. Here the appellant has been adjudged to be an habitual criminal and sentenced to prison for what may be the balance of his life, based upon a prison card with some ambiguous initials on it prepared by an unknown person upon information gained we know not how. That is not a proper way to prove a prior conviction. The obvious and proper way of proving a prior is by a certified copy of the commitment or judgment, not by a mere prison card about which the court knows nothing except that whoever made it out was of the opinion that the accused had been convicted of "HBL," whatever that might be.

[3] While it is true that counsel for appellant did not object to the introduction of a similar card offered as proof of the first prior, but which directly described a crime that is one of the enumerated felonies under California law, and while it is also true that appellant's counsel did not specifically object to the card here involved on the ground that such card was not the best evidence, we are of the opinion that the objection that was made, namely, that the sergeant's testimony and the card constituted no evidence at all that a prior had been suffered in Tennessee that is one of the felonies enumerated in section 644(a) of the Penal Code, should be interpreted as including the best evidence objection. All that the card could possibly prove would be the service of a term in Tennessee, but it could not prove a conviction of one of the enumerated felonies. Without proof of a judgment of conviction evidence of service of a term would be irrelevant. People v. Carrow, 207 Cal. 366, 278 P. 857. That was the objection that obviously was intended and it should have been sustained.

It follows that the adjudication that appellant suffered the prior here involved, and the further adjudication, based in part on this prior, that appellant is an habitual criminal, are unsupported by the evidence and cannot stand.

In view of this prejudicial error, what order should be made by this court? On this question the cases are in hopeless conflict. The parties are agreed that at different times the courts of this state have solved this problem in at least four different ways:

1. By an order setting aside the finding that appellant has suffered the challenged prior conviction, and modifying the judgment by vacating the determination that appellant is an habitual criminal. This was done, without much discussion, in People v. Foster, 3 Cal.App.2d 35, 39 P.2d 271. This is the solution advocated by appellant, and would result, of course, in there being no partial new trial on the issue of whether appellant has suffered this prior.

2. By an order similar to number 1 above but adding that the cause be remanded for a partial new trial on the challenged prior, and for resentencing in conformity with the outcome of that partial new trial. This is how the problem was solved in People v. Willison, 116 Cal.App. 157, 2 P.2d 543. This solution is only permissible if the issue as to the prior is severable from the main charge and can lawfully be retried by a separate and different jury than the one that tried the main issue. This is the solution preferred by the attorney general.

3. By an order reversing the entire judgment, that is, by reversing the convic-

tions on the four main counts, and on the unchallenged prior, as well as the challenged prior, even though the appeal here is limited to the one prior. This solution was arrived at in People v. Ysabel, 28 Cal.App. 2d 259, 82 P.2d 476, and People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223. This seems to be an heroic remedy, requiring as it does a new trial of issues not challenged by appellant. It is predicated upon the theory of the absolute non-severability of the main guilt issue and the issue of habitual criminality. But see In re McVickers, 29 Cal.2d 264, 176 P.2d 40; In re Seeley, 29 Cal.2d 294, 176 P.2d 24.

4. By an order reversing the finding that appellant has suffered the challenged prior conviction, and the adjudication that appellant is an habitual criminal, and remanding the entire cause to the trial court with instructions to grant the district attorney a period of time to determine whether he desires to dismiss the charge in reference to the prior here involved, in which event the trial court would resentence appellant upon the four counts of which he was convicted and the unchallenged prior, or whether he desires not to dismiss the prior here challenged. Should the district attorney not elect to dismiss the challenged prior, or should he take no action at all within the time limited, then the trial court would be directed to grant a new trial of the entire cause. This was done in People v. Chadwick, 4 Cal.App. 63, 87 P. 384, 389; People v. Carrow, 207 Cal. 366, 278 P. 857. This is the second alternative choice of the attorney general.

This apparent conflict can in part be explained by differences existing in the statutes applying to habitual criminals at different times. See People v. Fewkes, 214 Cal. 423, 6 P.2d 250, discussing some of these changes. The problem revolves around the question as to whether the priors charged are severable for trial purposes from the main charge or charges. There is no doubt a close relationship between them. While the solution arrived at in solution number 2 and approved and applied in People v. Willison, 116 Cal.App. 157, 2 P.2d 543, granting a new trial on the challenged prior alone, is a simple one and at first blush seems fair to both parties, there is something logically incongruous in one jury passing on guilt and another and different one passing on the charged priors. Under what we consider the best reasoned cases the charge of the commission of prior offenses cannot be considered as entirely separate and divisible from the charge of the main offense. The charge of having committed a prior or of being an habitual cannot be made independently of a charge involving a present offense. The charge relating to the prior has significance only in relation to the main charge. Moreover, as a practical matter, the fact of having priors may affect the fixing of the penalty under the main charges, that is, whether the sentences should run consecutively or concurrently.

[4] For these reasons either the charge based on the challenged prior should be dismissed, or the alternative suggested in solution 4 should be permitted. We think that granting to the district attorney the alternatives mentioned in solution 4 is fair to both the state and to the accused. The district attorney may think it most important that appellant be declared an habitual, and may feel that such is so important that he is willing to risk an acquittal of the main charge. The accused is either entitled to a dismissal of the prior or is entitled to a new trial on all issues. Such solution seems in accord with public policy, and does not violate the concept that the two charges are integrally connected.

The judgment is reversed and the entire cause demanded to the trial court, with directions to that court that, if within twenty days after the filing of the remittitur in that court the district attorney shall apply for an order dismissing that portion of the information charging appellant with "housebreaking and larceny" and if such application is granted, then the court, in the exercise of its discretion upon the facts and circumstances of the case, shall resentence appellant upon the four charges of which he stands convicted and upon the unchallenged prior of "burglary and grand larceny," and shall delete from its judgment

the adjudication that appellant is an habitual criminal. If the district attorney so elects, the judgment as modified and the order denying the motion for a new trial shall stand affirmed. If the district attorney shall not within the twenty-day-period make such application, the judgment in its entirety and the order denying the motion for a new trial are reversed, and a new trial of the entire cause ordered.

BRAY and FRED B. WOOD, JJ., concur.



118 Cal.App.2d 566

PEOPLE v. OCHOA et al.

Cr. 864.

District Court of Appeal, Fourth District, California.

June 18, 1953.

Defendants were convicted of having possession of marijuana. The Superior Court, Kern County, Warren Stockton, J., entered judgment of conviction, and appeals were taken from judgment and from order denying a new trial. The District Court of Appeal, Griffin, J., held, inter alia, that where prosecutor asked expert witness if he held any particular credentials from the State Department of Narcotics Investigations and witness answered that he had letter qualifying him to analyze narcotics, failure to sustain motion to strike answer was not prejudicial, in view of fact that witness was shown to be fully qualified by other evidence and that defendants failed to state ground of motion.

Judgment and order affirmed.

1. Criminal Law ⇐1168(4)

In prosecution for possession of marijuana, where prosecutor asked expert witness if he held any particular credentials from the State Department of Narcotics Investigations and witness answered that he had letter qualifying him to analyze narcotics, court's failure to sustain motion to strike answer was not prejudicial, in view of fact that witness was shown to be fully qualified by other evidence and that defendants failed to state ground of motion. Health and Safety Code, § 11500.

2. Criminal Law ⇐1037(1)

Where no objection was made to questions asked a defendant by district attorney, objection could not be made for first time on appeal.

3. Criminal Law ⇐706

In prosecution for possession of marijuana, where a defendant sought to prove that police officers were biased and that if any marijuana was found in his possession, it was placed there by police, cross-examination of such defendant as to prior use and possession of marijuana was proper. Pen.Code, § 1323; Health and Safety Code, § 11500.

4. Criminal Law ⇐1171(3)

In prosecution for possession of marijuana, where Deputy District Attorney in argument referred to fact that a defendant had possessed and used narcotics before, and defendants' counsel objected to statement and stated that he should not have allowed such evidence in record in first instance and court remarked that he did not know what counsel was going to do about it now, no prejudicial error occurred. Health and Safety Code, § 11500.

5. Criminal Law ⇐713, 1186(4)

In prosecution for possession of marijuana, statements of deputy district attorney in argument regarding claimed traffic in narcotics and valuation placed thereon, and statement which referred to defendants' then counsel in derogatory terms were not justifiable, but no miscarriage of justice resulted in view of fact that evidence was such that it could not be said that different verdict would have been rendered had statements not been made. Health and Safety Code, § 11500; Const. art. 6, § 4½.

6. Criminal Law ⇐635

In prosecution for possession of marijuana, where one of the counsel for defendants asked that respective counsel approach the bench, and, presence of reporter

was mutually waived, court did not err in holding conference outside hearing of defendants. Health and Safety Code, § 11500.

Henry E. Bianchi, Bakersfield, for appellants.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondents.

GRIFFIN, Justice.

Defendants and appellants Ochoa, Romero and Ruiz were charged with possession of marijuana, in violation of section 11500 of the Health and Safety Code. Romero admitted two prior felony convictions. A jury verdict resulted in their conviction. Romero was committed to State's prison. Ochoa and Ruiz were sentenced to a term in the county jail and they appealed from the judgment and order denying them a new trial. Romero appealed from the judgment. Subsequently, Ruiz abandoned his appeal and it was dismissed.

The evidence shows that about 12:50 a.m. on August 4, 1952, two police officers were patrolling the east side area of Bakersfield in an automobile. They observed the three defendants on the street and turned their car around and followed them as the defendants were walking in a southerly direction on Tulare Street. The car's headlights were on them. One officer saw Romero throw a package to the ground, and shortly thereafter he observed Ochoa throw one. One officer kept watch over the defendants and the other went back a few feet to the area where the officers had previously seen the packages thrown, and recovered them. The first was a package discarded by Romero and it contained eight marijuana cigarettes. The package discarded by Ochoa contained loose, leafy material identified as marijuana. Defendants were placed under arrest and at the police station were questioned and each denied any knowledge of the contents of the two packages. The linings of the pants pockets of each defendant were taken out and the residue or debris from them was shaken onto separate pieces of paper. The officers examined this residue with a magnifying glass and the particles thereof appeared to them to be marijuana. This residue was then placed in separate envelopes.

A chemist testified that he was a graduate chemist in chemical engineering from Stanford University; that he had run tests to determine whether or not the substance was marijuana and had testified as an expert in such matters in several courts; that he conducted both microscopic and chemical tests of the material from each of the exhibits and in his opinion the material examined from each package was marijuana, and that particles from the debris taken from the pants pockets were "representative of marijuana", i. e., "marijuana particles".

At the trial each defendant denied throwing or having in his possession any marijuana on that occasion. Ruiz did not testify.

On this appeal they do not question the sufficiency of the evidence to support the judgment. They allege certain errors were committed which require a reversal because the record discloses that the case is within the "Close Case Rule". In support of the argument they cite such cases as People v. Weatherford, 27 Cal.2d 401, 164 P.2d 753; and People v. Manchetti, 29 Cal.2d 452, 175 P.2d 533.

[1] They assign six claims of error committed by the trial court and the prosecuting attorney: (A) That the court erred in permitting the expert to testify in reference to his qualifications. The prosecutor asked the witness if he held any particular credentials from the State Department of Narcotics Investigations. He answered: "I have a letter in my files qualifying me to analyze narcotics". Counsel for defendant moved to strike the answer and the court denied the motion. No objection was made to the form of question, and the answer given was in response thereto. Since the witness was shown to be fully qualified by other evidence, and since counsel for defendants failed to state the ground of his motion or objection, the failure to strike the answer was not prejudicial. People v. Scalamiero, 143 Cal. 343, 76 P. 1098.

[2, 3] (B) It is next claimed that the prosecuting attorney committed prejudicial misconduct in his cross-examination of the defendant Ochoa. On direct examination Ochoa testified that he did not have any marijuana when arrested and that he had not been using marijuana that day. The district attorney, on cross-examination, asked if he had used it before and the defendant answered in the affirmative. He then asked him if he had had marijuana in his possession before and he answered "That is right". He then asked the defendant Ochoa if he would look at the exhibit and see if he knew "what that stuff is". The defendant answered "Yes, * * * that is what you call marijuana, you showed me". It is defendants' argument that this evidence was inadmissible not only because it was evidence of a collateral independent crime but that it did not tend to prove any material facts in reference to the crime charged and that it aroused passion and prejudice against the defendants, citing People v. Albertson, 23 Cal.2d 550, 578, 145 P.2d 7. Apparently no objection was made to the questions at the time. No objection may now be made thereto for the first time on this appeal. People v. Harris, 98 Cal.App.2d 662, 665, 220 P.2d 812. In People v. Cole, 113 Cal.App.2d 253, 258, 248 P.2d 141, knowledge on the part of the accused that the substance found in his possession was marijuana was held to be an element of the crime of violation of section 11500, supra. Evidence of the defendant's prior use and possession of marijuana operated to show that he did have knowledge of the character of the material found in his possession on this occasion, and tended to overcome some of the material facts sought to be proved by Ochoa to the effect that the police officers were biased against him under the claim that if any marijuana was found in his possession it was "planted" on him by the police officers. Such cross-examination, therefore, was proper to refute the inference deducible from defendants' direct testimony. People v. Gin Hauk Jue, 93 Cal. App.2d 72, 74, 208 P.2d 717; Penal Code, § 1323.

[4] (C) In the Deputy District Attorney's opening argument to the jury he stated: "You have got one man who admits he is a user of narcotics. * * *" Objection was made by counsel for defendants on the ground that the statement was prejudicial. A similar statement was made in the closing argument: "Sure, he used the stuff, he has had possession of the stuff before. * * *" After making his objection, counsel for defendants said: "I should not have allowed it in the record to begin with" and the court remarked: "I don't know what you are going to do about it now", indicating that it was too late for counsel to object since the statement of Ochoa was in evidence and the prosecutor could use it in his argument. No prejudicial error may now be claimed in this respect. People v. Duvernay, 43 Cal.App.2d 823, 111 P.2d 659, is factually dissimilar and would not justify a reversal under the facts here shown.

[5] (D) It is next claimed that the Deputy District Attorney committed prejudicial misconduct in arguing to the jury facts not in evidence. He said in effect that the narcotic field is one of the most difficult to work because a very small quantity can be worth a tremendous amount of money; that:

> "The concealed bottom in a suitcase can contain one million dollars worth of drugs; we are told by our custom officials they could get ten times their fees by checking such liners as are coming into this country today. There is no doubt about it, narcotics are coming into this country in such an extent it has been built into a billion dollar business. Today a Prince Albert can of marijuana brings up to one million dollars. * * * This stuff didn't fall out of those trees they have got on that street; police officers don't carry that around in their pockets; that stuff is being transported into this country at a tremendous price, there is known traffic in that. * * *"

Objection was then made that these statements were prejudicial and had nothing to do with the individual defendants.

It is quite obvious from a reading of the transcript that the deputy district attorney went beyond the evidence in his argument to the jury in respect to the claimed traffic in narcotics and the valuation placed thereon; that he resorted to arguments which were highly objectionable, did not adhere solely to the evidence in the case, and that he should be censured for this conduct. This is particularly true in referring to the argument of Mr. Umann, counsel for defendant Ochoa at the trial, wherein the deputy district attorney, Mr. Farrell, said to the jury.

"You may wonder why I sit here and shudder at this nonsense that has been thrown our way. * * * I have had men just as contemptible as Mr. Umann throw this kind of crap at me, and I use that word 'crap' because I am sick and tired of it, and I think, ladies and gentlemen, it is about time that you too got sick and tired of it. * * * Smirk if you will, sir." This was followed by the following dialogue:

"Mr. Umann: May I answer that?

"By the Court: Be careful, Mr. Farrell.

"Mr. Umann: I will say that in twenty years, this is the first time that anybody ever has made a statement like that to me. I will consider the source.

"By the Court: Just sit down."

The record does not disclose any justification for this apparent display of unprofessional conduct in the courtroom and a prosecutor has no right to inject into the proceedings by innuendo or otherwise such prejudice against a defendant or his counsel as would prevent a fair and impartial trial. There is no justification for this conduct on the part of the deputy district attorney. People v. Wells, 100 Cal. 459, 465, 34 P. 1078; People v. Podwys, 6 Cal.App.2d 71, 76, 44 P.2d 377.

It should be here noted that the arguments of counsel for the defense were not made a part of the record and were not reported at the trial. It does appear that some of these outbursts were apparently intended as an answer to the arguments of counsel for the defense and may have been, to some extent, invited. This conclusion is reflected in the ruling of the court when an objection was made by the prosecutor to a statement of counsel for one of the defendants to the jury in regard to one of the officers and Ochoa being mutually involved in a shooting affair. The court admonished counsel for the defendants: "I think you better be careful. If you don't look out you are getting pretty far afield here."

It does appear from the evidence that the defendants, on the witness stand, endeavored to have the jury believe that the officers were biased toward them; that one of the officers was "riding" Romero because of his former record and being on parole at the time; that one officer threatened him by stating that if he did not "quit hanging around" a certain bar he was going to make sure that he left town or was sent to prison; that Ochoa was a witness to a shooting incident in which one of the officers was involved and that accordingly these officers "planted" the marijuana on these defendants for the purpose of "getting rid of" them. It also appears that counsel for defendants did not complain of some of these remarks to the jury at the time they were made and made no motion to strike them or to have the court admonish the jury to disregard them. As to others, a claim of mistrial was made and denied.

The evidence produced against these defendants appears to be substantial and their guilt was proved to the satisfaction of the jury beyond a reasonable doubt. While the conduct of the deputy district attorney was reprehensible in many respects, it cannot be said, in view of the evidence, that a different verdict would have been rendered had it not been for these claimed errors. In the light of Article VI, § 4½ of the Constitution we are unable to conclude that a miscarriage of justice resulted from these errors. People v. Jackson, 106 Cal.App.2d 114, 123, 234 P.2d 766; People v. Salo, 73 Cal.App.2d 685, 690, 167 P.2d 269; People v. Hadley, 84 Cal.App.2d 687, 693, 191 P.2d 517.

[6] The last claim that the court erred in holding a conference at the bench out of the hearing of the defendants in untenable. One of the counsel for the defendants asked that the respective counsel approach the bench. Some discussion off the record occurred. The presence of the reporter was mutually waived. Later, the court admonished the jury to disregard the "tossing of one of the exhibits by the district attorney during his argument". In support of the claimed error appellants cite People v. Southack, Cal.App., 241 P.2d 558. A hearing was granted in that case and the Supreme Court decision is reported in 39 Cal.2d 578, 248 P.2d 12. The statement in the former opinion is no longer the law. Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



118 Cal.App.2d 494

MUSSLER v. NASH et al.

Civ. 19469.

District Court of Appeal, Second District, Division 1, California.

June 15, 1953.

Action to quiet title to realty in which certain defendants cross-complained seeking specific performance of plaintiff's agreement to convey such real estate to them. The Superior Court, Los Angeles County, Leon T. David, J., quieted title to the disputed property in the plaintiff and the cross-complainants appealed. The District Court of Appeal, Scott, J. pro tem., held that where the consideration for an agreement to convey realty failed, the promisor was not obliged to make a conveyance.

Judgment affirmed.

1. Specific Performance ⇐121(8)

In action to quiet title, evidence presented on cross-complaint of certain defendants who sought specific performance of plaintiff's agreement to convey certain realty, showed that plaintiff never got title to certain other realty which was the consideration for the plaintiff's agreement to convey to cross-complainants.

2. Vendor and Purchaser ⇐15

Where the consideration for an agreement to convey realty failed, the promisor was not obliged to make a conveyance. Civ.Code, § 1689.

3. Exchange of Property ⇐4

Where a three way exchange of realty was to be carried out through two escrow agreements, no privity of contract existed between participants to the exchange who were not parties to the same escrow agreement.

4. Estoppel ⇐68(2)

Where plaintiff and defendant executed escrow for exchange of properties and defendant then executed escrow to exchange property to be received from plaintiff for codefendants' property but defendant cancelled escrow with plaintiff and was adjudged bankrupt, plaintiff who filed suit for specific performance and to quiet her title to defendant's property, under mistaken hope that deal might be consummated, was not estopped as against codefendants from asserting title to her original property.

John Van Aalst, Los Angeles, for appellants.

Blanche & Fueller, Pasadena, John K. Blanche, Pasadena, for respondent.

SCOTT, Justice pro tem.

Defendants and cross-complainants Stoike appeal from an adverse judgment relating to a parcel of real property. They sought to require plaintiff Mrs. Mussler to convey the property to them. Plaintiff obtained judgment quieting title to the property in her as against defendants. Other parties to the action who were involved in the dealings but do not participate in this appeal are defendants Nash.

The controversy involved three parcels of improved real property:

1) Mrs. Mussler's "Valley Boulevard" property.

2) The Nashes' "El Monte" property.

3) The Stoikes' "Colton" property.

Mrs. Mussler and the Nashes decided to trade properties and entered into an escrow for that purpose. Mrs. Mussler moved into the El Monte property. The Nashes decided they would prefer Stoikes' Colton property and arranged to let the Stoikes have the Valley Boulevard property in exchange. The plan would result in Mrs. Mussler getting the El Monte property—the Nashes getting the Colton property and the Stoikes getting the Valley Boulevard property.

It was decided that Mrs. Mussler would deed her Valley Boulevard property direct to the Stoikes instead of making a deed to the Nashes who would then have deeded it to the Stoikes.

If each party had owned her or their property outright there might have been no difficulty, but that was not the case. It appears that each owned only an equity in her or their respective parcels, but that these equities were substantially equal.

While the deals were in escrow Nash cancelled his escrow instructions and repudiated his contract with Mrs. Mussler. Later that year he was adjudicated bankrupt. The El Monte property was sold by the trustee under power of sale provided for in the trust deed. So that parcel dropped out of the picture. Then, too, the Colton property was lost to the parties by foreclosure.

This left only the Valley Boulevard property with Mrs. Mussler and the Stoikes both claiming it. The trial court decided that it belonged to Mrs. Mussler and from this decision the Stoikes appeal.

It is not contended by the Stoikes that when Mrs. Mussler moved into the El Monte property and temporarily occupied it she acquired title thereby. In re Chrisman, D.C., 35 F.Supp. 282.

[1, 2] Nor do we find that Mrs. Mussler ever got title to the El Monte property. Even before Nash cancelled the escrow instructions he had executed and delivered to his wife's daughter and son-in-law named Turner, a deed to this El Monte property. The Turners promptly filed a declaration of homestead thereon. They have filed a disclaimer in this case. Further light on the character of Nash, if not upon the issues in the case, is shown by the execution by Nash—six months after he had deeded the property to the Turners—of a trust deed purporting to encumber both the El Monte and the Valley Boulevard properties. It was unfortunate for both Mrs. Mussler and the Stoikes that they should have been parties to a deal involving a financially irresponsible third party. The fact remains that Mrs. Mussler never received the El Monte property which was the consideration for her agreement to convey the Valley Boulevard property to the Stoikes. The consideration having failed she was not and is not obliged to convey. Section 1689, Civil Code.

[3] There was no privity of contract between Mrs. Mussler and the Stoikes. They were not parties to the same escrow. The deed to the Valley Boulevard property which Mrs. Mussler executed was placed in the escrow between the Nashes and Mrs. Mussler (to which the Stoikes were not parties) to be delivered to the Stoikes through a separate escrow (to which Mrs. Mussler was not a party) when she got title to the El Monte property. This escrow between Mrs. Mussler and the Nashes was cancelled by Nash. There is no claim that Mrs. Mussler received anything of value from the Stoikes.

[4] Turning now to the Stoikes claim that Mrs Mussler is estopped to resist their claim, we find the following: The original complaint in the instant case was filed by Mrs. Mussler in the mistaken hope that the entire deal might still be consummated. It included a prayer for specific performance or damages against Nash—quiet title as to the El Monte property against the Turners, Nashes and Stoikes. An amended complaint was later filed to substantially the same effect. After the El Monte property

had been sold under the trust deed and Mrs. Mussler could no longer hope to have the deal carried through, she filed a supplemental complaint which added nothing to the issues.

It is claimed by the Stoikes that Mrs. Mussler has misled them to their detriment by the pleadings in this case and is estopped to assert her title to the Valley Boulevard property. We find no merit in this contention. Mrs. Mussler optimistically sought specific performance of the deal before it became apparent that such a result was unattainable. Stoikes shared that optimism and cross-complained seeking a similar result. They may have been equally mistaken but neither was misled nor deceived by the other. No supplemental cross-complaint was filed by the Stoikes bringing the issue of such estoppel before the trial court.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

118 Cal.App.2d 410

WADE v. MARKWELL & CO.

Civ. 19341.

District Court of Appeal, Second District, Division 2, California.

June 10, 1953.

Action for conversion of mink coat, which had been pledged to defendant as security for loan. The Superior Court of Los Angeles County, James H. Pope, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to establish that value of coat at time of conversion was $3,278.

Judgment affirmed.

1. Pleading ⇐245(4)

In action for conversion of mink coat, where defendant objected to introduction of any evidence on ground that plaintiff's first amended complaint failed to state facts sufficient to constitute cause of action, allowing plaintiff, after briefly taking testimony, to serve upon defendant a second amended complaint upon which case was subsequently tried was not error.

2. Pleading ⇐229

A court may exercise great liberality in permitting amendments of pleadings in order to present necessary issues adequately.

3. Pledges ⇐36

Complaint, which alleged that plaintiff had pledged her $4,800 mink coat to defendant to secure $300 loan and received $270 from defendant, after deduction for prepaid interest had been made, that, on or about November 23, 1949, defendant's agent told plaintiff that she would have week to reclaim coat, and that, on November 25, 1949, when plaintiff demanded coat and tendered $270 plus any accrued interest or charges, defendant refused to return coat, was sufficient to state cause of action for conversion. St.1939, p. 2675, § 17.

4. Evidence ⇐419(11)

Where consideration recited in contract is different from consideration actually received, party is not bound by written recital but may prove the true consideration which passed between parties. Code Civ. Proc. § 1962, subd. 2.

5. Pleading ⇐406(7)

Uncertainties in complaint are waived by failure to demur on such ground.

6. Pleading ⇐34(6), 428(5)

Objection to introduction of any evidence did not serve function of special demurrer for uncertainty and, where no such demurrer was filed, any uncertainties found to exist would be resolved in favor of complaint's sufficiency.

7. Pleading ⇐428(6)

Only uncertainty constituting defect at an essential point in complaint will justify an order sustaining an objection to receipt of any evidence.

8. Estoppel ⇐85

Promissory estoppel is well recognized as either a species of consideration or as substitute for consideration.

9. Estoppel ⇐85

Promise which promisor should reasonably expect to induce action or forbearance of definite and substantial character on part of promisee and which does induce such action or forbearance is binding under doctrine of promissory estoppel if injustice can be avoided only by enforcement of promise.

10. Estoppel ⇐85

Where, while pledgor refrained from exercising her right to redeem pledged coat in reliance on promise of pledgee's agents to hold coat for another week for her, pledgee sold coat during week so that it was not available when pledgor made her alleged tender within week, pledgee would not be heard to maintain that its promise could not be enforced by pledgor even though pledgee's attempt to redeem after her forbearance was at variance with terms of pledge agreement. St.1939, p. 2667; Civ.Code, § 1698.

11. Estoppel ⇐102

Even though statute provides that written contract may be altered only by contract in writing or executed oral agreement, facts of particular case may give rise to equitable estoppel against party who denies verbal modification. Civ.Code, § 1698.

12. Pledges ⇐36

In action for conversion of mink coat, where pledgee's agent allegedly induced pledgor not to exercise her right to redeem under pledge while performance was still possible, fact that complaint did not allege that pledgee had authorized its agent to alter terms of written pledge agreement or to make alleged extension of time for redemption would not make complaint fatally defective since such allegation, if made, would involve evidentiary facts constituting matter of defense which should not be averred in complaint.

13. Pledges ⇐56(5)

Regardless of external, literal compliance with formalities of law and comprehensiveness of power of sale vested in pledgee, circumstances attending sale of pledged property are subject to strictest scrutiny by the courts. Civ.Code, § 3005; Code Civ.Proc. §§ 692, 694.

14. Pledges ⇐1

Relation between pledgor and pledgee, wherein pledgee is empowered to sell pledge placed in his hands as security for a debt in event of default, is in nature of a trust. Civ.Code, § 3005; Code Civ.Proc. §§ 692, 694.

15. Pledges ⇐56(5)

Pledgor has right to have his collateral sold at honest sale to highest bidder. Civ. Code, § 3005; Code Civ.Proc. §§ 692, 694.

16. Pledges ⇐56(5, 6)

Pledgee cannot sacrifice pledged property wantonly or purchase such property at valuation so inadequate as to suggest fraudulent purpose or engage in conduct incompatible with his status as a fiduciary. Civ. Code, § 3005; Code Civ.Proc. §§ 692, 694.

17. Pledges ⇐56(5)

Mere inadequacy of sale price of pledged property alone will not render pledgee's sale invalid, but, where price obtained is greatly disproportionate to actual value, very slight evidence of unfairness or irregularity is needed before relief can be given to an aggrieved party. Civ.Code, § 3005; Code Civ.Proc. §§ 692, 694.

18. Pledges ⇐36

In action for conversion of mink coat, which had been pledged to defendant as security for loan, evidence was sufficient to sustain finding that defendant's sale under pledge contract was a fictitious proceeding. Civ.Code, § 3005; Code Civ.Proc. §§ 692, 694.

19. Pledges ⇐53

Where pledgor, who had waived notice of sale of mink coat, which had been pledged as security for loan, called in reply to pledgee's notification regarding redemption of pledged coat or renewal of loan and was told by pledgee's agent, who was clothed with ostensible authority, that she would have additional week in which to redeem, it was manifestly inequitable for pledgee to proceed with strict foreclosure without notice to pledgor. Civ.Code, § 3005; Code Civ.Proc. §§ 692, 694.

20. Pledges ⇐56(4)

Pledgee's right to sell pledged property without notice may be waived by pledgee even where it is stipulated that sale may be made without notice, and such waiver requires no new or independent consideration to support it but may be made either expressly or impliedly from pledgee's conduct. Civ.Code, § 3005; Code Civ.Proc. §§ 692, 694.

21. Pledges ⇐50

Where pledgee notified pledgor that mink coat which had been pledged as security for loan was not available and had been sold and account closed, pledgor was excused of necessity of making tender of amount sufficient to cover loan, interest, and charges since law does not require doing of idle acts. Civ.Code, §§ 1511, subd. 3, 3005, 3336, 3532; Code Civ.Proc. §§ 692, 694.

22. Common Law ⇐9

Law does not require the doing of an idle act.

23. Pledges ⇐56(5)

Pledgor, who, after having been notified that mink coat which she had pledged as security for loan had been sold and account closed, protested against sale while offering to buy property for sake of peace,

would not be held to have ratified sale. Civ.Code, §§ 1511, subd. 3, 3005, 3336, 3532; Code Civ.Proc. §§ 692, 694.

24. Evidence ⇐574

In action for conversion of mink coat which had been pledged to defendant as security for loan, wherein evidence as to value and condition of coat was contradictory and conflicting, trial court was not bound to accept opinion of defendant's expert witness but could look to other evidence of value in light of surrounding circumstances.

25. Evidence ⇐474(16)

Property owner, whether generally familiar with such values or not, is competent to estimate worth of his property.

26. Trover and Conversion ⇐39

Testimony as to cost of goods is circumstance tending to show value, and such circumstances may be taken into consideration, along with other circumstances such as extent of use of property and its condition and depreciation, in order to determine subsequent value of property and establish loss sustained as result of unlawful conversion.

27. Pledges ⇐36

In action for conversion of mink coat, which had been pledged to defendant as security for $300 loan, evidence was sufficient to sustain trial court's finding that $3,278 constituted fair value of coat at time of conversion, even though coat allegedly had been reconditioned and resold for only $1,500 by purchaser at pledgee's sale. Civ.Code, §§ 1511, subd. 3, 3336, 3532; Code Civ.Proc. §§ 692, 694.

28. Appeal and Error ⇐1013

In action for conversion of mink coat, which had been pledged to defendant as security for loan, compensation to be allowed plaintiff was matter for determination by trial court in exercise of its sound discretion after its consideration of all facts and circumstances established by evidence.

29. Appeal and Error ⇐1013

In action for conversion of mink coat, weight of evidence on value was question for trial judge, and it was not province of the District Court of Appeal, upon review, to determine otherwise.

30. Pledges ⇐36

In action for conversion of mink coat, which had been pledged to defendant as security for loan, fact that trial court used mathematical formulae in computing depreciation of coat by taking pro rata average based on estimated life of eight years would not justify reversal.

31. Appeal and Error ⇐1013

It is appellate court's duty, upon subject of damages, to uphold trial court's findings if it is possible to do so upon any sound theory.

32. Pledges ⇐36

In action for conversion of mink coat, which had been pledged to defendant as security for loan, price obtained upon resale by purchaser at pledgee's sale was not conclusive on issue of value of coat. Civ. Code, §§ 1511, subd. 3, 3336, 3532; Code Civ.Proc. §§ 692, 694.

33. Appeal and Error ⇐1071(1)

In action for conversion of mink coat, which had been pledged to defendant as security for loan, where testimony covered value of coat during entire period from time of its purchase by pledgor to time of resale by purchaser at purported pledgee's sale, fact that trial judge found value of coat as of time of delivery to pledgee rather than as of time of purported pledgee's sale would not constitute reversible error. Civ. Code, §§ 1511, subd. 3, 3336, 3532; Code Civ.Proc. §§ 692, 694.

34. Pledges ⇐31(4), 36

Where pledgee, up to time of resale by purchaser at pledgee's sale of mink coat, which had been pledged to defendant as security for loan, still had power to return coat to plaintiff and receive amount due upon pledge, pledgee's exercise of total dominion over coat by its act of resale, even though believing it had right to do so, constituted a conversion, and such later conversion was properly treated as time for computation of damages. Civ.Code, §§ 1511, subd. 3, 3336, 3532; Code Civ.Proc. §§ 692, 694.

Grainger, Carver & Grainger and Harry M. Irwin, Los Angeles, for appellant.

A. Brian Weinberg, Santa Monica, for respondent.

Levy, Bernard & Jaffe, Saul J. Bernard, and Reuben Freedman, Los Angeles, for California Collateral Loan Broker Ass'n, amici curiae.

FOX, Justice.

This is an appeal by defendant company from a judgment for defendant's conversion of plaintiff's coat.

[1, 2] At the outset of the trial, defendant objected to the introduction of any evidence on the ground that plaintiff's first amended complaint failed to state facts sufficient to constitute a cause of action for the recovery of her coat or its value. After briefly taking testimony, plaintiff served on defendant her second amended complaint, and it was on the allegations of this pleading that the case was subsequently tried. There can be no quarrel with this procedure. A court may exercise great liberality to permit the amendment of a pleading at any and all stages of the proceedings in order to present adequately the necessary issues. Redondo Improvement Co. v. Redondo Beach, 3 Cal.App.2d 299, 302, 39 P.2d 438; 21 Cal.Jur., p. 183.

In her second amended complaint, plaintiff made the following material allegations: That on March 23, 1949, she was the owner of a full length, mink fur coat which, at that time, had a value of $4,800; that on said date, defendant orally represented to her that "if the plaintiff would permit the defendant to retain possession" of her coat, defendant would give her $300 as a loan thereon and send her written notification of the expiration date of the loan and that she need not be concerned about reclaiming the coat until such time; that plaintiff, relying upon these representations by defendant, through its agents, which representations defendant knew to be false, placed her coat in defendant's custody, whereupon defendant delivered to plaintiff the sum of $270, withholding the sum of $30 as prepaid interest on the loan in violation of section 17, page 2675 of the 1939 Statutes of California; that at the time of this transaction defendant gave plaintiff a written receipt, reproduced in part as follows:

"Los Angeles, Calif.,
3-23, 1949 . . . F 16926

I hereby pledge to Markwell & Co., the following described property, to wit:

1—Natural Eastern Mink Coat
Anglefetzer Cleveland Label

to secure the payment of a loan in the sum of

"Three Hundred . . . Dollars $300.-00 (The receipt of which is hereby acknowledged) together with interest and charges as herein provided. It is agreed that said loan shall bear interest and/or other charges from date until paid at the maximum rate permitted by the statutes of California. * * *

"It is further agreed that the last day of redemption of this pledge shall be thirty (30) days after the date hereof. * * * In the event of default I expressly waive demand of performance and the giving of notice of time and place of sale and agree that said property may be sold at public or private sale and that pledgee may be a purchaser if the property is sold at such sale. * * * I agree that the fair market value of the above described pledged property is not more than 125 percent of the principal amount of the said loan * * *" that notwithstanding any valuation appearing in the written receipt, plaintiff and defendant agreed that the fair market value of the coat, as estimated by defendant's agent, was between $4,500 and $5,000.

The complaint further recites that about November 23, 1949, defendant sent a written notification to plaintiff notifying the plaintiff of the expiration date of the loan and requesting plaintiff to repay the loan and reclaim the coat; that on the same day this notification was received, plaintiff telephoned defendant and orally represented to defendant's agents that she had received the aforesaid notification and would recover the coat before the weekend, in response to which defendant's agents represented that the coat would be available for plaintiff to reclaim within a week; that on or about November 25, 1949, plaintiff oral-

ly demanded of defendant the return of the mink coat, offering to defendant's agents "the sum of $270 as repayment of the loan, plus any accrued interest or charges; that defendant's agents refused to accept such tender and refused to return the coat; that defendant orally represented to plaintiff that it had sold the coat to a third person, whose name defendant's agent refused to divulge, in violation of section 342 of the Penal Code; that defendant's act of disposing of the coat was unlawful and was to plaintiff's damage in the sum of $4,800.

The complaint prayed judgment "for the recovery of possession of the coat or, in the event delivery could not be had, its value of $4,800.

[3] Defendant's contention that the complaint does not state facts sufficient to constitute a cause of action is without merit. In support of this contention, defendant argues that there is no allegation that plaintiff has ever paid or tendered to defendant the sum for which her coat was pledged. It relies on the fact that the first amended complaint alleges an offer to pay the sum of $270 in repayment of the loan, which is the exact amount which the complaint alleges plaintiff received from defendant, and is insufficient because it does not include any of the accrued interest or charges from March 23, 1949. This insufficiency was cured in the second amended complaint, on which the issues were tried, by plaintiff's allegation that to redeem her coat, she offered defendant's agents the sum of $270 in repayment of the loan, plus any accrued interest or charges.

[4–7] It is further argued that since, in the pledge agreement, which is recited in the complaint, plaintiff acknowledged the receipt of $300, plaintiff could not comply with her obligation to defendant without alleging a tender of $300 together with interest and charges. However, where the consideration recited in a contract is different from the consideration actually received, a party is not bound by the written recital, but may allege and prove the true consideration passing between the parties. Code Civ.Proc. sec. 1962, subd. 2; Johnston v. Courtial, 216 Cal. 506, 510, 14 P.2d 771; 6 Cal.Jur., p. 197 et seq. This is precisely what plaintiff alleged in her complaint, along with her offer of payment of the amount due under the allegations. Having thus alleged a demand accompanied by sufficient tender, defendant's refusal to restore her coat, and certain other facts tending to show defendant's fraudulent dominion over the coat inconsistent with her right to immediate possession, the complaint contains all the requisites of a cause of action for conversion. Baird v. Olsheski, 102 Cal.App. 452, 283 P. 321; Gustafson v. Byers, 105 Cal.App. 584, 288 P. 111. While it may be conceded that the complaint was somewhat ambiguous and uncertain in its allegations of an unlawful sale of the coat by defendant and greater particularity with respect to the transaction would have been desirable, the rule is that uncertainties in a complaint are waived by failure to demur on that ground. Redondo Improvement Co. v. Redondo Beach, supra, 3 Cal.App.2d at page 49, 303, 39 P.2d 438. An objection to the introduction of any evidence "does not serve the function of a special demurrer for uncertainty, and as no such demurrer was filed, any uncertainties that we find to exist are to be resolved in favor of the complaint's sufficiency. [Citation.] None but a defect at an essential point will justify an order sustaining an objection to the receipt of any evidence." Bauer v. Neuzil, 66 Cal. App.2d Supp. 1020, 1022, 152 P.2d 47, 49. See Gallagher v. California Pac. T. & T. Co., 13 Cal.App.2d 482, 486, 57 P.2d 195.

[8] Defendant makes the further point that the pledge agreement, as alleged in the complaint, fixes April 22, 1949, as "the last day of redemption of this pledge" and the pledgee had the statutory right, Stats. 1939, Ch. 951, p. 2667, to sell the pledge upon the expiration of six months after the last day of redemption, viz.: after October 22, 1949. Therefore, it is argued that the alleged oral representations made by appellant's agents on November 23, 1949, that the coat "would be available for plaintiff to reclaim within a week" is not valid or binding on defendant because (a) neither the written pledge agreement nor the alleged written notification to plaintiff of the ex-

piration date of her loan can be orally altered nor can the expiration date specified therein be extended orally, and (b) there was no consideration for the alleged extension of the time for plaintiff to reclaim her coat. These arguments are without foundation, since they misconceive the effect of plaintiff's allegations with respect to her conversation with defendant regarding her redemption of the coat. Her pleading may well be construed as raising a promissory estoppel against defendant, which is well recognized either as a "species of consideration", Porter v. Commissioner of Internal Revenue, 2 Cir., 60 F.2d 673, 675, or as a substitute for consideration. 1 Williston on Contracts (Rev. Ed.) sec. 139; 3 Pomeroy's Equity Jurisprudence, 5th Ed., sec. 808(b).

[9] According to the complaint, plaintiff received a notification from defendant requesting her to repay her loan and reclaim her property. Thereupon plaintiff orally informed defendant that she was ready to do so, and was advised by defendant's agents that she had a week within which to reclaim the coat. Relying on this representation, plaintiff alleges that she appeared two days later with proper tender, only to be told that the coat had been sold. Assuming the truth of these facts, as we must when considering the sufficiency of a pleading after an objection to the introduction of evidence, Miller v. McLaglen, 82 Cal.App.2d 219, 186 P.2d 48; Scott v. Cline Electric Mfg. Co., 104 Cal.App. 122, 285 P. 349, a situation has been pleaded under which it would be proper to invoke the doctrine of promissory estoppel as embodied in section 90, Restatement of Contracts: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[10–12] The allegations indicate that at the time plaintiff telephoned, the coat was available for redemption and plaintiff was induced by defendant's representations to forbear from immediately redeeming under the assurance that that it would be held for her for at least another week. In the interim, while plaintiff refrained from exercising her right to redeem in reliance on a promise calculated to induce such forbearance, defendant sold the coat so that it was not available when plaintiff made her alleged tender. Under such circumstances, it lies not in the mouth of the party making a promise which induces forbearance of a substantial character (here the loss of a right to redeem a pledge) to maintain that his promise cannot be enforced by the party aggrieved since it was unsupported by consideration, for the principle of promissory estoppel does not rest upon a consideration moving to the party estopped. Carpy v. Dowdell, 115 Cal. 677, 687, 47 P. 695, 697. In the case last cited the court states: "The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden." The court goes on to cite the case of Van Syckel v. O'Hearn, 50 N.J.Eq. 173, 24 A. 1024, in which defendant purchased property encumbered with a mortgage lien upon the strength of a promise made by plaintiff mortgagee that he would withhold enforcement for a year. Plaintiff commenced foreclosure within the year. In holding plaintiff to his promise, the court, after conceding that normally a consideration must be shown to support a promise, said: "But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party * * * waive strict performance of his contract, and makes promises to the defendant, upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel. In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and, when this

plainly appears, it is most equitable that the court should say that they shall so stand. [Citations.]" See, also, Hunter v. Sparling, 87 Cal.App.2d 711, 725–726, 197 P.2d 807, for a discussion of the doctrine of promissory estoppel and a partial citation of the cases applying the principle.

Defendant's contention that plaintiff is precluded by section 1698 of the Civil Code from attempting to vary the terms of the pledge agreement is without force in light of the facts already discussed, which established an estoppel to rely upon section 1698. This is illustrated by the language of the court in Wilson v. Bailey, 8 Cal.2d 416, 421–422, 65 P.2d 770, 772: "And likewise, while it is settled in view of section 1698 of the Civil Code which provides that a written contract may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, * * * nevertheless, it is also true that the facts of a particular case may give rise to an equitable estoppel against the party who denies the verbal modification." In Panno v. Russo, 82 Cal.App.2d 408, 186 P.2d 452, a case involving an oral extension of the time fixed in a written sales-contract for payment of the price by the buyer, the court reiterates the rule that section 1698 is subject to the exception that a party to the contract may be estopped by his conduct or representations from denying an oral modification. In D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 432, 246 P.2d 946, where the entire problem is reviewed, the court cites both the Wilson and Panno cases, supra, in recognizing that an oral modification of a written agreement may be shown when the facts establish an estoppel to rely on section 1698. So here, the allegations, which we must accept as true, are that plaintiff was misled into believing, at a time when she was ready to redeem her coat, that she was being given an extra week in which to repay the loan, during which time the coat was sold by defendant. In effect, plaintiff alleges she was induced by oral representations of defendant's agents not to exercise her rights under the contract while performance was still possible; this is sufficient to bring plaintiff within the rules heretofore discussed. Nor is the complaint fatally defective in that there is no allegation that defendant authorized its agents to alter the terms of the written pledge agreement or to make the alleged extension. Whether the defendant corporation did or did not authorize its agents to make the representations alleged involves evidentiary facts constituting a matter of defense, "which it would be contrary to the very first rules of good pleading to aver in the complaint." Union Trust Co. v. Dickinson, 30 Cal.App. 91, 97, 157 P. 615, 618; Malone v. Crescent City M. & T. Co., 77 Cal. 38, 42, 18 P. 858.

Defendant's answer denied generally all of the allegations in the complaint not expressly admitted. It alleged the making of the pledge agreement and plaintiff's receipt of the $300 loan pursuant thereto (except for the retention of $3.50 to pay for fumigation and demothing of the coat) and plaintiff's default in repayment. The answer further alleged that defendant sold the coat at public auction after proper notice of sale more than six months after the last date to redeem; that it became owner of the coat by making the highest bid, applying the proceeds in satisfaction of plaintiff's debt with no surplus remaining and that it thereafter resold the coat. It alleged that plaintiff made no demand for return of the coat until after the resale.

After trial of the issues, the court made findings of fact which furnish a concise summary of certain salient aspects of the transactions between the parties. The findings are that on March 23, 1949, plaintiff delivered her coat to defendant as security for a loan to her of $300, "together with interest and other charges." The coat was a full length, natural dark mink and was acquired by plaintiff in November, 1948, at a cost of $3,750, to which was added a luxury and sales tax, making the total price paid by plaintiff $4,612.50. At the time the coat was delivered to defendant it was in first class condition and defendant requested that it be demothed prior to being placed in storage, for which a charge of $3.50 was made by defendant and deducted from the amount of the loan. It was also agreed that the coat would be cleaned and glazed

by defendant at a cost of $15, which plaintiff was to pay at the time of the redemption of her coat.

At the time the coat was delivered in pawn, a written pledge agreement was entered into, which truthfully set forth the amount of the loan as $300, a description of the pledged property, interest rate, and redemption date. The court found, however, that a statement in fine print in the instrument reading: "I agree that the fair market value of the above pledged property is not more than 125% of the principal amount of the said loan" was untrue, was not negotiated between the parties, and was not in keeping with the valuations communicated between the parties at the time of the pledge. The court found, instead, that counsel stipulated facts fixing the valuation as above described, namely, that the purchase price was $3,750, plus taxes. Simultaneously with the making of the pledge contract and loan, defendant delivered to plaintiff an envelope in which to enclose the agreement upon which was printed: "We suggest that you phone us 24 hours in advance of redemption." Thereafter, plaintiff's account was charged $4 per month interest, as well as $15 for defendant's cleaning of the coat. It was found that when the loan expired in 30 days, plaintiff had not repaid the principal, interest, or cleaning charges and that defendant continued to charge $4 interest for nine months, up to and including December 22, 1949.

On or about November 22, 1949, plaintiff informed defendant by telephone that she intended to redeem her coat and asked if the 24 hour notice was necessary, at which time she was told that such notice was required and was further informed that she could make her payments and redeem her coat at any time within the succeeding week. The court found that plaintiff presented herself at defendant's office "within the period of time fixed, to wit, a week, and in fact within the month of November, and was informed that her account had been closed." On demanding to know what disposition had been made of her account, she was informed that the coat had been sold and the amount received at the sale credited to, paying off, and closing her account. The findings state "it was not true that the account was closed and that the coat had been sold, and the court finds that at the time of the declarations of Markwell & Co. that such had taken place, Markwell & Co. had charged interest on the loan up to and including December 22, which was many days thereafter, and that the coat was in the possession of Markwell & Co., and that Markwell & Co. had conducted a fictitious proceeding in which a purported sale had purportedly been made, which sale consisted of nothing more than one member of Markwell & Co. declaring the coat for sale and another member of Markwell & Co. then declaring that the coat was sold to itself for the amount due on the loan * * * that no effort was made to find a buyer at a fair value, that the interest was charged at the time, and that the purported sale was fictitious, and that the seizing of the coat and the declaration of the closing of the account for the amount of the loan was wrongful."

The court further found that subsequent to the fictitious sale, while the coat was still in defendant's possession and interest was being charged on the loan for a period of time which had not yet expired, defendant rejected plaintiff's offer to pay up to $1,000 to recover her coat, but instead sold the coat two weeks after the sale to a third party for $1,500 and refused to disclose to plaintiff the identity of the purchaser upon plaintiff's request for this information. It was found that a coat such as plaintiff's "has a reasonable life for use of 8 years when * * * given reasonable care, and that the reasonable value of the coat at the time of its delivery by Markwell & Co. to the person who purportedly purchased it was the sum of $3,278.00." The court concluded that defendant had converted plaintiff's coat and awarded plaintiff the sum of $2,927, and interest from December 22, 1949 ($351 having been deducted as the amount of the loan, plus $36 interest and $15 for cleaning).

The record is replete with sharply conflicting testimony, presented on the one side by plaintiff as the principal witness in her own behalf, and by defendant's chief witnesses—E. R. Woodruff and L. M. Ir-

ving, president and secretary, respectively, of defendant corporation, and Levan Tootikian (referred to as Mr. Levon), an employee of defendant who qualified as an expert on fur values and with whom plaintiff negotiated the pledge contract. Viewed in the light most favorable to plaintiff as the party prevailing below, it is clear that on November 23, 1949, plaintiff received from defendant the following notice: "If you desire to renew your loan contract No. F16926, we ask that you kindly call at our office previous to November 25, 1949, as otherwise we will close and terminate the account." Plaintiff at once telephoned defendant's office and spoke to a female employee of defendant to whom she stated that she was then ready to call for her coat and inquired if 24 hours' advance notice was required. Upon being informed that it was, and the next day being Thursday, November 24, 1949 (Thanksgiving Day), plaintiff stated the coat would be called for on Friday or Saturday, November 25 or November 26. Thereupon defendant's employee stated she could come at any time within the following week. Plaintiff telephoned again, either on Friday or Saturday, and informed the girl taking her call that she was sending her son to pick up the coat and asked that it be made available to him. Plaintiff was informed that the coat was not there and the call was transferred to a person plaintiff identified as Mr. Levon, with whom plaintiff had originally negotiated the loan, who also informed her that the coat was unavailable. Plaintiff was referred to Mr. Woodruff, whom she telephoned several times to discuss redeeming her coat. Mr. Woodruff stated the coat had already been sold. Plaintiff testified she pleaded with Mr. Woodruff to allow her to redeem the coat, offering him first three or four hundred dollars and then as much as $1,000 to no avail. Defendant's witnesses denied these incidents or conversations had occurred.

The record shows that on November 22, 1949, defendant had already listed plaintiff's coat on a "Notice of Pledgee's Sale," a 3-page document containing some 280 items which was posted in three public places, giving notice that a pledgee's sale would be conducted on November 29, 1949, at defendant's place of business. If plaintiff's testimony last described is believed, then the statements made to her that the coat had already been sold at the time she called were false. With reference to the pledgee's sale, the sole testimony relating thereto came from defendant's agents, since plaintiff was never given actual notice of the sale (and had, in fact, waived notice under the pledge agreement). The actual sale was conducted in the private office of defendant's president, which is a room at the extreme rear of defendant's place of business. This room is reached by a corridor 18 or 20 feet long from the main waiting room, which is adjacent to the entrance to defendant's premises. Along the corridor are several small booths in which loan transactions are made. There are two doors at the opposite ends of the corridor which open respectively into the outer waiting room and the president's office. It was testified that these doors were never closed throughout the sale, and that there was no visual obstruction to anyone who might desire to walk from the outer room of its place of business into the office where the sale was held. Mrs. Irving testified that Mr. Woodruff conducted the sale and displayed plaintiff's coat on a desk in his office before asking if there were any bidders. Mrs. Irving bid $351 in behalf of defendant, and no higher bid being made, Mr. Woodruff declared the bidding closed and the coat sold to defendant for the amount of the bid. Mrs. Irving and Mr. Woodruff were uncertain as to whether any other persons were present at the time of the sale. Neither could remember whether anyone else was present. Mr. Woodruff stated he believed others had attended the sale. Mrs. Irving disclaimed any specific recollection of attendance by members of the public at that particular sale and conceded "it could be" that no one but her and Mr. Woodruff was present. Mrs. Irving stated that her bid was $351 because she had erroneously calculated the interest as being due for nine months, or $36, at the time of the sale, whereas only 8¼ months had actually elapsed from the date of the loan.

[13–15] Defendant contends that the court's finding that the pledgee's sale was a fictitious proceeding is contrary to the undisputed evidence. It is argued that defendant complied fully with all the technical requirements of the law in selling plaintiff's coat at "public auction, in the manner and upon the notice of sale of personal property under execution" as prescribed in the applicable statutes. Civ.Code, sec. 3005; Code Civ.Proc. secs. 692, 694. Yet however much there may be external, literal compliance with the formalities of the law, and however comprehensive may be the power of sale vested in a pledgee, the circumstances attending such a sale are subject to strictest scrutiny by the courts. Henning v. Akin, 91 Cal.App. 246, 255, 266 P. 981; Toplitz v. Bauer, 161 N.Y. 325, 55 N.E. 1059, 1061. For the relation between pledgor and pledgee, wherein the latter is empowered to sell a pledge placed in his hands as security for a debt in the event of default, is in the nature of a trust. English v. Culley, 85 Cal.App. 291, 297, 259 P. 355; Hudgens v. Chamberlain, 161 Cal. 710, 716, 120 P. 422. Occupying a status akin to that of a fiduciary, and being accorded by the code powers in derogation of the common law such as the right himself to become a purchaser at a sale wherein the pledge may be disposed of without notice to the debtor, if so agreed upon, there is all the more reason why the pledgee is held to the utmost good faith in his transactions both with the pledged property and the pledgor. Hudgens v. Chamberlain, supra; English v. Culley, supra. Though the pledgor has waived virtually all the protection afforded him at common law, he has not waived the right to have his collateral sold at an honest sale to the highest bidder. For it has been held that even where a contract waives notice and permits a sale to himself, the pledgee is still a " 'trustee to sell,' not to buy, though with the privilege of buying, if fairly sold." Dibert v. Wernicke, 6 Cir., 214 F. 673, 681.

[16] It is manifest that the court was not satisfied that the circumstances attending the sale were such as would adequately discharge the pledgee's responsibility of trust, as well as his regard for the interest of the pledgor. For broad as may be the powers lodged in him, the pledgee cannot "wantonly sacrifice the property" or purchase "at a valuation so inadequate as to suggest a fraudulent purpose" or engage in conduct incompatible with his status as a fiduciary. Buder v. N. Y. Trust Co., 2 Cir., 82 F.2d 168, 170, 104 A.L.R. 1035; 76 A.L.R. 722, and cases there cited. The evidence in the case at bar clearly lends itself to the interpretation placed on it by the trial judge—that the sale was basically a clandestine one conducted in the office of the president of the company, in a part of the premises least accessible to outside bidders, with possibly no one present but two officers of defendant corporation, the sale being consummated for a price in conspicuous disparity with the worth of the collateral, and under circumstances smacking of oppression and indifference to plaintiff's interest. It was little more than a secluded drama wherein defendant arrogated to itself dominion over the coat for the amount debited to plaintiff. But defendant contends that the uncontradicted testimony of its witnesses establishes the regularity and genuineness of the sale. However, in view of the relation of Woodruff and Mrs. Irving to the defendant pledgee and their obvious interest in the transaction the trial court was not required to accept as true their testimony of what transpired at the sale in the former's office or of the accessibility of the place of sale to prospective purchasers. Bloyd v. Senn, 100 Cal.App.2d 597, 600, 224 P.2d 117; Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657; Scheff v. Roberts, 35 Cal.2d 10, 15, 215 P.2d 925; Burdick v. Wittich, 46 Cal.App.2d 456, 464, 116 P.2d 90.

It may be observed that the very notice of sale given to the public by pledgee shows a callous insensitivity to its duty to attempt to procure the highest price possible. In a notice consisting of about 280 items listed in three pages of closely spaced typewriting, plaintiff's coat is identified as "Loan Contract F16926 1 fur coat." At the bottom of the third page appears the following: "Reference is made to said contracts for full particulars and for full descriptions of the property and the amounts paid on said respective contracts." This character of per-

functory advertising can scarcely be said to do justice to plaintiff. Her coat was not just a fur coat—it was a full length, natural Eastern mink coat and was entitled to that description. Such a notice should also disclose the amount of the debt; for this publicizes to the potential purchaser the expected range of bidding within which he may procure a desirable item. Mere reference to a loan agreement is an unrealistic way of achieving the purpose for which notice of sale is intended—that of stimulating interest in the sale and procuring bidders to the end that a pledgor gets the full measure of protection. Laclede Nat'l Bank v. Richardson, 156 Mo. 270, 56 S.W. 1117, 1118; Hagan v. Continental Nat'l Bank, 182 Mo. 319, 81 S.W. 171; Seasongood, Drastic Pledge Agreements, 29 Harv. L.Rev. 277, 282–283. This is all the more significant where the pledgee itself is conducting the sale pursuant to an agreement prepared by it which gives it power of sale with no notice to the pledgor. To sanction any conduct but that of highest probity and adherence to the trust relationship would be to ignore completely the spirit of the code in authorizing the pledgee's right to make a contract to sell without notice and to become a purchaser at his own sale; and if, as defendant implies, this is the usual practice resorted to among loan brokers, then it would appear to this court that the time has come to rectify a custom that lends itself too facilely to abuse and frustration of both the legislative intent and the trust relationship of the parties to the contract.

[17, 18] While it is unquestionably true that mere inadequacy of price alone will not render a pledgee's sale invalid, the rule is well established that where the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to give relief to an aggrieved party. Winbigler v. Sherman, 175 Cal. 270, 165 P. 943; Odell v. Cox, 151 Cal. 70, 90 P. 194. From all the findings made and their consequent inferences, as well as from the evidence already discussed, there is clear support for the finding that the sale was a fictitious proceeding. In Winbigler v. Sherman, supra, 175 Cal. at page 275, 165 P. at page 946, the court quotes the following language from Schroeder v. Young, 161 U.S. 334, 16 S.Ct. 512, 40 L.Ed. 721, in support of the court's right to impeach the fairness of a sale, resulting in a foreclosure for a palpably inadequate price: "If the sale has been attended by any irregularity, * * * if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem."

Certainly the evidence before the court strongly suggests that plaintiff was misled to her detriment by being told, at a time before the sale and when she was ready to redeem, that she could come any time within the succeeding week. The court could reasonably infer from all the evidence that defendant was following a well-prepared program whereby it hoped "to acquire a valuable property for a paltry sum by following the forms of law but in defiance of the elemental rules of equity * * *" and where "the sale was conducted in such manner that the full value of the property could not be realized," and where the principal interested bidder had been kept away. Turner v. Milstein, 103 Cal.App.2d 651, 655, 657, 230 P.2d 25.

[19, 20] But independent of the actual conduct of the sale, there are other grounds for sustaining the judgment of conversion. At the time plaintiff received her notification from defendant, notice of sale had already been posted. Though she had waived notice, she was nevertheless entitled to full disclosure of the pending sale when she called in reference to defendant's notification regarding redemption of her coat or renewal of her loan. After having itself extended the time for redemption to November 25th by a communication upon which plaintiff relied, and having, through an agent clothed with ostensible authority, granted her a particular period in which to redeem, it was manifestly inequitable for defendant to proceed with a strict foreclosure without notice to the pledgor. In 72 C.J.S., Pledges, § 59, p.

121, the rule is stated: "The right of the pledgee to sell without notice may be waived by the pledgee, even where it is stipulated that the sale may be made without notice, and such waiver requires no new or independent consideration to support it. The waiver may be made either expressly or it may be implied from the pledgee's conduct, * * *."

In the often-cited case of Toplitz v. Bauer, 161 N.Y. 325, 55 N.E. 1059, 1061, the court says: "The pledgee doubtless has the right to exact strict performance of the contract according to its terms, and, upon default in the payment of the debt at the time stipulated, he may, under a contract like this, dispose of the pledge. But if he waives the right to exact strict performance, and gives time and indulgence to the debtor, he cannot recall this waiver at his own option, without notice to the pledgor, to the end that the latter may have an opportunity of protecting the pledge. The good faith which the law exacts from a person dealing with trust property will not permit the pledgee, after having once waived the forfeiture or the right to dispose of the pledge upon default of payment at the prescribed time, to suddenly stop short and insist upon the forfeiture for the nonpayment of the debt when the other party is unprepared to redeem. Strict performance in such cases may be waived by any agreement, declaration, or course of conduct on the part of the pledgee which leads the owner to believe that a forfeiture will not be insisted upon without an opportunity given him to redeem. (Insurance Co. v. Eggleston, 96 U.S. [572] 577, 24 L.Ed. 841); * * *." This language applies with especial appositeness to the case at bar.

Defendant asserts that the finding that plaintiff "presented herself" at its office within the week allowed her only to be informed that her coat had been sold and the account closed is lacking in evidentiary support. There may be some doubt about plaintiff's physical presence at defendant's office but that is immaterial. The important thing is that she was advised by defendant's agents that her coat was not available and had been sold and the account closed. Plaintiff testified that she was so advised by Levon and Woodruff, when she telephoned on Friday or Saturday following Thanksgiving Day stating she was sending her son to pick up her coat and requesting that it be delivered to him. Thus the information relative to the sale of her coat and the closing of her account was communicated to her by telephone rather than across the counter. Such inexactness cannot possibly justify a reversal of the judgment.

[21, 22] These statements which, however, were not true, explain plaintiff's failure to send her son to pick up her coat and excused her of the necessity of making a tender of an amount sufficient to cover the loan, interest and charges because the law does not require the doing of an idle act. Civ.Code, secs. 3532 and 1511, subd. 3; Hulen v. Stuart, 191 Cal. 562, 568, 217 P. 750; Barnes v. Osgood, 103 Cal.App. 730, 734, 284 P. 975; Woods-Drury, Inc., v. Superior Court, 18 Cal.App.2d 340, 348, 63 P.2d 1184.

[23] It is argued that plaintiff is estopped to question the validity of the sale because by her subsequent negotiations to obtain the coat from defendant she must be held to have ratified the sale. It is true that a pledgor is deemed to have ratified a sale "where, without objection, and with knowledge of his rights, he commences to treat with the pledgee purchaser with a view to acquiring the property * * *." 21 Cal.Jur., p. 372. But that is not the situation here, where plaintiff at all times questioned the propriety of the sale. Of her conduct it may be said that there has "been no ratification if the pledgor, while offering to buy the property, should protest against the sale, although offering to buy it for the sake of peace." Hill v. Finigan, 77 Cal. 267, 275, 19 P. 494, 497.

[24] Defendant contends that the damages of $3,278 awarded to plaintiff are exorbitant and excessive and not supported by any evidence. He argues that Mr. Levon, qualifying as an expert furrier, testified that in his opinion the coat was three years old and worth $500 at the time it was pledged since it was matted, worn,

and soiled in many places. He also testified that a fur coat depreciates as much as one half, for purposes of resale, as soon as it is worn. He testified that the life of an evening mink coat given ordinary care by a prudent person is between five and ten years. He also testified that before the coat was resold, it was repaired, relined and restyled. Plaintiff's testimony was in sharp contradiction. She stated that her coat was brand new when she purchased it, that it was in perfect condition at the time she deposited it with defendant four months after the purchase and that she had only worn it two months. She testified that Mr. Levon stated "You must have paid $4,500 or $5,000 for the coat" when she first showed it to him. In placing a valuation on the coat, plaintiff testified at one point that it was worth $5,000 and at another point that its value to her was what she had paid for it. It is undisputed that the coat was in storage with defendant until the time of its resale. Thus, the court had before it contradictory and conflicting evidence as to value and condition. The court was not necessarily bound to accept the opinion of Mr. Levon but could look to other evidence of value in the light of all the surrounding circumstances. Linforth v. San Francisco Gas & E. Co., 156 Cal. 58, 63, 103 P. 320; Birkhofer v. Krumm, 27 Cal.App.2d 513, 541, 81 P.2d 609.

[25–31] "It is a recognized rule that the owner of property, whether generally familiar with such values or not, is competent to estimate its worth * * *." 10 Cal.Jur. 1023. Also, "testimony as to cost of goods is a circumstance tending to show value." Ibid. Such evidence may be taken into consideration, along with other circumstances such as the extent of the use of the property and its condition and depreciation, in order to determine the subsequent value of the property and establish the loss sustained as the result of an unlawful conversion. Kirstein v. Bekins Van etc. Co., 27 Cal.App. 586, 150 P. 999; 24 Cal.Jur., p. 1060. On the basis of the evidence as to the life of a mink coat, the range of figures before it as to the value of the coat and its obvious belief that the coat was at all times while in defendant's possession in first class condition, the court arrived at the figure of $3,278 as a fair value at the time of conversion. The record therefore contains substantial evidence to support the finding of the trial court as to value of the property converted. Griffin v. Porter, 54 Cal.App.2d 254, 255, 128 P. 2d 820. The "amount of compensation * * * must be left to the sound discretion of the trial court, to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence in the case." LeBrun v. Richards, 210 Cal. 308, 320, 291 P. 825, 830, 72 A.L.R. 336. The weight of the evidence on value being a question for the determination of the trial judge, "it is not the province of this court, upon a review thereof, to determine otherwise." Hood v. Bekins Van & Storage Co., 178 Cal. 150, 152, 172 P. 594, 595. The fact that the court used the mathematical formula of computing depreciation of the coat by taking a pro rata average based on an estimated life of eight years does not justify a reversal of the case. It is the duty of an appellate court on the subject of damages "to uphold the findings if it is possible to do so upon any sound theory." Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 192, 25 P.2d 839, 842, 91 A.L.R. 1357. The method used by the trial court is accepted practice in many fields and was justifiably employed in the case at bar in order to award plaintiff "an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of * * *." Civ.Code, sec. 3336; Bedell v. Mashburn, 87 Cal.App.2d 417, 423–424, 197 P.2d 98. The court merely resolved conflicts on the issue of value against the defendant. Gruber v. Pacific States Sav. & L. Co., 13 Cal. 2d 144, 150, 88 P.2d 137.

[32] Defendant's contention that the fact that after the coat was reconditioned it was sold for only $1,500 proves conclusively that the sum of $3,278 damages is excessive cannot be sustained. Such price on resale is not conclusive of its value. Breznikar v. T. J. Topper Co., 46 Cal.App. 2d 435, 438, 116 P.2d 176. This is especially

true where the pledgee seller has acquired the chattel at a very low figure and even at the re-sale price has netted for himself a very substantial profit. There was no inducement for defendant to find a purchaser at its true value when it could reap a handsome—and quick—profit at the amount for which it sold the coat.

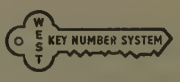
[33] Defendant argues that the judgment must be reversed because the court made no finding as to the value of the coat at the time of the conversion. Civ.Code, sec. 3336. The finding of the court was that "the reasonable value of the coat at the time of its delivery by Markwell & Co. to the person who purportedly purchased it was the sum of $3,278." Defendant urges that if any conversion occurred, it took place at the time of the pledgee's sale on November 29, 1949. Even under this theory, defendant's argument cannot prevail. In Woodbine v. Van Horn, 29 Cal. 2d 95, 173 P.2d 17, the trial court erroneously failed to compute damages on the basis of the market value of certain wood at the time of conversion, using instead its value either at the time of the filing of the complaint or at the time of trial in computing the amount of the judgment. The court states, 29 Cal.2d at page 109, 173 P. 2d at page 25: "But the error of finding the value as of the date of the commencement of the action does not require the reversal of the judgment. The complaint was filed about a month after the conversion and the testimony covers the wholesale market value of the wood during the period from the time of conversion until the commencement of the action. * * * The finding of damage in the amount of $1 per cord is therefore supported by evidence of market value at the date of the conversion." Similarly in the case at bar, the testimony covered the value of the coat during the entire period from the time of its purchase by plaintiff to the time of the resale to Mrs. Enquist, which occurred only 17 days after the purported pledgee's sale. Therefore, as has already appeared, the finding of the damage is supported by evidence of value at the time of conversion, the court having considered all the factors involved.

[34] But it may also be added that defendant was guilty of successive conversions—the last being the sale to Mrs. Enquist—and the court was justified in treating this later conversion in its findings as the time for computation of damages. Up to the time of such resale, defendant still had it in its power to return the coat to plaintiff and receive the amount due upon the pledge. Its exercise of total dominion over plaintiff's property by its act of resale, even though believing it had the right to do so, constituted a conversion. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 143, 134 P. 1157.

Certain minor points raised by defendant do not require discussion since they are unnecessary to the determination of the case and could not possibly affect the result.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



118 Cal.App.2d 668

JONES et al. v. SUNSET OIL CO.

Civ. 19542.

District Court of Appeal, Second District, Division 1, California.

June 24, 1953.

Rehearing Denied July 13, 1953.

Hearing Denied Aug. 20, 1953.

Action by lessee against coexecutors of lessor for declaratory relief respecting provisions in lease giving lessee option to terminate at end of five years, if not in default. The Superior Court of Los Angeles County entered judgment from which lessee appealed. The District Court of Appeal, Scott, J. pro tem., held that where lease provided for minimum rental and additional rental based on gallonage reports required to be submitted by lessee, and lessor had accepted minimum rentals for period of year and a half after lessee's notice to terminate, without requiring compliance with gallonage report provision, lessor waived right to declare lessee to be in default and thereby precluded from ending lease, and lessor's executors were es-

topped from asserting such alleged default in resisting termination by lessee.

Judgment reversed.

1. Landlord and Tenant ⇐109(1)

Where lease of gasoline station gave lessee option to terminate at end of five years, if not in default, and provided that manner of conducting business should remain within sole discretion of lessee, its sublessee, assignee or any other persons occupying the demised premises by authority of lessee, lessor could not prevent exercise of option by lessee to terminate lease at end of five year period on theory that lessee was in default because of unsatisfactory method in which lessee and its sublessee had operated the business, thereby allegedly causing a devaluation of the premises.

2. Estoppel ⇐92(2)

Where lease of gasoline station which gave lessee option to terminate at end of five years, if not in default, provided for monthly rental and gallonage on sales in excess of 15,000 gallons per month, and required lessee to report sales for previous months by 20th day of each month accompanied by payment of contingent rental, acceptance by lessor of monthly checks for minimum rental without objection because of failure to render monthly gallonage reports for a period of a year and a half after receipt of lessee's notice to terminate, amounted to waiver of right to assert that failure to furnish reports constituted a default precluding termination of lease by lessee at end of five year period.

3. Estoppel ⇐92(2)

An implied waiver is found in a situation in which the party for whom the act in question was to be done permitted his contractee to perform contrary to the contract and accepted the benefits of such performance after default and with knowledge thereof.

4. Estoppel ⇐53, 55, 115

A party relying on a waiver must plead and prove facts from which an actual intention to relinquish the right may be derived, but such intention may be manifested by express agreement or by conduct, and if conduct is relied upon, bona fide reliance upon such conduct must also appear.

5. Estoppel ⇐83(1)

Where lease for 10 year term gave lessor option to terminate at end of five years and same option to terminate to lessee, if not then in default, right to so terminate was a valuable part of the agreement, and lessor could not by her conduct mislead lessee to its detriment and then declare that it had forfeited its right under the lease to terminate.

6. Estoppel ⇐119

The existence of an estoppel is a question of fact.

7. Estoppel ⇐118

Party asserting an equitable estoppel has burden of proving all elements constituting it by evidence having some reasonable tendency to establish the fact.

8. Estoppel ⇐92(2), 98(3)

Lessor under lease giving lessee option to terminate at end of five years, if not then in default, and providing for a minimum rental and a gallonage rental pursuant to gallonage reports required to be submitted by lessee, by accepting minimum payments for a year and a half after lessee's notice to terminate, without requiring compliance with provision for gallonage reports, waived her right to declare that lessee was guilty of default precluding termination of lease, and executors of lessor were estopped from resisting lessee's exercise of its right to terminate on ground of such default.

Francis B. Cobb, Los Angeles, for appellant.

Steiner A. Larsen, Los Angeles, for respondent.

ROBERT H. SCOTT, Justice pro tem.

Defendant appeals from an adverse judgment in an action for declaratory relief. Plaintiffs are coexecutors of the Estate of Bessie H. Jones, deceased, and one of them is her surviving husband.

Mr. and Mrs. Jones had operated a service station at Los Angeles, California, for

many years. On March 27, 1947, Mrs. Jones leased the station to defendant, Mr. Jones waiving any claim or interest therein. The lease was for a term of ten years with right to terminate at the end of five years reserved in lessor, and option to terminate at the end of five years reserved in lessee, if it is not then in default. It required lessee to give six months' advance notice of its intention to exercise the option. Defendant gave more than a year's advance notice of its intention to exercise this option and moved out at the end of the five year period. Plaintiffs brought this action alleging that defendant was in default and seeking a decree that defendant had no right to terminate the lease but must continue operating the station.

The lease provided for $365 monthly rental plus additional rental of one cent per gallon for gasoline sold in any month in which sales exceeded 15,000 gallons. It required that lessee make to lessor a report of sales for the previous month by the 20th day of each month accompanied by payment of the contingent additional rental. Sales, however, did not exceed 10,000 gallons in any month during the entire five year period. Lessee promptly sent in the check for the basic rental each month but sent no report informing lessor that no more money as lessor's percentage on the sales was forthcoming and did not report the number of gallons sold each month. Lessor made no demand for such reports until the five year period was nearly completed, and upon such demand being made, lessee reported sales to date showing the amount of gasoline sold, from which reports it appeared that no added rental was due lessor.

The trial court found that defendant was in default partly because of failure to make monthly reports of sales to lessor and was therefore not entitled to exercise its option to terminate at the end of the five years, but was required to continue to operate the service station under the terms of the lease.

[1] As conduct of defendant upon which plaintiffs apparently rely as reenforcing their claim that it was in default the complaint alleges that in November, 1950, defendant acquired some interest in "Golden Eagle" gasoline stations, including one within a block of the plaintiffs' station; that it closed the plaintiffs' station for several months and then sublet it to tenants whose methods of operation were not as good as those of defendant and who sold less gasoline. The complaint then asserts that prior to November, 1950, (i. e. even before defendant acquired the interest in "Golden Eagle") defendant operated plaintiffs' station "in the manner that discouraged the selling of gasoline and in a manner that would cause persons in that area to purchase gasoline from the station a block away selling Golden Eagle gasoline," thereby reducing gasoline sales at plaintiffs' station and causing devaluation of the premises.

Plaintiffs refer to a provision in the lease which allows defendant to sublet the premises if such subletting "is in accordance with Lessee's customary methods of operating premises." They indicate that a sublessee under this provision was expected to operate the station in as good a manner as defendant, but that the sublessee had methods of operation which were even worse than those of defendant.

Another provision in the lease merits consideration in this connection because it contains the answer to these objections. It says, "The manner of conducting said business or businesses shall be and remain within the sole discretion of lessee, its sub-lessee, assignee or any other person or persons occupying the demised premises by authority of lessee, and shall not be subject to the exercise of any control by lessor." From this it appears that lessor understood and agreed at the time the lease was executed that she was not hiring an employee but was leasing a service station, and that she could not control its operation by defendant. If the station sold less than 15,000 gallons of gasoline a month or depreciated in value because of defendant's methods, she would not, for either of those reasons, be entitled to complain. In any event none of these matters of poor methods, small sales or unsatisfactory subtenants could properly be urged as a

"default" which would preclude an exercise by defendant of an option to terminate the lease at the end of five years. Prior to that time defendant had resumed its own operation of the station, and was then doing everything the lease required it to do, even to the extent of sending a report of sales covering the period of its tenancy. Strictly speaking, when the five year period was up defendant was not then in default.

As above stated, it was required that defendant give a six months' advance notice of its intention to exercise the option to end the lease when the first five years had ended, and it appears that it did so as early as June, 1950. About six months after this notice had gone to lessor, defendant's representative had a meeting with her at a bank and the service station operations were discussed. Lessor, at that time, did not say anything to lessee about its notice of intention to terminate the lease at the end of the five years, although she had received the notice. She said nothing about lessee's omission to send the gallonage report for the preceding month. Lessor knew about the operation of the station and that the sales were less than 15,000 gallons per month.

There is no evidence that lessor informed lessee of her intention to reject the notice of termination because reports of sales had not been made, nor does it appear that she made any demand, even after she had received that notice, for such reports, up to the date of her death in November, 1951. After that date her executors repudiated the termination notice and demanded a report of sales covering the period of the lease up to that time, which was furnished to them by lessee.

The trial court concluded that defendant was in default and had lost its right to exercise the option to end the lease; that plaintiffs were not estopped to set up the default in opposition to defendant's endeavor to end the tenancy, that defendant shall be required to continue to operate the station and to perform all of its obligations under the lease; and that defendant is obligated to pay plaintiffs' attorney's fees in this action under certain other terms of the lease because the controversy was its fault.

A critical evaluation of lessor's claim that defendant was in default and of the trial court's determination that defendant's conduct constituted such a default as would preclude termination of the lease discloses that adequate basis for this finding and judgment must be found if it is found at all, in defendant's failure to make its required gallonage reports showing sales each month. Otherwise the trial court's decision cannot be sustained. What do we find? At the end of the first month defendant apparently sent its check for the basic rental and continued sending these checks each month. No report of gasoline sales was made on the 20th day of the second month and of each month thereafter. The obvious effect of these regular payments of the minimum rental was to inform lessor that lessee claimed that the gasoline sales were less than 15,000 gallons for the preceding month. How much they fell below this amount was apparently of no primary concern to lessor. In any event it is clear that when the reports were not made that lessor had a right to demand them. Instead of doing so she accepted the monthly check for the minimum rental and permitted lessee to continue its occupancy of the premises. Actually she suffered no detriment and was not deprived of any information.

[2] By accepting monthly payments of the minimum rental without demanding sales reports, lessor had waived her right to assert that failure to furnish them constituted such a default of lessee as to preclude its exercise of the option to terminate. Because of her failure to reject the notice of intention to terminate because of this failure to furnish sales reports, and her failure to demand such reports for the year and a half after she had received lessee's notice, (during which time lessee could have supplied all the missing sales reports and thereafter kept them up to date) lessor is estopped to resist the termination of the lease by asserting that lessee is in default.

[3] An implied waiver is found in a situation in which the party for whom the

act in question was to be done permitted his contractee to perform contrary to the contract and accepted the benefits of such performance after default and with knowledge thereof. Pitt v. Mallalieu, 85 Cal.App. 2d 77, 85, 192 P.2d 24.

[4] "Waiver cannot be predicated upon the fact of the acceptance of rent alone. The party relying on a waiver must plead and prove facts from which an actual intention to relinquish the right may be derived. This intention may be manifested by express agreement or by conduct. If conduct is relied upon, *bona fide* reliance upon such conduct must also appear." Linnard v. Sonnenschein, 94 Cal.App. 729, 272 P. 315, 318. Waiver of a legal right may be implied as well as express. Prairie Oil Co. v. Carleton, 91 Cal.App.2d 555, 559, 205 P.2d 81.

[5] The lease in the instant case had the effect of providing for a ten year term unless lessor or lessee chose to end it after five years. The right to terminate was a valuable part of the agreement. Lessor could not by her conduct mislead lessee to its detriment and then declare that it had forfeited its right under the lease. There can be no question that lessee relied upon the conduct of lessor as constituting a waiver.

[6–8] The existence of an estoppel is a question of fact and the settled rule as to the proof of equitable estoppel is that the burden rests upon the party asserting such estoppel to prove all the elements constituting it by evidence having some reasonable tendency to establish the fact. General Motors Accept. Corp. v. Gandy, 200 Cal. 284, 295, 253 P. 137. The principal facts in the case now before us are not in serious dispute. The effect of the language used in the lease and the conduct of the parties must therefore be construed and interpreted. The only conclusion we can reach is that lessor had waived her right to declare, (1) that lessee was in default, and (2) that it was thereby precluded from ending the lease. Because of lessor's conduct she led defendants to believe that she had waived her right and plaintiffs, as her executors, are now estopped to assert this alleged default in resisting lessee's exercise of its right to terminate. See: People v. Ventura Refining Co., 204 Cal. 286, 295, 268 P. 347, 283 P. 60.

Code of Civ.Proc. Sec. 1962, Subd. 3, provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it".

"Where a party to a transaction induces another to act on the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist on such rights, remedies, or objections to the prejudice of the one misled." 31 C.J.S., Estoppel, § 61, p. 246.

Plaintiffs suggest that in this case the principles discussed in Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 173, 74 P. 700, 704, should be considered. In that case renewal of a lease was refused by lessor because of failure of lessee to properly perform during the original term, and it was urged that lessor had waived its right to refuse a renewal. The court pointed out, "The waiver of the forfeiture is one thing, the renewal of the lease is quite another. The neglect of the landlord to strictly enforce his right of forfeiture for breach of condition does not entitle the tenant to a renewal when such renewal is dependent upon faithful performance of conditions." But, as the court observed in Kaliterna v. Wright, 94 Cal.App.2d 926, 936, 212 P.2d 32, 38:

"The Swift case holds that the mere failure of the landlord to insist upon a forfeiture for waste or breach of covenant, does not preclude the landlord from refusing to grant another term. The case expressly holds that there was no waiver of performance of the conditions of the lease."

The court then declared that the Swift case is not authority for the contention, "that oral modifications of a lease, or breaches that are waived, justify a refusal to grant a renewal provided in the lease". Nor do we, in the instant case, regard it as authority for plaintiffs' claim that a breach

that is waived can justify a denial to the tenant of the valuable right to end the lease at the close of the five year term.

On the matter of the award of attorney's fees to plaintiff it must be held that since justification for plaintiffs' action is absent, this award cannot stand.

Judgment reversed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 636

KLOSE v. SEQUOIA UNION HIGH SCHOOL DIST. et al.

Civ. 15478.

District Court of Appeal, First District, Division 1, California.

June 23, 1953.

Rehearing Denied July 23, 1953.

Hearing Denied Aug. 20, 1953.

Resident, taxpayer, citizen and elector of high school district brought mandamus proceedings against district, its board of trustees, and general contractor, who had submitted bid for repair of high school, to require board to impose penalty on general contractor. The Superior Court of the County of San Mateo, Edmund Scott, J., entered judgment adverse to taxpayer, and taxpayer appealed. The District Court of Appeal, Peters, P. J., held that where general contractor, in making bid for repair of high school, inadvertently inserted wrong name for the electrical subcontractor, and bid of the one wrongfully named was $500 higher than bid of the one who was intended to be named, board of trustees had authority to consent to substitution of proper name for the electrical subcontractor.

Judgment affirmed.

1. Contracts ⇐22(1)

Subcontractor, whose name is submitted with bid of general contractor, secures no legal rights as result of acceptance of general contractor's bid by awarding authority. Government Code, §§ 4104(a, d), 4106.

2. Contracts ⇐22(1)

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding authority. Government Code, §§ 4104(a, d), 4106.

3. Schools and School Districts ⇐80(2)

Where general contractor, in making bid for repair of high school, inadvertently inserted wrong name for the electrical subcontractor, and bid of the one wrongfully named was $500 higher than bid of the one who was intended to be named, board of trustees had authority to consent to substitution of proper name for the electrical subcontractor. Government Code, §§ 4104 (a, d), 4106.

Aaronson & Cohn, San Carlos, for appellant.

Louis B. DeMatteis, Dist. Atty. of the County of San Mateo, and Keith C. Sorenson, Asst. Dist. Atty., Redwood City, for respondents.

PETERS, Presiding Justice.

William Klose, as a "resident, taxpayer, citizen, and elector" of respondent school district brought this proceeding in mandate against the district, its board of trustees, and one Julian Basin, a general contractor who had submitted a bid for the repair of a high school in the district, which bid had been accepted by the board, to compel the board to assess against Basin a penalty of twenty per cent of the amount of the subcontract for electric work submitted by him as part of his bid. The theory is that Basin illegally substituted one subcontractor for another, and that under such circumstances the imposition of the penalty is mandatory under section 4106 of the Government Code. The trial court entered its judgment denying petitioner any relief. Petitioner appeals on the judgment roll.

The facts as they appear in the findings are these: On April 25, 1951, Basin, as a duly licensed general contractor, submitted to the board a bid for the remodeling

of the high school in question. Such bid was accepted by the board, and a contract entered into with Basin. With the bid submitted by Basin was a list of subcontractors. Klose Electric Inc.[1] was listed as the electrical subcontractor. It is found that "said listing was made in error, and through inadvertence the name of Klose Electric Inc. was listed as the electrical subcontractor, whereas the figure used for the electrical work by respondent Julian Basin in making up his bid was in fact the amount which had been bid to him by the Richmond Electric Company and not the amount which had been bid to him by Klose Electric Inc.;" that the amount bid by the Richmond Electric "was approximately $500.00 less than the bid submitted to Julian Basin by Klose Electric Inc.;" that thereafter Basin requested permission from the board to change the electrical subcontractor from Klose Electric Inc. to Richmond Electric Company; that the architect for the school board was consulted by the board and his consent to the substitution secured; that on August 3, 1951, the board consented to and approved the requested substitution. The court also found that at no time here involved had Basin submitted a written contract to Klose Electric Inc., nor did Klose Electric Inc. ever refuse to execute such a contract. The court also found that a demand upon the board to impose the penalty was made by petitioner, and that the board has in its possession sufficient funds belonging to Basin to pay the penalty. The court concluded that on these facts petitioner was not entitled to any relief. Such conclusion is sound.

It is the theory of petitioner that Basin had no legal right to request, and the board had no legal power to approve, the substitution here involved. This conclusion is predicated upon petitioner's interpretation of section 4104(d) of the Government Code. Based on this interpretation, it is contended that under section 4106 of that code the imposition of the twenty per cent penalty is mandatory, and that the board can be compelled to impose the penalty by any "resident, taxpayer, citizen, and elector" of the district by a mandamus proceeding. We express no opinion on the question as to whether mandamus is the appropriate remedy or as to whether petitioner has the legal right to enforce any rights conferred by these sections, inasmuch as we are convinced that, on the merits, the petitioner's interpretation of the sections is unsound, and that, under the facts here involved, no penalty could or should be imposed.

Section 4104 of the Government Code reads as follows:

"No general contractor whose bid is accepted shall, without the consent of the awarding authority, either:

"(a) Substitute any person as subcontractor in place of the subcontractor designated in the original bid.

"(b) Permit any such subcontract to be assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the bid.

"(c) Sublet or subcontract any portion of the work in excess of one-half (½) of one per cent (1%) of the general contractor's total bid as to which his original bid did not designate a subcontractor.

"(d) The awarding authority may consent to the substitution of another person as a subcontractor, when the subcontractor named in the bid after having had a reasonable opportunity to do so, fails or refuses to execute a written contract, when said written contract, based upon the general terms, conditions, plans and specifications for the project involved, or the terms of such subcontractor's written bid, is presented to him by the contractor."

The penalty section—4106 of the Government Code—reads as follows: "A general contractor violating any of the provisions of this chapter violates his contract and the awarding authority may cancel the contract. After any such violation, the general contractor shall be penalized to the extent

1. There is no allegation or finding that William Klose, the petitioner, is in any way connected with Klose Electric Inc. Nor is there an allegation or finding that he is not.

of twenty per cent (20%) of the amount of the subcontract involved. Funds recovered through the application of this penalty shall be paid to the State Treasurer who will deposit them in the General Fund."

Petitioner contends that subdivision (d) of section 4104, which was added to the section in 1945, should be interpreted as setting forth the sole situation in which a consent to a substitution can be given by the awarding authority, and urges that otherwise the subdivision would be superfluous. This construction, of course, completely disregards subdivision (a) of the section, which confers plenary power of substitution on the awarding authority. Such a construction, limiting the right of the awarding authority to authorize a substitution to the one situation where the original subcontractor refuses to execute a written contract, would create a completely unworkable system. It would mean that once a general contract had been accepted by the awarding authority, no substitution of a subcontractor could be made against his will, even though such subcontractor refused to complete the work, or neglected or was unable to handle the job, went out of business or into bankruptcy, or even died. Thus many public projects would be held up or subjected to interminable delays. The basic public policy of the sections involved, and of the sections related to them, is not to grant rights to a subcontractor, but is to assure the reliability of the subcontractors by requiring an initial check by the awarding authority with the assistance of its technical staff, and then to be sure that no subcontractor will be substituted without the approval of the awarding authority, given, as it was in this case, only after a reliability check by the technical staff.

It should be noted that section 4104 expressly grants to the board the right to consent to an assignment or delegation of duties by the original subcontractor to another. But under petitioner's interpretation of subdivision (d), subcontractors, with consent of the awarding authority, could assign their contract or delegate the duties thereunder, but the general contractor, who, as will later be pointed out, owes no contractual duty to the subcontractor until a contract is executed between them, cannot secure the right to a substitution even with the consent of the awarding authority regardless of the cause, except where the subcontractor refuses to execute a written contract. Such an interpretation would lead to absurd results, and would constitute a grave limitation on the general law of contracts. Obviously, subdivision (d) of the section constitutes simply an admonition to the awarding authority to exercise the discretion conferred by subdivision (a) in the situation described—refusal of the subcontractor to execute a contract—by permitting the substitution. In that way subdivisions (a) and (d) can both be given effect. Subdivision (d) is a limitation on subdivision (a) in that one respect, but does not repeal subdivision (a), as petitioner's interpretation would do. That this is the proper interpretation of the section seems obvious. To construe the section otherwise would not only lead to absurd and unfair results, but would be to ascribe to the Legislature an intent to change the fundamental law applicable to the rights of subcontractors on public works.

[1, 2] Petitioner's arguments are necessarily predicated upon the concept that a subcontractor, whose name is submitted with the bid of the general contractor, in some undefined way, secures some legal rights when the general contractor's bid is accepted by the awarding authority. In the absence of statute that is not the law. A subcontractor bidder merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the general contractor. No contractual relationship is created between the subcontractor and the general contractor even though the bid is used as part of the general overall bid by the general contractor and accepted by the awarding authority. Williams v. Favret, 5 Cir., 161 F.2d 822; 1 Corbin on Contracts, p. 58, § 24, particularly cases cited in footnote 11 on p. 59.

In order to uphold petitioner's interpretation of section 4104(d) we would have to hold that the Legislature intended by that

amendment to change the general law of contracts, and to confer on subcontractors the irrevocable right to perform the contract as soon as the awarding authority accepted the general contractor's bid except where the subcontractor refuses to execute a contract. We can find no such expressed or implied intent in the sections. They appear in the chapter of the public works law dealing with "Subletting and Subcontracting" which are regulatory provisions. None of those sections is aimed at conferring rights on the subcontractors, but are all aimed at protecting the public and the awarding authority.

In the instant case Basin used in his bid the amount bid by Richmond Electric Company, but, through inadvertence, inserted the name of Klose Electric Inc. The bid of Klose Electric Inc. exceeded that of Richmond by about $500. When the awarding authority, after a proper investigation and recommendation by its architect of the reliability of Richmond Electric Company consented to the substitution, it was but consenting to the correction of a mutual mistake or a remediable unilateral mistake in the contract as awarded. See annotations 59 A.L.R. 809, 827; 80 A.L.R. 586, 588; 107 A.L.R. 1451, 1452. There are there collected many cases, with but a few contra, establishing the rule that even without a mistake of the type that would permit reformation, and where the mistake is unilateral, the courts will grant to the general contractor the right of equitable rescission where his bid was based on an honest and not grossly negligent mistake. This rule obtains in California. M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7, 11. The court in that case held that even though the form calling for bids expressly stated that bidders "will not be released on account of errors," that provision applied only to errors of judgment and not to "clerical or mathematical mistakes." Otherwise, said the court, a business man would be unjustly required to perform a contract he had no intention of making. At page 703 of 37 Cal.2d, at page 11 of 235 P.2d the court stated: "Where a person is denied relief because of an error in judgment, the agreement which is enforced is the one he intended to make, whereas if he is denied relief from a clerical error, he is forced to perform an agreement he had no intention of making. The statement in the bid form in the present case can be given effect by interpreting it as relating to errors of judgment as distinguished from clerical mistakes. If we were to give the language the sweeping construction contended for by the city, it would mean holding that the contractor intended to assume the risk of a clerical error no matter in what circumstances it might occur or how serious it might be. Such interpretation is contrary to common sense and ordinary business understanding and would result in the loss of heretofore well-established equitable rights to relief from certain types of mistake."

[3] By analogy this language is applicable to the problem of the interpretation of section 4104. Certainly there is nothing in that regulatory statute, or in any other section of the chapter where it appears, that indicates that by the 1945 amendment the Legislature intended to limit or take away from a general contractor his common law right of rescission. If this is so, then Basin could have rescinded the entire contract because of the mistake. The board, rather than go to the expense and trouble of securing new bids, and rather than delay the project, by consenting to the substitution of the company originally intended and whose bid for electric work was in fact the amount used in the master bid by Basin, merely was compromising the contractor's right of rescission. This the board had the legal right to do.

For these several reasons, the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

118 Cal.App.2d 598

SUTTON v. WALT DISNEY PRODUCTIONS.

Civ. 19190.

District Court of Appeal, Second District, Division 2, California.

June 22, 1953.

Rehearing Denied July 9, 1953.

Hearing Denied Aug. 20, 1953.

Action for alleged breach of an express contract or implied contract in that defendant motion picture producer, which had examined book written by plaintiff, allegedly copied plaintiff's composition into a motion picture film which earned large profits. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that complaint was subject to demurrer as to count alleging express contract and as to count alleging implied contract.

Judgment affirmed.

1. Copyrights ⇐82

Literary Property ⇐9

Provision of Code of Civil Procedure requiring a copy of production as to which infringement is claimed, and copy of alleged infringing production, to be attached to complaint if demand is for relief on account of alleged infringement of plaintiff's rights in and to a literary, artistic or intellectual production, applies to actions on contract as well as to suits grounded in tort for plagiarism. Code Civ.Proc. § 426, subd. 3.

2. Pleading ⇐8(2), 35

Where plaintiff's book and defendant's motion picture film, which plaintiff alleged was a copy of plaintiff's story, were before court, plaintiff's comments in pleadings as to nature and meaning of plaintiff's allegations were surplusage without official status and were mere conclusions of plaintiff. Code Civ.Proc. § 426, subd. 3.

3. Literary Property ⇐9

In action for alleged breach of an express contract or implied contract in that defendant motion picture producer, which had examined book written by plaintiff, allegedly copied plaintiff's composition into a profitable motion picture film, plaintiff could not state cause of action in contract without demonstrating a substantial similarity between plaintiff's idea and defendant's motion picture.

4. Literary Property ⇐9

In action for alleged breach of an express or implied contract in that defendant motion picture producer had examined book written by plaintiff, which was a fantasy of animals, reptiles, amphibians and insects endowed with intellectual attributes, and had copied plaintiff's composition into a profitable motion picture, comparison of plaintiff's book and defendant's motion picture established that the two finished products lack substantial similarity to each other, and complaint was subject to demurrer as to count alleging express contract and as to count alleging implied contract.

5. Pleading ⇐205(1)

Generally a common count is not subject to attack by general demurrer.

George De Roy, Los Angeles, for appellant.

Gunther R. Lessing, Burbank, O'Melveny & Myers, Jackson W. Chance, William W. Alsup, Los Angeles, Harned Pettus Hoose, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Appeal from judgment entered after the trial court had sustained a demurrer to the amended complaint. Appellant insists that a comparison of the contents of her book entitled "Circus in Nightland" with the film produced by respondent entitled "Beaver Valley" can leave no doubt that some reasonable minds would find that the film utilized a portion of the contents of the book and that, therefore, defendant's[1] demurrer was unjustly sustained. Pursuant to the stipulation of the parties and the provisions of section 426, subdivision 3, of the Code of Civil Procedure, both book and film were deemed part of the pleading under attack. This opinion is the result of the study of all pleadings, exhibits and authorities.

1. All lunar and fictitious defendants are out leaving only the corporation.

The book is a fantastic story written for the young. Its central figure is a child named Nancy who by reason of an injury to her foot missed an opportunity to attend the circus on its annual visit to her town. To acquaint her with the sights of the menagerie and the performances of the beasts that furnished the interest and hilarity at the show, a joyful, sympathetic chum came and described the animals and their acts. So impressed was Nancy that after she fell asleep, a fairy entered her room, escorted her into the wood and introduced her to more than thirty small animals and insects which staged a "nightland circus." During the performance the fairy so instructed Nancy as to the mode of life of all the creatures that the little girl learned the habits, behavior and characteristics of the entire population of the woodland. On Nancy's finding her new friends more interesting and amusing than the inmates of the circus could possibly have been, plaintiff wrote her story, illustrating it with fantastic drawings of the newly found friends, the actors in the woodland dream. A field rat and a red squirrel were ringmasters. The attacine moth with its four wings and six legs was there still thriving on the food she ate while in the larva stage. The garter snake left her forty babies and at once consumed a colony of earthworms and a school of tadpoles. The gopher ran backwards under the lifted sod carpet; a mother frog laid eggs on blades of grass; a ferret harassed the prairie dog and the rabbit, and robbed the quail of her eggs. Two crickets broke the silence of the nocturnal festivities by scraping their wings together; the tarantula crept from his secret abattoire and spun the circus tightrope for the two larvae to perform upon; the hoot owl eyed the mice, gophers and ferrets from on high. A mother opossum with naked ears and pig-like nose sat on a limb, her pouch alive with her naked babies. A bat flew from a cave with her infant holding fast to her neck and sought the night-roaming insects. Nancy was perturbed by the whining of a frog crying for his mamma, and by the hooting of the neglected owl. The tent for the circus was fabricated, the parade began, Nancy clapped her hands for joy and sat entranced as the performers made their music or did their stunts with enviable skill. A group of lizards posed as models; two chameleons begged for some dewdrops; the friendly pacific bull snake coiled near the ring, visited the garter snake and dined on a course of young rabbits. With a variety of beetles, spiders, flies, and moths in action, the red squirrel assisted by the sprites, elves and fairies brought the memorable circus of nightland to a successful close.

Beaver Valley

Turning now to the picture "Beaver Valley" made by respondent, it is readily found to be denuded of fantastic trimmings, nothing like a cartoon. It is not the product of fancy. It is real life among mammals, birds, amphibia and fish in the lands of Minnesota and Montana. Its primary purpose is to educate men and women of mature years as well as children, to reveal the nature and appearance of the denizens of the forest, rivers and plains. Such creatures were photographed in the environments that nurture them. The subject of each picture shows it to have been "shot" in the vicinity where it dwells. The comment describes their mode of living, their food, friends and enemy. It is a film of nature's progeny in their pristine habitat whose authors animated it by appropriate comment intoned to harmless music. It is the type of film frequently produced in the past for education and amusement.

Flashing sunlight and creeping shadows fall across the woodland, the lake or river. The untiring beaver builds his dam; the moose, the bear, the otter, the coyote and raccoon in turn are subjected to the searching eye of the camera. The weasel and the chipmunk make hasty marches across the meadow. Growling bull frogs scan the gloriously blue waters and the landscape with disdain. Schools of salmon leap mighty rapids, and many die in unsuccessful effort to gain higher levels and a freeway to spawning pools. The imperious eagle surveys the brilliant scene from his lofty heights; the swift hawk dives into a covey of his prey; swarms of ducks and geese quack and honk as they come to rest on

waters or wander through wet lands in quest of food. The raven caws for his lost mate and the heron quietly searches for his fish or worms or mice that he too might feast again, but stands motionless when the coyote comes near. The entire scene is colorful, glamorous, intriguing, calculated to captivate and enthrall the spirit of restless man and convince him that not all beauty is artificial, or that all skill or happiness is in the genus homo.

Argument

Appellant alleges that at defendant's request she delivered her book to respondent "with the oral understanding and agreement that in the event said defendants desired to use said literary composition and book for the production of a motion picture and photoplay, said defendants would buy and purchase the same, or the rights to use said literary composition in a motion picture and photoplay, from plaintiff."

[1, 2] She follows this with the allegations that defendant "retained plaintiff's said literary composition and book in its manuscript form in their possession a long period of time and examined, read, considered and became fully informed of and concerning, plaintiff's said literary composition and book and * * * had knowledge of the contents and subject matter of said literary composition and book and * * * without the knowledge, consent, or authority of or from plaintiff, during the year 1950, and continuously to and including the present time did deliberately and unlawfully appropriate and substantially copy plaintiff's said literary composition and book and produced, sold and continued to produce and sell and distribute and exhibit said literary composition and book in a motion picture and photoplay * * * Beaver Valley." While the foregoing allegations would in the ordinary pleading constitute a valid pleading against a general demurrer, they do not comprise a complete declaration of the plaintiff's cause, in actions for alleged infringement of plaintiff's rights in and to a literary or artistic composition. Section 426, Code of Civil Procedure, requiring plaintiff's story to be attached to the complaint in infringement actions, applies to actions on contract as well as to suits grounded in tort for plagiarism. Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947. By virtue of the presence of both products before the court, plaintiff's comments in the pleading as to the nature and meaning of her allegations are surplusage without official status, mere conclusions of the pleader. Weitzenkorn v. Lesser, supra, 40 Cal.2d 778, 256 P.2d 947. We are thus by a trial of the demurrer placed in a position to try the merits of plaintiff's charge that the corporate defendant copied her composition into a film and has "earned and received great profits and sums of money by reason of the * * * appropriation and use" of plaintiff's composition. Washer v. Bank of America, 21 Cal.2d 822, 830, 136 P.2d 297, 155 A.L.R. 1338; Alphonzo E. Bell Corp. v. Bell etc. Syndicate, 46 Cal.App.2d 684, 691, 116 P.2d 786. Both products are in final form and judgment can be cast without resorting to other evidence of the truth of the pleading. Weitzenkorn v. Lesser, supra, 40 Cal.2d 778, 256 P.2d 947.

[3] Count I of the amended complaint alleges the breach of an express contract, count II alleges substantially the same facts in the common counts as an implied-in-fact contract. Hence there is no question raised as to the protectibility of appellant's work. Inasmuch as the demurrers acknowledge respondent's access to "Circus in Nightland," the only issue tendered on appeal is that of similarity. Unless appellant can demonstrate a substantial similarity between her ideas as embodied in her book and the motion picture "Beaver Valley," she cannot state a cause of action in contract. Weitzenkorn v. Lesser, supra; Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962.

[4] A comparison of the two works leaves no suspicion that the film is a reproduction of the book. The only ground of similarity is that both relate to animals. The book is a fantasy of animals, reptiles, amphibians and insects endowed with intellectual attributes; the film is a real-life portrayal of animals in the wilds with no particular order or story except the loose thread of a young beaver's adventures in

establishing his own dam. Accordingly, the holding of the trial court that the two finished products have no substantial similarity to each other, and hence that the demurrer to count I must be sustained was correct.

[5] The same conclusion must be reached as to count II. If a plaintiff relies on the same facts to plead both a specific count and a common count, the latter is vulnerable to the same attacks as the former. Weitzenkorn v. Lesser, supra, 40 Cal.2d 778, 256 P.2d 947; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248; Harris v. Kessler, 124 Cal.App. 299, 303, 12 P.2d 467. Hence, although generally a common count is not subject to attack by general demurrer, Auckland v. Conlin, 203 Cal. 776, 778, 265 P. 946, under the facts of this case the lack of substantial similarity between the book and the motion picture precludes appellant from stating a cause of action whether specifically pleaded as an express contract or generally as an implied-in-fact contract. The judgment of the trial court, therefore, was correct.

Affirmed.

McCOMB and FOX, JJ., concur.



118 Cal.App.2d 643

MALLEY et al. v. SIERRA MFG. CO. et al.

Civ. 19159.

District Court of Appeal, Second District, Division 3, California.

June 23, 1953.

In manufacturer's action against parts processor for breach of contract, wherein defendant filed a cross-complaint, the Superior Court, Los Angeles County, rendered judgment that plaintiff take nothing on the complaint and that the cross-complainant recover $3,000, and plaintiff appealed. The District Court of Appeal, Wood, J., held that trial court's findings, with regard to whether processor was required to deliver a specified quantity of work each week or was merely given option to deliver such quantity per week, were fatally inconsistent.

Reversed.

See, also, 258 P.2d 526.

1. Appeal and Error ⇐1071(1)

Where there are contradictory and irreconcilable findings on a material issue, and determination of them one way or other is essential to correctness of judgment, judgment cannot stand.

2. Contracts ⇐354

In manufacturer's action against parts processor for breach of contract, wherein defendant filed a cross-complaint, trial court's findings, with regard to whether processor was required to deliver a specified quantity of work each week or was merely given option to deliver such quantity per week, were fatally inconsistent.

Thompson & Thompson, Pasadena and Benjamin J. Goodman, Los Angeles, for appellant.

Frederick G. Stoehr, Pasadena, for respondents.

PARKER WOOD, Justice.

Action for damages for alleged breach of contract. Defendant Sierra Manufacturing Company, a limited partnership, answered the first amended complaint and also filed a cross-complaint. The judgment was that plaintiff take nothing on said complaint, and that the cross-complainant recover from cross-defendant on the cross-complaint the sum of $3,000. Plaintiff appeals from the judgment.

In 1945, plaintiff was engaged in the business of manufacturing and selling an electric broiler, referred to at the trial as the Malley Kitchen Master. On November 13, 1945, plaintiff and Sierra Manufacturing Company, hereinafter referred to as defendant, entered into a written agreement which provided that defendant would perform certain work consisting of metal spinning, polishing, punching holes and

riveting specified parts (used in the manufacture of the broiler), which parts were to be spun from 12, 16 and 17 inch aluminum blanks ("circles" of aluminum sheet) of specified weights. The agreement provided further that defendant would do the work for a flat price of $1.35 a set; plaintiff would "supply all the material used to manufacture" the said items, and would supply chucks, three foot presses and dies for punching holes; plaintiff would "give" to the Sierra Manufacturing Company, and defendant would complete, a minimum of work amounting to $15,000 annually, and defendant agreed to complete such contracts as given to it in excess of $15,000 and up to $50,000 per annum. It was provided further therein that neither party would be liable in damages occasioned by a shortage of materials, labor difficulties, or causes beyond the reasonable control of the respective parties. A copy of said agreement was made a part of the amended complaint.

It was alleged in the amended complaint that, as required by said contract, plaintiff supplied to defendants the chucks, three foot presses and dies, all of which were in the possession of defendants prior to signing the agreement and ever since have been in their possession. It was alleged in paragraph IX of said complaint that, in furtherance of said contract, on January 10, 1946, plaintiff in writing, ordered defendants to make 15,000 sets at $1.35 per set, at the rate of, "as stated in said written order, 'up to 1,000 sets weekly'"; said order was accepted by defendants; when said order was given, it was agreed and understood that defendants would make up sets so that they would be ready for pick-up by plaintiff at the rate of 1,000 sets a week commencing January 17, 1946, and that defendants were to complete said sets so that on or before April 25, 1946, all of said completed sets would have been picked up by plaintiff. It was alleged in paragraph XI of said complaint that up to and including April 30, 1946, defendants failed to perform the contract and the January 10, 1946 order, by failing to complete the 15,000 sets for pick-up by plaintiff in the manner described in paragraph IX of said complaint, and defendants completed for delivery only various parts of sets (setting forth therein the parts which were completed). It was alleged further in said complaint, in part, as follows: at the time said order was given, defendants were in possession of approximately 10,000 pounds of aluminum sheets theretofore supplied by plaintiff; in addition thereto plaintiff caused to be delivered to defendants materials far in excess of the amount required, and plaintiff continuously kept defendants supplied with all materials, and performed everything required to be done by plaintiff under the said contract to enable defendants to complete and have said sets ready for pick-up by plaintiff in the manner described in paragraph IX of said complaint; in April, 1946, plaintiff and defendants conferred about the failure of defendants to perform the contract, and at that time plaintiff told defendants he was about to go on a trip to promote the sale of housewares which he manufactured, and he stated it would be pointless to make the trip unless defendants assured him of delivery of "at least 5,000 sets during the months of May and June, 1946," and thereafter 500 sets a week, all within the limitations of the original contract; defendants assured plaintiff they would do so, whereupon plaintiff ordered defendants to make 5,000 sets for May and June, 1946, and thereafter 500 sets a week; in furtherance of said further order, plaintiff caused to be delivered to defendants materials far in excess of that required, and plaintiff performed everything required to be done by him under the contract to enable defendants to fill the order given in April, 1946; upon the assurance of defendants that they would make up the order, given in April, 1946, plaintiff went on the trip, expended approximately $1,000 as expenses thereof, and obtained orders for the broilers amounting to approximately $70,000, to be shipped to plaintiff's customers during July, August, and September, 1946; from May 1, 1946 to and including December, 1946, defendants completed various parts of sets, specified therein (the quantities of parts allegedly completed during each month were specifically set forth—and were less than the quantities required by the purported

orders); by reason of the failure of defendants to perform everything required of them under the contract plaintiff lost large profits and many customers, and the good will of his business suffered great damage; plaintiff has been damaged in the sum of $85,000.

As a second cause of action it was alleged, in part, that in September, 1946, plaintiff and defendants entered into an oral agreement which provided that defendants would manufacture for plaintiff 6,000 broilers for $1.86 per broiler; said broilers would be available for delivery to plaintiff not later than December 31, 1946; as part of said oral contract plaintiff was to supply defendants with necessary materials and parts, and defendants were to have the use of certain chucks, foot presses and dies, which were and ever since have been in the possession of defendants; plaintiff caused to be delivered to defendants materials and parts far in excess of the amount required and plaintiff performed everything required to be done by him under said oral contract; at the time said contract was entered into, defendants knew plaintiff would rely upon defendants for the supply of all broilers as per said contract, and that plaintiff would not manufacture or buy any other broilers in his business; by June, 1947, defendants had made only 3,626 broilers and have failed and refused to make up the balance of the broilers as required by the contract; by reason of such failure of defendants to perform the contract, plaintiff suffered damages in the sum of $12,500.

As a third cause of action it was alleged, in part, that within four years last past plaintiff and defendants entered into a written contract which provided that defendants would manufacture 10,000 hinges for $350 and 10,000 element guards and fingers for $500, as per sample submitted by plaintiff, said work to be done in a good and workmanlike manner; defendants did not make said hinges as per the sample, nor in a good and workmanlike manner; as a result of which, the hinges were entirely useless to plaintiff; prior to completion of the hinges, plaintiff paid defendants $350 therefor; prior to the completion of the guards, defendants charged plaintiff's account for full delivery, but delivered to plaintiff only 5,500 of said guards; in consequence thereof defendants received payment for 4,500 guards at 5 cents each, or a total of $225 for guards which were not delivered; by virtue of the foregoing, defendants became indebted to plaintiff in the sums of $350 and $225.

As a fourth cause of action it was alleged, in part, that on March 23, 1946, plaintiff and defendants entered into a written contract which provided that defendants, for the sum of $425, would make for plaintiff, in a good and workmanlike manner, a die for certain hinges that plaintiff used in the assembly of the Malley Kitchen Master; defendants made a die but said die was not made in a good and workmanlike manner; in consequence thereof, it broke when defendants used it for the manufacture of said hinges; plaintiff paid defendants $425 for said die prior to the breaking of the die; plaintiff demanded that defendants repay said $425, and defendants refused to do so.

The answer denied the material allegations of the amended complaint. Paragraph VI of said answer denied the allegations of paragraph IX of the amended complaint, except that it admitted that an order was placed on January 10, 1946, for "up to 1,000 sets weekly," but it alleged that the said phrase (just quoted) was intended to limit the number which plaintiff would be required *to accept* to 1,000 per week, and was further intended to be subject to the number of sets which the defendant could manufacture from the raw material with the chucks, presses and dies furnished by plaintiff. Paragraph VIII of said answer denied the allegations of paragraph XI of the amended complaint, except that it admitted that defendant manufactured approximately the number of sets alleged in said paragraph XI; and that paragraph VIII alleged that defendant manufactured all the sets possible with the material and equipment furnished by plaintiff.

The cross-complaint alleged three causes of action. In the first cause of action it was alleged that cross-defendant was in-

debted to cross-complainant in the sum of $1,010.06 for work performed; and in the second cause of action it was alleged that cross-defendant was indebted to cross-complainant in the same sum on an account stated. In the third cause of action it was alleged that the written agreement entered into by said parties on November 13, 1945, was modified, by mutual consent, increasing the price from time to time; cross-complainant performed everything required by said agreement to be performed by it; cross-complainant employed skilled and unskilled labor, engineering skill, rearranged its plant, installed machinery and equipment, and established an assembly line for the sole purpose of carrying out the provisions of said agreement, at a cost of $8,000; cross-complainant was prevented from using said installation, labor and engineering by reason of the breach of said agreement by cross-defendant, and the entire amount of said expenditure was thereby lost; cross-defendant failed to comply with said agreement by failing to supply to cross-complainant proper and adequate materials, equipment (tools, patterns, plans) and designs with which to do the work provided for by the agreement; cross-defendant took from cross-complainant's possession tools and equipment necessary to perform said work; materials, tools and equipment furnished by cross-defendant were unsuitable to perform the work provided for in said agreement; cross-defendant failed to place orders in accordance with said agreement, and he refused to accept and pay for merchandise manufactured pursuant to said agreement and thereby prevented completion of the agreement according to its terms; by reason of cross-defendant's breach of said agreement, cross-complainant was damaged in the sum of $8,000 (as special damages) and in the further sum of $15,000 as general damages.

[1, 2] Appellant (plaintiff) contends that the findings of fact are inconsistent, irreconcilable, and do not support the judgment. The findings specifically referred to are findings II, III, XXII, XXVI, XXIX, and XXX.

In finding number II the court found, with respect to paragraph IX of the amended complaint, that the order of January 10, 1946, contained the provision "Shipping date—Up to 1000 weekly"; that the phrase "up to 1000 weekly" was intended to mean that the defendant agreed to deliver any number up to 1,000 broiler sets per week depending upon the availability of materials.

In finding number III the court found that the allegations of paragraph XI of the amended complaint were true. Paragraph XI of said complaint, as above stated, alleged as follows: "That up until and including April 30, 1946, defendants failed to perform the aforementioned contract and the aforementioned January 10, 1946 order given defendants by plaintiff, by failing to complete the aforementioned 15,000 sets for pick-up by plaintiff as and in the manner described in paragraph IX hereof, and defendants completed for delivery to plaintiff only the various parts of sets as follows: [enumerating the parts]" Paragraph IX of said complaint alleged, as above shown, that when the order containing the phrase "up to 1000 sets weekly" was given, it was "agreed and understood" by the order that "defendants would make up said sets so same would be ready for pick-up by plaintiff at the rate of 1,000 sets a week commencing January 17, 1946."

It thus appears that, by finding number II, the court found that the phrase "up to 1000 sets weekly" was intended to mean that defendants might deliver any number of sets up to 1,000 a week; and that, by finding number III, the court found that (as alleged in paragraph XI of the amended complaint) the defendant failed to perform the contract of November 13, 1945, and "the order" of January 10, 1946, by failing to complete the 15,000 sets (in the manner described in paragraph IX of the amended complaint) at the rate of 1,000 sets a week. Said findings are, in effect, that defendant was not required to complete 1,000 sets a week, but might deliver any number of sets up to 1,000 a week; and that defendant was required to com-

plete 1,000 sets a week. Said findings are therefore inconsistent.

In finding number XXII the court found, in part, that the allegations and denials of paragraphs VI and VIII of the answer to said amended complaint were true. As above shown, paragraph VI of said answer denied the allegations of paragraph IX of said complaint, except it admitted that the order of January 10, 1946, was for "up to 1000 sets weekly"; and said paragraph VI alleged that said phrase (just quoted) was intended to limit the number of sets which plaintiff would be required to accept to 1,000 a week, and was intended to be subject to the number of sets which defendant could manufacture from the raw material with the equipment furnished by plaintiff. In other words, that part of finding XXII was to the effect that defendant was not required to complete 1,000 sets a week. It therefore appears that said finding XXII, insofar as it relates to paragraph VI of the answer, is inconsistent with finding number III (which was to the effect that defendant was required to complete 1,000 sets a week). Paragraph VIII of the answer, as above shown, denied the allegations of paragraph XI of the amended complaint, except that it admitted defendant manufactured approximately the number of sets alleged in said paragraph XI, and it alleged that defendant manufactured all the sets possible with the material and equipment furnished by defendant. In other words, that part of finding XXII was to the effect that defendant was not required to complete 1,000 sets a week. It therefore appears that finding number XXII, insofar as it relates to praragraph number VIII of the answer is in conflict with finding number III (that the allegations of paragraph XI of the amended complaint were true), which finding was, as above stated, to the effect that defendant was required to complete 1,000 sets a week. In summary, it appears that the trial court found, in substance, that defendant was required to deliver any number of sets up to 1,000 a week (finding No. II); that defendant was required to complete 1,000 sets a week (finding No. III); that the phrase "up to 1000 sets weekly" was intended to limit the number of sets which plaintiff would be required *to accept* to 1,000 per week (finding No. XXII regarding paragraph VI of answer); and that defendant was not required to complete 1,000 sets a week (finding No. XXII regarding paragraph VIII of answer). Those findings are contradictory and irreconcilable. Whether defendant was required to complete 1,000 sets a week or was required only to complete any number up to but not in excess of 1,000 sets a week was a material issue since the action for damages was based upon alleged breach of contract by defendants. "Where there are contradictory and irreconcilable findings on a material issue, and the determination of them one way or the other is essential to the correctness of the judgment, the judgment cannot stand." Hill v. Donnelly, 43 Cal.App.2d 47, 52, 110 P.2d 135, 138.

By reason of the above conclusions, it is not necessary to discuss other contentions on appeal.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



118 Cal.App.2d 650

MALLEY et al. v. SIERRA MFG. CO. et al.

Civ. 19160.

District Court of Appeal, Second District, Division 3, California.

June 23, 1953.

Manufacturer's action in claim and delivery to recover certain machinery, tools and materials from a parts processor. The Superior Court, Los Angeles County, rendered a conditional judgment for plaintiff, and the plaintiff appealed. The District Court of Appeal, Wood, J., held that even though manufacturer's action in claim and delivery, to recover machinery, tools and materials delivered to parts processor, had been consolidated for

trial with another action, in which both of the parties claimed damages for breach of contract, trial court had not been empowered to require that judgment for damages rendered in favor of processor in the latter action be satisfied by manufacturer as condition to recovering possession of materials to which it was held entitled in the first action.

Reversed.

Judgment ⇐229

Even though manufacturer's action in claim and delivery, to recover machinery, tools and materials delivered to parts processor, was consolidated for trial with another action, in which both of the parties claimed damages for breach of contract, court was not empowered to require that judgment for damages rendered in favor of processor in the latter action be satisfied by manufacturer as condition to recovering possession of materials to which it was held entitled in the first action.

Thompson & Thompson, Pasadena and Benjamin J. Goodman, Los Angeles, for appellant.

Frederick G. Stoehr, Pasadena, for respondents.

PARKER WOOD, Justice.

This action in claim and delivery was consolidated for trial, and was tried, with the action of Malley v. Sierra Manufacturing Company, Cal.App., 258 P.2d 522. The plaintiff sought possession of certain personal property, and damages for detention thereof. The judgment herein was that plaintiff recover possession of the property claimed, except certain aluminum; and that plaintiff recover possession of the aluminum upon payment of the judgment (for $3,000 damages) in said other case of Malley v. Sierra Manufacturing Company. Plaintiff appeals from the judgment.

This action arose out of the transactions referred to in said other case. The articles claimed herein were certain machinery, tools and materials delivered by plaintiff to defendant to be used by defendant in manufacturing the electric broiler referred to in the other case. The court found herein that all the property described in the complaint, except the aluminum, had been delivered to plaintiff.

Plaintiff contends that the court erred in entering the conditional judgment that plaintiff "will be entitled to possession" of the aluminum upon payment of the other judgment for $3,000 damages. Defendant alleged, in its answer, that pursuant to an agreement between plaintiff and defendant the defendant performed work upon the property described in the complaint of the reasonable value of $993.93, and that it was entitled to a lien thereon "upon that account." The court found that the aluminum had been partially processed by the defendant for the plaintiff pursuant to a contract between them, that the completion of the processing was prevented by plaintiff's breach of contract, and that defendant was damaged by said breach. No finding was made as to the value of the work which defendant alleged that it performed upon "the property described in the complaint," and there was no finding, conclusion of law, or judgment that defendant had a lien upon the aluminum by reason of any work it had performed upon the aluminum or any other property. As stated, the judgment was that plaintiff "will be entitled to possession" of the aluminum upon payment of the judgment for damages ($3,000) in the other case. As shown by defendant's answer, it did not claim a lien for more than $993.93. There was no proper basis for the provision in the judgment that plaintiff should pay the judgment for $3,000 in said other case before he would be entitled to the possession of the aluminum. Although the two cases were tried together, they were separate cases and the court was not empowered to require that the judgment for damages in the other action be satisfied by plaintiff before he would be entitled to an unconditional judgment in this claim and delivery action. The judgment should be reversed. If the question as to the conditional judgment were the only question involved herein, this court would be justified in directing the superior court to render an unconditional judgment for the return of the aluminum.

Another question is involved herein, namely, whether the evidence was sufficient to support the finding that all the claimed

property, except the aluminum, was delivered to plaintiff. Plaintiff argues that 1½ parts (sets) of the guard-bracket die, and the hinge die, were not returned. He argues further that the evidence shows that defendant broke the hinge die and did not return it; and that the evidence was uncontradicted that the full set of guard dies was not returned. Since the judgment is to be reversed for the reason above stated, it is not necessary to determine this further contention.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



118 Cal.App.2d 551

McKENNA v. ELLIOTT & HORNE CO. et al.

Civ. 19356.

District Court of Appeal, Second District, Division 1, California.

June 18, 1953.

Action to quiet title to realty. The Superior Court, Los Angeles County, Ellsworth Meyer, J., granted defendants' motion to dismiss, and plaintiff appealed from judgment of dismissal and from orders denying plaintiff's motions for relief after judgment. The District Court of Appeals, White, P. J., held that where plaintiff's claims to the property were adjudicated in actions in 1947 and 1948, plaintiffs' subsequent quiet title suit, brought in 1950, and based upon a claim of 20 years adverse possession, was barred by the prior judgments, and that the orders denying motions for relief after judgment were nonappealable.

Judgment affirmed, attempted appeal from orders dismissed.

1. Judgment ⇐743(2)

Where plaintiff's claims to certain lots were adjudicated in actions filed in 1947 and 1948, plaintiff's subsequent quiet title suit, brought in 1950 and based upon a claim of 20 years adverse possession, was barred by the prior judgments.

2. Judgment ⇐948(2)

The defense of res judicata may be raised by motion to dismiss supported by affidavit.

3. Judgment ⇐948(2)

Judgment dismissing action as barred by prior judgments was not erroneous as denying plaintiff's right to trial of issue of res judicata, although such defense was raised by motion to dismiss complaint supported by affidavit, instead of by verified answer, as evidence at trial would be record of former action, which was introduced at hearing on motion to dismiss, and trial would take place before trial of another issue, as in case of hearing on motion.

4. Dismissal and Nonsuit ⇐53(2)

A trial court has inherent power to dismiss an action which is clearly shown to be sham and without merit.

5. Dismissal and Nonsuit ⇐53(1)

The statutory grounds for dismissal of action are not exclusive. Code Civ.Proc. §§ 581, 581b.

6. Appeal and Error ⇐82(1)

Where appellant's motions for relief after adverse judgment amounted to no more than requests that the trial court reconsider its original action, and did not purport to be authorized by statute setting forth the only situation in which an order denying motion for relief after judgment solely upon grounds that existed prior to entry of judgment may be appealed, and where validity of orders denying such motions, as well as the merits of the action, were fully considered on appeal from judgment, the orders denying relief after judgment were nonappealable. Code Civ.Proc. §§ 663, 663a.

Catherine A. McKenna, in pro. per.

Robert E. Rosskopf, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Appellant, Catherine A. McKenna, brought an action to quiet title to real

property consisting of two lots described as lots 75 and 76 of Tract 2704 in the County of Los Angeles. Respondent, Frank R. Sipe, filed a demurrer and motion to dismiss the action. The demurrer was sustained with leave to amend. Upon the filing of a first amended complaint, respondent again demurred and moved to dismiss. The motion to dismiss, supported by affidavit, was upon the ground that the issues presented by the action were res judicata between the plaintiff and defendant Sipe, by reason of judgments entered in two previous actions in the superior court. The motion to dismiss was granted, and plaintiff appeals from the judgment of dismissal. Plaintiff has also appealed, quoting from her notice of appeal,

"And from the order of the court, denying the plaintiff's motion to vacate and set aside the said order and judgment made herein on the 12th of March, 1952.

"And from that certain order of the Court, on the 20th day of March, 1952, and from the order thereon made denying Plaintiff's Motion to Strike out defendant's motion of defense of res adjudicata, and motion to dismiss, and demurrer, and to enter judgment for plaintiff judgment for plaintiff on the pleadings.

"And from that order made on the 31st day of March, 1952, denying the plaintiff's motion, to set aside and strike from the file the said order and judgment of Dismissal of the action as to Frank R. Sipe, and from the whole thereof.

"And from that Order of the Court, made on the 27th day of March, 1952, denying the Plaintiff's Motion, to Dismiss, and the affidavit on Motion to dismiss, filed on the 27th of March, on the behalf of Frank R. Sipe, and the denial of the plaintiff's motion to enter judgment on the pleadings under the provisions of sections 437, and sections 446 and 447, Code of Civil Procedure, and from all and each and every of one of the said orders, so made by the Court, on the 20th day, March, 1952, and denying the motions of this plaintiff Being To-Wit:

"1—Motion to vacate and set aside Minute Order, putting Demurrer off Calendar, and denying motion to restore the Demurrer to the Calendar, and that the Court rule on the Demurrer on the merits, and from the order denying the Motion to strike from the file, the Demurrer, and the Motion of Frank R. Sipe, to dismiss the action as to Frank R. Sipe; and the order denying the plaintiff's Motion to enter judgment on the pleadings in favor of the Plaintiff.

"And appeals from the Orders of the Court made on the 29th day of April, 1952, denying the plaintiff's motion to vacate and set aside the certain decision and judgment entitled 'Judgment of Dismissal', made on the 12th of March, 1952, and from the orders made on the 20th day of March, 1952, denying the plaintiff's motions. 1—To set aside order and restore demurrer to calendar and to rule on same. 2—To strike from the demurrer paragraph 11, thereof; * * * 3—To Strike from the file notice of Motion to Dismiss the action, as to Frank R. Sipe, 4—To Strike from the file the affidavit of Robert E. Rosskopf, filed on motion to Dismiss, and to Strike the Demurrer to the First amended complaint; and 5—The Order denying the plaintiff's motion to enter judgment on the pleadings, in favor of the plaintiff; as provided by sections 437 and section 446 and 447 Code of Civil Procedure on the 29th day of April, 1952—* * *."

On May 1, 1945, a default judgment was entered in superior court action No. 478808, quieting title in favor of Catherine A. McKenna against certain parties. On May 10, 1947, Frank R. Sipe, successor as beneficiary under a deed of trust on both lots 75 and 76 to one of the defendants in action No. 478808, commenced superior court action No. 526755, wherein judgment was rendered setting aside the default judgment in action 478808, and adjudging that Sipe was the owner and holder of a note and trust deed constituting a valid and subsisting instrument affecting the real property involved. Upon appeal, this latter judgment was affirmed, the court assessing a penalty of $300 against appellant McKenna for a frivolous appeal. Sipe v. McKenna, 105 Cal.App.2d 373, 233 P.2d 615.

In February, 1948, an action to quiet title was commenced by Sipe as to Lot 76, his title being based on a street bond fore-

closure. Judgment in favor of Sipe against appellant herein was entered January 31, 1950, in action No. 540253. Upon appeal by appellant McKenna the judgment was affirmed. Sipe v. McKenna, 106 Cal.App. 2d 559, 235 P.2d 416.

The present action was filed by appellant herein on July 6, 1950, after the entry of the judgments in the two previous actions and while they were pending on appeal, appellant averring that she had been the owner of the two lots for more than ten years, had been in open, notorious and adverse possession, and had paid all taxes thereon for more than twenty years.

By her first amended complaint, appellant asserted that she was the owner in possession and actual occupation of the properties "and through her own person and right, and by and through her predecessor in title, Sarah O'Neill, has been in open, exclusive possession and claiming to own" the disputed properties, adversely to the defendants, and had paid all taxes on the properties for more than twenty years prior to the filing of the action.

[1] Appellant's brief fails to present any argument directed to the merits of the contention that her claims are barred by the prior judgments. Appellant could not have acquired a title by adverse possession subsequent to the entry of the judgments in the actions in which her claims were rejected. These two actions were filed in May, 1947, and February, 1948, and the present action was brought in July, 1950. Appellant's claims were adjudicated in these two actions, and her present suit, to be successful, must be based upon a title acquired subsequent to such adjudications. She failed in her first amended complaint to show such a title. Her present arguments, like her arguments in the court below, constitute no more than an attempt to relitigate matters which have been settled by judgment.

[2, 3] The only remaining question is whether the trial court acted properly in granting the motion to dismiss. Appellant contends that she was entitled to a trial on the merits upon a verified answer raising the plea of res judicata. That the question of res judicata may be raised and determined, in circumstances such as are here presented, was settled by Olwell v. Hopkins, 28 Cal.2d 147, 168 P.2d 972, 976, wherein it was said, "the fact remains that to reverse the judgment on that ground [that it was raised by motion and affidavits rather than by answer] would serve no useful purpose, since the record of the former action makes it clear that plaintiffs cannot overcome that defense.

"* * * Although the defense of res judicata in the present action was raised by demurrer and motion to dismiss and not by answer, it was tried at the hearing upon that motion as it would have been tried under the provisions of section 597. The evidence at a trial under that section would be the record of the former action, which was introduced at the hearing upon defendants' motion to dismiss, and since that trial would take place 'before the trial of any other issue,' plaintiffs would find themselves in exactly the same position as they are now."

See, also, Best v. Fitzgerald, 81 Cal.App. 2d 965, 185 P.2d 377.

Precisely the same situation is here presented.

The record herein discloses that the trial court followed the rule approved in the two last-cited cases.

[4, 5] It is also established that a trial court has inherent power to dismiss an action which is clearly shown to be sham and without merit. The provisions relating to dismissal contained in sections 581 and 581b of the Code of Civil Procedure are not exclusive. See Cunha v. Anglo-California Nat. Bank, 34 Cal.App.2d 383, 93 P.2d 572, 576, in which the court quoted from Stewart v. Butler, 27 Misc. 708, 59 N.Y.S. 573, 576, with respect to vexatious litigation—quoting in turn from an English decision—" 'when such a litigant is found I think it a most wholesome doctrine that any court should have the power of stopping such a litigation.' "

[6] None of the orders made by the trial court in denying the various motions made by appellant after judgment are appealable. They amount to no more than

requests that the trial court reconsider its original action. Appellant at no time presented any motion purporting to be authorized by sections 663 or 663a of the Code of Civil Procedure, the only situation in which an order denying a motion for relief after judgment solely upon grounds that existed prior to entry of judgment may be appealed. See Rounds v. Dippolito, 94 Cal. App.2d 412, 210 P.2d 893. The merits of the instant action and the validity of the several orders made after judgment have been fully considered upon the appeal from the judgment.

The judgment is affirmed. The attempted appeal from the order denying plaintiff's motion for a new trial and for other relief, the attempted appeal from the minute order of March 31, 1952, entered April 8, 1952, denying motion to strike from file, as well as the attempted appeals from orders dated March 12, 1952, March 27, 1952, April 29, 1952, and all other orders specified in appellant's notice of appeal filed May 6, 1952, are, and each is, dismissed.

DORAN, J., and SCOTT, J. pro tem. concur.



118 Cal.App.2d 563

PEOPLE v. HARDEN.

Cr. 780.

District Court of Appeal, Fourth District, California.

June 18, 1953.

Proceeding to vacate judgment of conviction of forgery entered against defendant. The Superior Court, San Diego County, William A. Glen, J., denied the motion and defendant appealed. The District Court of Appeals, Mussell, J., held that where defendant did not claim that evidence introduced at preliminary examination was insufficient to show that crime of forgery had been committed or that there was not sufficient cause to find him guilty thereof, judgment of conviction of forgery would not be set aside, even though defendant was held on charges of uttering check bearing fictitious name.

Order denying motion to vacate judgment affirmed.

1. Criminal Law ⇐998

On motion to vacate judgment of conviction of forgery on ground that trial court was without jurisdiction to proceed against defendant because he was not held to answer on charges of forgery but instead was held to answer on charges of uttering check bearing fictitious name, there could be no review with respect to issues which could be reviewed on appeal from judgment.

2. Criminal Law ⇐998

Where defendant did not claim that evidence introduced at preliminary examination was insufficient to show that crime of forgery had been committed or that there was not sufficient cause to find him guilty thereof judgment of conviction of forgery would not be set aside, even though defendant was held to answer on charges of uttering a check bearing a fictitious name and not on charges of forgery. Pen.Code, §§ 476, 739.

3. Criminal Law ⇐998

Where judgment is regular on its face, motion to vacate judgment must be denied.

4. Criminal Law ⇐997

Writ of error coram nobis cannot be used to serve purposes of appeal.

5. Criminal Law ⇐998

Where question raised on motion to set aside judgment of conviction of forgery could have been raised by appeal, and time for appeal had expired, the trial court had no jurisdiction to grant the motion.

6. Criminal Law ⇐1131(4)

Appeal from denial of motion to set aside judgment of conviction of forgery can be dismissed by appellate court where question raised in motion could have been raised by appeal.

Milton Fredman, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

MUSSELL, Justice.

On May 8, 1952, a complaint was filed in the San Diego Municipal Court charging defendant with a violation of section 476 of the Penal Code (uttering a check bearing fictitious name). A preliminary examination was held at which defendant, who was represented by counsel, was held to answer on the charge contained in the complaint. On the same day the District Attorney filed in the Superior Court an information charging defendant with three counts of violating Penal Code section 470 (forgery). These counts were with reference to three checks introduced in evidence at the preliminary examination. Defendant pleaded not guilty. A jury trial was had which resulted in a verdict finding the defendant guilty of the crime of forgery in three counts and having suffered two prior convictions of felony, and on June 20, 1952, the court committed him to the state prison. No notice of appeal from the judgment of conviction was filed.

On September 2, 1952, defendant filed in said superior court a motion to vacate and set aside the judgment entered against him therein. He stated in his motion that the trial court was without jurisdiction to proceed against him because he was not held to answer on the charges of forgery but instead was held to answer on the "charges of uttering a check bearing fictitious name", and, therefore, the entire proceedings were null and void. A hearing on defendant's motion was had by the trial court. After the court had examined and considered the entire file in said matter, the motion was denied and this appeal was taken from the order denying it.

[1] Upon the application of defendant for appointment of counsel, this court appointed Milton Fredman of San Diego to represent him on this appeal. Mr. Fredman requested permission to file a full report to the court in lieu of a brief on the grounds that the points of law which could be considered on behalf of appellant on his appeal are so clearly detailed in the applicable statutes and decisions adversely to appellant that no arguable grounds exist upon which to base a brief in his behalf. This request was granted following similar procedures indicated in People v. Dodd, 113 Cal.App.2d 682, 248 P.2d 965 and People v. Sutton, 115 Cal.App.2d 751, 252 P.2d 633, and the full, fair and complete report of counsel is on file herein. Counsel therein concluded that there can be no review on an appeal of this sort with respect to issues which could be reviewed on appeal from the judgment. Citing People v. Ward, 96 Cal.App.2d 629, 216 P.2d 114. The report is accepted in lieu of a brief and we agree with the conclusion reached therein.

[2] The contention that the trial court was without jurisdiction to proceed because the information filed by the district attorney charged the crime of forgery when defendant was held to answer for a violation of section 476 of the Penal Code is without merit, as the district attorney is empowered by section 809 (now 739) of the Penal Code to charge the offense—named in the order of commitment or any offense—shown by the evidence taken before the magistrate to have been committed. People v. McGee, 31 Cal.2d 229, 233, 187 P.2d 706.

Defendant does not claim in his motion, or otherwise, that the evidence introduced at the preliminary examination was insufficient to show that the crime of forgery had been committed or that there was not sufficient cause to find him guilty thereof. Defendant, in his "statement of facts" alleges that he was not advised of his constitutional and statutory rights to an appeal. However, the record shows that he was represented by counsel at both the preliminary examination and the trial of the case, and the fact, if it be a fact, that he was not so advised is not set forth as a ground for granting the motion.

[3–6] The motion to vacate a judgment must be denied where, as here, the judgment is regular upon its face. If we consider the motion as a petition for a writ of error coram nobis, such a writ cannot be used to serve the purposes of an appeal. Where the question raised could have been raised by appeal, after the time for appeal

has expired, the trial court has no jurisdiction to grant the motion, and an appeal from the denial of such a motion to vacate can be dismissed by the appellate court. People v. Ward, supra, 96 Cal.App.2d at page 633, 216 P.2d 114.

The order denying the motion to vacate the judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



118 Cal.App.2d 624

OSTBERG v. THATRO et al.

Civ. 19262.

District Court of Appeal, Second District, Division 3, California.

June 22, 1953.

Action to recover balance allegedly due general contractor on building contract and to foreclose a mechanic's lien, wherein defendants filed a cross-complaint for defective paint work. From a judgment of the Superior Court, Los Angeles County, Leo Freund, J., in favor of plaintiff, plaintiff appealed. The District Court of Appeal, Vallée, J., held that the evidence supported findings that nothing was owing to contractor for labor performed or materials furnished prior to filing of last request with building fund disbursing agency for reimbursement for expenditures made by contractor for materials and labor.

Judgment affirmed.

1. Evidence ⇐272, 313

Certificate and warranty contained in written requests for reimbursement signed by general contractor and filed with building fund disbursing agency that laborers named therein were the only ones who worked on job during time covered by each request constituted declarations of contractor against his interest and were sufficient to support implied finding that nothing additional was due contractor for labor performed prior to filing of last request.

2. Contracts ⇐350(1)

In action to recover balance allegedly due general contractor on written contract for construction of a residence for defendants and to foreclose mechanic's lien, evidence supported findings that nothing was owed by defendants to contractor for labor performed or materials furnished prior to date on which contractor filed last written request with building fund disbursing agency for reimbursement.

3. Contracts ⇐322(4)

In action to recover balance allegedly due general contractor on building contract and foreclose mechanic's lien, wherein owners filed cross-complaint for defective paint work, evidence supported findings that contractor applied to exterior redwood a new type of paint which was wholly unsuitable for the purpose, that contractor knew or should have known it was unsuitable and that paint was negligently applied, all to the damage of owners in stated amount.

Floyd H. Norris, Los Angeles, for appellant.

Sims & Wallbert, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff, a general contractor, from a judgment in his favor foreclosing a mechanic's lien and awarding him $1,757.07. He claims the judgment is erroneous in two particulars: (1) it does not award him the full amount to which he is entitled under the contract; (2) an award to defendants of $500 on their cross-complaint for defective paint work is not supported by the evidence.

On June 23, 1948, plaintiff and defendants entered into a written contract for the construction of a residence by plaintiff for defendants on a "cost plus fixed fee" basis. On the same day they executed a written agreement with Joint Control, Inc., a building fund disbursing agency. Pursuant to the latter agreement, defendants deposited with Joint Control sums of money totaling in excess of $29,000, to be used for the purpose of paying the cost of con-

struction of defendants' residence and to be paid out by Joint Control, Inc., on the order of plaintiff, subject to the control of the disbursing agency.

It was the practice of plaintiff to pay his laborers and thereafter, from time to time, file a written request for reimbursement with Joint Control. The request was made in each instance on a form furnished by Joint Control, denominated "Release of Labor Liens." Each of the forms was signed by plaintiff and the laborers who had been paid by him for a particular period preceding the date it was submitted to Joint Control. The releases contained the following provision:

> "For the purpose of obtaining payments for the above items, the undersigned contractor-employer hereby certifies and warrants that the above-named laborers and mechanics actually performed work and labor at the times and upon the job hereinbefore set forth and that they have actually been paid by him. The undersigned further certifies and warrants that the above is a full and complete list of all laborers and mechanics that performed work and/or labor for him upon the job."

Plaintiff filed approximately 17 requests on this form with Joint Control for reimbursement for labor, and received payment for the amounts claimed. The last request was filed on October 14, 1949.

Plaintiff had an audit made of his books and records showing expenditure by him of $37,254.46 in the construction of the residence. Joint Control paid plaintiff $29,395.91. Plaintiff claimed a balance due from defendants of $7,858.55 ($37,254.46–$29,395.91) for labor and materials.

In this action plaintiff sought to recover the balance he claimed to be due. The trial court made no award to plaintiff for labor claimed to have been done or materials claimed to have been furnished prior to October 14, 1949, the date of the last release given by him to Joint Control. It awarded him $868.45 for labor done after October 14th, and $169.52 for materials furnished after December 1, 1949. No materials were furnished between October 14th and December 1st. The amount plaintiff says he should have been awarded, over and above that allowed, is for labor claimed to have been done and materials claimed to have been furnished prior to October 14, 1949.

The claim here is that the only reason the trial court found plaintiff could not recover the total sum shown to be owing by the audit, less certain agreed overcharges and errors, was that it ruled that by not including sums claimed to have been expended prior to October 14th in the release forms filed with Joint Control, he waived his right to any expenditures made prior to that date and not included.

Although the findings and judgment do not itemize the amount recovered by plaintiff for labor and materials, the record shows the trial court ruled "that the releases filed in Joint Control are binding upon Mr. Ostberg." Careful reading of the record fails to disclose any evidence that the court ruled the releases had any effect on plaintiff's claim for materials. There was no credible evidence to support the claim for materials furnished prior to October 14th. The record discloses that plaintiff's books and records were so confused and confusing that it was difficult for the court to say when they could be relied upon. There were many mistakes "honeycombed" in the case, and plaintiff failed to produce sufficient evidence to support the earlier claims for materials.

[1] Defendants contend that by reason of section 1962(2) of the Code of Civil Procedure, a conclusive presumption arose against plaintiff by the filing of the releases with Joint Control and precluded him from recovering any sums claimed to have been expended by him for labor prior to October 14th. Plaintiff argues that the releases do not come within the term "written instrument" as used in section 1962(2). We need not reach this question. The releases constitute declarations of plaintiff against his interest. Each release is a declaration by plaintiff that the laborers named therein were the only ones who worked on the job during the time covered by the particular release; that the amounts shown thereon, as earned by those laborers and paid to them by plaintiff, were all of the amounts

expended by plaintiff for labor during the period covered; and, collectively, they are evidence that nothing additional was owing by defendants to plaintiff for labor performed prior to October 14, 1949. The releases in themselves are sufficient to support the implied finding that nothing was owing for labor done prior to October 14th. Moore v. Campbell, 72 Cal. 251, 253, 13 P. 689; Riedy v. Bidwell, 93 Cal.App. 202, 207, 269 P. 682; Wallace v. Oswald, 57 Cal. App. 333, 335–336, 207 P. 51.

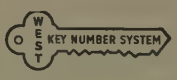
[2] We hold the evidence is sufficient to support the findings that nothing was owed by defendants to plaintiff for labor performed or materials furnished prior to October 14, 1949.

The cross-complaint alleged: plaintiff so negligently performed the paint work on the interior and exterior of the premises as to necessitate that it be done over; plaintiff caused a new type of paint, wholly unsuitable for the purpose, to be applied to the exterior; plaintiff knew or should have known that the paint so applied was unsuitable for such purpose; by reason of the negligent performance of the paint work, defendant was damaged in the sum of $3,000. The court found: plaintiff applied a new type of paint, Phenoplast, to the exterior redwood; this paint was wholly unsuitable for the purpose; plaintiff knew or should have known it was unsuitable; this new paint was negligently applied; by reason of the foregoing, defendants have been damaged in the amount of $500.

[3] Plaintiff contends there is no evidence to support these findings. He argues that he told defendant, George Thatro, that Phenoplast was a new product and that the latter agreed that it be used on the redwood, knowing that plaintiff did not know what the result of its use would be. Defendant, George Thatro, testified: plaintiff was going to treat the redwood with a material that he had selected "as a result of some personal preference of his account"; he (Thatro) knew nothing of the treatment of redwood and accepted plaintiff's knowledge on the subject; after plaintiff told him he was going to use the new product, he (Thatro) said: "Well, if that is what is proper for redwood, I will accept it."; he did not take the responsibility of selecting Phenoplast; plaintiff decided to use it and he (Thatro) did not object to it. There was evidence that the paint job was bad, that Phenoplast should never have been put on, and that the paint work on the house as a whole was not a workmanlike job. The evidence amply supports the findings with respect to the paint work.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



118 Cal.App.2d 656

PEOPLE v. ARIAS.

Cr. 4899.

District Court of Appeal, Second District, Division 3, California.

June 23, 1953.

Defendant was convicted of robbery. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence warranted conviction.

Affirmed.

1. Robbery ⇐24(1)

Evidence relating to identification of defendant and the corroborating circumstances warranted robbery conviction.

2. Criminal Law ⇐1122(5)

Where instructions were not contained in the record, question whether instruction on circumstantial evidence should have been given would not be considered by reviewing court.

3. Criminal Law ⇐814(17)

Where principal evidence of the People was direct and the circumstantial evidence was merely corroborative, instruction on circumstantial evidence was unnecessary.

Oscar Arias, in pro. per.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Oscar Arias was convicted in a jury trial of robbery. It was found that it was robbery of the first degree and at the time of the offense defendant was armed. He had counsel at the trial but presents his appeal in propria persona. His principal contention is that the evidence was insufficient to justify the verdict.

The property taken was one bottle containing 1000 APC's and certain medical instruments. They were taken from one Lester L. Clark, Jr., a student in the College of Osteopathy who was also employed as a first aid attendant in an emergency surgical hospital. Clark testified that when he was on duty at the hospital at about 10:45 p. m. a 1949 or 1950 Ford was driven onto the parking lot with its lights shining into the window. He looked out and saw one person in the car. He answered the front doorbell and when he opened the door he was confronted by a man in a trench coat with a handkerchief over his lower face and a bandage applied to his head. He was holding what appeared to be a .45 automatic; he put the gun to Clark's back and shoved him forward; he demanded morphine and, being told there was none, demanded cocaine; he was told there was nothing on hand except a mild analgesic tablet called APC's. Clark went to a cabinet where there were three bottles of these tablets, one full and the others partially filled. The man demanded the full one, took it and put it in his pocket. He required Clark to lie down on a table and after looking around for a time came back with a roll of tape and taped Clark's hands behind his back. He asked where the stethescope and the syringes were kept and Clark heard him take the stethescope from a hook where it was hung; it disappeared and was not recovered. The man went through cabinet drawers. He told Clark he was a German Jew and he talked with a soft German accent. The handkerchief around his face was white with a blue border. He wore a pair of new leather gloves. After he left Clark called the police and gave the officers pieces of tape which he had cut from his wrists. Two days after the robbery defendant was arrested while driving a 1950 Ford which he had rented shortly before the robbery. Defendant and the arresting officer went to the former's room. There the officer found a trench coat and in a pocket a white handkerchief with a blue border. He also found a gun holster and .45 shells for an automatic. In the trench coat was found an envelope from the hospital containing APC pills. These articles were introduced in evidence. Defendant admitted ownership of the coat, the holster, the handkerchief and the pills. He admitted having owned a .45 automatic but said it had been taken away from him by sheriff's deputies. A roll of adhesive tape was found in a pocket of defendant's coat, which he said he used to tape his hands in his work. Defendant had been treated in the hospital on four occasions and on two occasions Clark had seen him. It was shown by the hospital records that during the treatments no pills had been given defendant. He claimed to have received the pills from Clark at the hospital, which was denied by the latter.

Testifying as a witness, defendant claimed he was in bed at the time of the robbery; that he took one pyrobenzedrine pill, went to sleep and, about midnight, took another pill. He testified he suffered from hives and that on the night of the robbery there was much swelling around and underneath his eyes. He denied that he had ever used narcotics, and it was admitted that the APC pills are used to reduce pain, and are not a narcotic.

[1] The contention that the identification by Clark was insufficient is not sustainable. He was positive as to defendant's identity and mentioned characteristics which enabled him to make the identification. Defendant is of Mexican and Belgian extraction and has no foreign accent, and although Clark testified that the robber spoke with a soft German accent, the jury could have believed that this was simulated. The identification of de-

fendant with the corroborating circumstances furnished sufficient evidence to justify the verdict.

[2, 3] Defendant complains that an instruction on circumstantial evidence should have been given. The instructions are not contained in the record and the point need not be considered. However, the principal evidence of the People was direct, the circumstantial evidence merely corroborative, and an instruction on circumstantial evidence was unnecessary. People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805.

There are no other claims of errors which require attention.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 621

PEOPLE v. PANZICK.

Crim. 4987.

District Court of Appeal, Second District, Division 2, California.

June 22, 1953.

Defendant was convicted for engaging in bookmaking upon result of a horse race and for accepting money wagered upon result of a horse race. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained the conviction.

Affirmed.

Gaming ⇐98(1, 3)

Conviction for engaging in bookmaking upon result of a horse race and accepting money wagered upon result of horse race was sustained by evidence. Pen. Code, § 337a.

William W. Burns and Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Ellis Peter Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of violating section 337a of the Penal Code on August 12, 1952, in that he engaged in bookmaking upon the result of a horse race (count I) and accepted money wagered upon the result of a horse race (count III). He was acquitted of (count II) accepting money allegedly wagered on August 8, 1952, on a "contest of speed and power of endurance" between horses. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The sole basis of appeal is appellant's notion that the evidence is insufficient to support either charge made against him. In fostering such vain hope, appellant is doomed to disappointment. He openly violated the statute in respect to the two phases charged on the twelfth day of August, was immediately arrested and as promptly confessed his crimes. His subsequent appearances in court, protesting his innocence, are of no virtue in removing the stain of having engaged in the wayward venture of idle men.

His first attempt while under surveillance to subvert the law on August 8 was when, through the friendly intercession of Mr. Pirrone, proprietor of the bar where appellant made his headquarters, he offered his services to a member of the Los Angeles Police Department. After Officer Janowicz and Pirrone had conferred, the latter went over to talk to appellant who soon came up and inquired of the officer as to his wish. "Give me five and five on Justashower," said the minion of the law. Thereupon, money was allegedly passed to appellant.

Four days later the plainclothesman returned to the Pirrone bar and approached appellant. When he momentarily hesitated, appellant said, "Don't hesitate. If you have got a winner, you have got a winner." The officer thereupon presented to appel-

lant two five-dollar bills, saying, "O. K., give me a five and five parley from Gustaf to Nickelodeon." As the officer was seated at the bar, appellant came forward with a scratch pad and pencil, "again verified * * * the amount of the wager and wrote on the paper Gustaf and Nickelodeon followed by two fives." The officer gave his name as Tip and departed with the promise to return and collect his bet in a few days. In a short time Officer Janowicz returned with his two partners, Officers Adcock and Clark, found appellant at the bar, and put him under arrest. Adcock searched appellant and recovered the two five-dollar bills which bore the identical numbers he had noted prior to Janowicz' bet. At the same time appellant voluntarily returned to Officer Janowicz the ten-dollar bill placed as a bet on August 8.

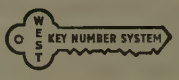
The officers lingered for a half hour at the bar, discussing the marked money and allowing appellant to take a "one-ounce shot of whiskey" which did not intoxicate him. On the way to jail appellant stated, "I am guilty. I took the bets from you last Friday and today. There is no use me telling you I didn't. I'm just going to plead guilty and get 180."

At the trial, Officer Janowicz qualified as a bookmaking expert and testified that "Justashower," "Gustaf" and "Nickelodeon" were horses running at Del Mar Race Track on the 8th and 12th of August, 1952.

Thus, every element in the crimes charged in the information was established by the testimony of the officers, by the recovery of the money that was wagered and by appellant's confession. The argument that the State did not introduce into evidence the scratch pad used by appellant in "bookmaking" is answered by subdivision 1 which emphatically declares that bookmaking "with or without writing, at any time or place * * * is punishable by imprisonment * * * not exceeding one year." The only task for the state was to convince the court of appellant's guilt. It did so by the reasonable testimony of credible witnesses. The court's adoption of such proof spelled the guilt of appellant. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Judgment and order denying the motion of a new trial are affirmed.

McCOMB and FOX, JJ., concur.



118 Cal.App.2d 596

CITY OF LONG BEACH v. LAKEWOOD PARK et al.

Civ. 19432.

District Court of Appeal, Second District, Division 1, California.

June 22, 1953.

Rehearing Denied July 8, 1953.

Hearing Denied Aug. 20, 1953.

Eminent domain proceeding by city in which individual defendants moved for transfer of proceedings to county other than that in which city was located. The Superior Court of the County of Los Angeles, Stanley N. Barnes, granted motion, and city appealed. The District Court of Appeal, Scott, J. pro tem., held that provision of Code of Civil Procedure relating to transfer of actions or proceedings to which city is a party, applied to eminent domain proceedings.

Order affirmed.

1. Venue ⇐36

Provision of Code of Civil Procedure relating to transfer of trial of actions of proceedings to which a city is a party, to a county other than that in which city is located and its adversary resides, applied to eminent domain proceedings by which city sought to acquire property for airport purposes, and defendants who made proper application were entitled to transfer of case to another county for trial. Code Civ.Proc. §§ 394, 1243.

2. Venue ⇐67

Affidavits of defendants who requested order transferring eminent domain proceeding by city for acquisition of property for airport purposes, to another county, by

which such defendants asserted ownership of oil and gas rights, subject to which the property was to be acquired, showed a sufficient interest to warrant transfer order. Code Civ.Proc. §§ 394, 1243.

3. Appeal and Error ⇐912
Venue ⇐72

It is not function of trial court in passing upon sufficiency of showing in support of motion to transfer case to another county than that in which city bringing suit is located, to try the issues, but where the motion is made and determined upon the allegations of the verified complaints and affidavits of defendants, all conflicts must be resolved in favor of prevailing party, and all reasonable inferences which are to be drawn must be in support of trial court's order respecting transfer.

Irving M. Smith, City Atty., and Joseph B. Lamb, Asst. City Atty., Long Beach, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondents, Boyar, Taper, Weingart, Sugarman and Jaffe.

SCOTT, Justice pro tem.

Plaintiff appeals from an order made under Sec. 394 of the Code of Civil Proc. granting a motion by certain defendants to transfer its proceedings in eminent domain to another county. The suit was filed in Los Angeles County, where the property is located, and by this order was transferred to Orange County.

Appellant's first contention is that Sec. 394 of the Code of Civil Proc. is inapplicable to the situation in the case before us. That section provides in part: "Whenever an action or proceeding is brought by a * * * city, against a resident of another * * * city * * * the action or proceeding must be, on motion of either party, transferred for trial to a county, * * * other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides, or is doing business, or is situated". Plaintiff suggests that a proceeding in eminent domain is a "special proceeding", and is therefore neither an "action" nor a "proceeding" as those terms are used in the section cited.

[1] Back in 1903 in the case of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123, 1136, the supreme court held that the section 394, as it then read, applied only to actions and not to "special proceedings" such as eminent domain. But in 1915 the section cited was amended to include the words "or proceeding". In 1926 in the case of City of Stockton v. Ellingwood, 78 Cal.App. 117, 248 P. 272, it was held to be properly applicable to proceedings in eminent domain. In 1951 in the case of City of Oakland v. Darbee, 102 Cal.App.2d 493, 227 P.2d 909, the same section was fully considered and was applied to such a proceeding. See also Mono Power Co. v. City of Los Angeles, 33 Cal. App. 675, 166 P. 387.

Under Title VII—Eminent Domain, section 1243 of the Code of Civ.Proc. says: "The provisions of this code for the change of place of trial of actions shall apply to proceedings under this title except as in this section otherwise provided."

[2] Plaintiffs next contend that the individual defendants who filed the affidavits and requests for order transferring the case to another county do not have rights in the property sought to be condemned sufficient to warrant this demand. It may be that when the case is tried on its merits and the evidence is all before the court a finding may be made that defendants would suffer no detriment.

Considering the showing made in support of the motion and against it, we find in the complaint that the property is to be acquired for airport purposes subject to rights of various defendants to explore for oil, to drill wells, to erect derricks, tanks, machinery and other structures, to construct and maintain pipelines. Defendants' affidavits assert ownership of some of these rights, especially oil and the right to drill wells to get it out.

The methods by which the property will be operated as an airport while derricks are erected and oil is extracted will doubtless be explained at the time the case is

tried, but the trial court in passing on this motion was not called upon to determine it.

[3] It is not the function of the trial court, in passing upon the sufficiency of a showing in support of a motion to transfer a case to another county, to try the issues. Harbinson v. Affeldt, 75 Cal.App.2d 499, 171 P.2d 474. Where, as here, the motion was made and determined upon the allegations of the verified complaint and the affidavits of defendants, "all conflicts must be resolved in favor of the prevailing party * * *; and all reasonable inferences which are to be drawn must be in support of the trial court's order". Hale v. Bohannon, 38 Cal.2d 458, 466, 241 P.2d 4, 8.

Order of June 5, 1952, granting motion to transfer proceedings and trial to another county and designating Orange County is affirmed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 675

MARINO et al. v. TUOLUMNE COUNTY.

Civ. 8206.

District Court of Appeal, Third District, California.

June 24, 1953.

Action against county for damages sustained when a fill over culverts in county road gave way, toppling truck loaded with plaintiffs' household goods into stream. The Superior Court, Tuolumne County, J. T. B. Warne, J., entered judgment for defendant notwithstanding a verdict for plaintiffs, and plaintiffs appealed. The District Court of Appeals, Jones, J. pro tem., held that where the culverts were properly and safely installed in the first instance, and county thereafter inspected them regularly and kept right-of-way clear of all debris and material which might hazardously affect flow of storm water through the culverts, and where inspection made 36 hours before accident showed roadway to be safe, with culverts functioning properly, county was not liable for damages sustained.

Affirmed.

1. Notice ⇐6, 15

It is not in every case that the question of constructive notice is one of fact for jury, but its existence depends upon the circumstances of the particular case, and test of chargeability is whether a person has actual notice of circumstances sufficient to put a prudent man on inquiry. Civ.Code, § 19.

2. Highways ⇐193

To escape charge of constructive notice of defect in county road, county must have made, with reasonable diligence, inspections for discovery of unsafe or defective conditions. Government Code, § 53051.

3. Highways ⇐194

County is not an insurer of safety of all persons using county roads in periods of storm, and was not required to maintain an around the clock inspection of its highways during period when flood condition existed, in order to give warning to travelers of dangerous condition of all weakened bridges and fills, but county was only required to do what a prudent person would do under the circumstances, and had right to assume that all persons using the highways in such periods would be equally prudent in protecting themselves from danger.

4. Automobiles ⇐271

Where culverts in county road were properly and safely installed, and county thereafter inspected them regularly and kept right of way clear of all debris and material which might hazardously affect flow of storm water, and where inspection of such culverts made 36 hours before accident showed the roadway to be safe, with culverts functioning properly, county was not liable for damages sustained when fill over culverts gave way, toppling truck loaded with plaintiffs' household goods into stream. Government Code, § 53051.

5. Automobiles ⇐308(7)

In action against county for damages sustained when a fill over culverts in county road gave way, toppling truck loaded with plaintiffs' household goods into a stream, evidence tending to establish constructive notice of the dangerous condition of the fill was insufficient for jury.

Ross A. Carkeet, Sonora, for appellant.

T. R. Vilas, Sonora, for respondent.

JONES, Justice pro tem.

This appeal is from a judgment notwithstanding the verdict in a case brought by appellants Antone Marino and May Marino against the County of Tuolumne for recovery of damages resulting from a defective condition in a county road. Since Antone Marino was the active participant in plaintiffs' cause, we shall hereafter refer to him for convenience as the appellant.

There is no dispute as to the facts in the case. The accident occurred on a fill over twin culverts in the county road known as the Cedar Ridge Road maintained by the respondent, county. The culverts were installed at a point where the road crosses the headwaters of Sullivan's Creek and had been in operation without incident through winter and summer for eight or ten years up to the time of the accident. The culverts were installed in the stream channel and a fill made over them of sufficient depth to bring its surface up to road grade. A pavement of ordinary black top was laid on the top of the fill. This fill was thoroughly compacted at the time of its construction and had given no trouble during the entire time of its operation.

At about midnight on Saturday, November 18, 1950, appellant was moving a truckload of household goods over the road from Alameda to a home which he had purchased at Cedar Ridge. The truck was being driven by appellant's brother-in-law, with appellant preceding it in a Nash sedan. On arriving at the fill appellant proceeded across and stopped on the far side. While the truck was on the fill it gave way, toppling the truck and dumping the household goods into the stream. It is for this loss that appellant has sought recovery.

Upon the trial a jury awarded him the full amount of his demand, but upon motion the court ordered judgment in favor of the county notwithstanding the verdict. From this judgment the appeal is taken.

[1, 2] Appellant concedes that the county did not have *actual* notice of any defect in the fill, but contends that it had constructive notice of an existing dangerous condition and therefore became liable. Govt.Code, § 53051; Civ.Code, § 19. The precise and only question to be determined on this appeal is whether the record is so devoid of substantial evidence tending to establish constructive notice of the dangerous condition of the fill that the court as a matter of law could refuse to accept the verdict of the jury. It is not in every case that the question of constructive notice is one of fact for the jury. Its existence depends upon the circumstances of the particular case, and the test seems to be that if a person has actual notice of circumstances sufficient to put a prudent man on inquiry he is chargeable. Civ.Code, § 19. And in cases such as this, to escape the charge of constructive notice reasonable diligence must have been made in making inspections for the discovery of unsafe or defective conditions. Perry v. City of San Diego, 80 Cal.App.2d 166, 170, 181 P.2d 98.

The record discloses that when the culverts were installed all the debris that might be hazardous was removed. It further appears that these culverts were inspected regularly to see that they were clear and special inspections were made during each storm. In this case the culverts were inspected by the road crew of the county on the afternoon of Friday, November 17th, and found to be clear and functioning properly. Sometime after this inspection a wooden diversion dam installed by a property owner upstream from the dam washed out and one of the planks 2 x 12 inches in width and thickness washed down and lodged against the upper ends of the culverts, shutting off their intake. The witness Schoettgen testified that he remov-

ed such a plank in this position immediately after the accident. With the intake of the culverts practically shut off, the water backed up and ran over the top of the fill. The witness Abbott testified that when he passed over the culverts about 4:00 p. m. on the afternoon of November 18th, the water was flowing over the top. Prior to 8:00 a. m. of Saturday, November 18th, 2.44 inches of rain had fallen in the area, and from Saturday morning until 8:00 a. m. of the following Monday the rainfall amounted to 5.33 inches. It is unquestioned that a flood condition existed in the area at the time of the accident and that the washout of the culverts occurred because of debris floating downstream from above and clogging the intake.

[3] Appellant argues that it was the duty of the county to maintain an around the clock inspection of its highways in such periods of emergency and to give warning to travelers of the dangerous condition of all weakened bridges and fills. With this contention we can not agree, for to do so would make the county an insurer of the safety of all persons using the highways in periods of storm. The county is only required to do what a prudent person would do under the circumstances, and has the right to assume that all persons using the highways in periods of such excessive storms will be equally prudent in protecting themselves from danger. The storm itself may be said to be a warning of danger on an isolated mountain road likely to result from landslides and washouts and within the contemplation of reasonable persons. It can not be said with any degree of persuasion that the county was in duty bound to make an hour by hour inspection of the Sullivan Creek culverts in order to warn a traveler at midnight at the height of the storm that debris had clogged the inlet. Nor may it be said that a reasonably prudent person would have been on that relatively isolated mountain road at that hour of the night in such a rainstorm with a heavily laden truck and not have expected to flounder in the mud.

The cases of Maddern v. City and County of San Francisco, 74 Cal.App.2d 742, 169 P.2d 425, Murphy v. County of Lake, 106 Cal.App.2d 61, 234 P.2d 712, and Anderson v. County of San Joaquin, 110 Cal.App.2d 703, 244 P.2d 75, do not fit the factual situation existing here. In the Maddern case there was involved a busy street in San Francisco where the pavement collapsed because of a broken sewer pipe. Witnesses testified that cracks in the pavement had existed and were plainly visible for from two to five days before the accident. In the Murphy case the existing dangerous condition of the road had been discussed with the supervisor, within whose district the road was located, preceding the accident, and in Anderson v. County of San Joaquin the dangerous condition had existed and was known to people generally for several months before the accident. Here an inspection made within thirty-six hours showed the roadway to be perfectly safe, which it was, in fact, with the culverts functioning properly and clear of all debris.

[4, 5] The controlling facts in this case are that the culverts were in the first instance properly and safely installed; that the county kept the right-of-way clear of all debris and material which might hazardously affect the flow of storm water through the culverts; that they were inspected regularly; and that in this particular instance they were inspected after the commencement of the storm and were found to be functioning properly and with no debris in sight which would cause a hazard. In our opinion there was no substantial evidence upon which the jury could base its verdict and that the motion for a judgment notwithstanding the verdict was properly granted.

The judgment appealed from is affirmed.

SCHOTTKY, J., and VAN DYKE, P. J., concur.

118 Cal.App.2d 684

BEAR RIVER SAND & GRAVEL CORP. v. PLACER COUNTY et al.

Civ. 8244.

District Court of Appeal,
Third District, California.
June 24, 1953.

Action by sand and gravel company against county and representatives of deceased county road commissioner for breach of alleged contract to purchase crushed rock for use on county roads. The Superior Court, Placer County, Raymond McIntosh, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Jones, J. pro tem., held, inter alia, that the county road commissioner was without authority to make such a contract, and being without authority any such act on his part could not be ratified by the board of supervisors.

Affirmed.

1. Highways ⇐110

Letter from sand and gravel company proposing to deliver three quarter inch crusher run material produced from crushing dredge tailings at certain price and stating that defendant understood that county would take minimum amount of crushed rock, and letter from road commissioner stating that the letter was confirmation to go ahead making preparation for crushing rock and that payment therefor would begin in the future, neither of which letter made mention of lease or hire of company's machinery, did not effect contract for rental of company's equipment. Streets and Highways Code, §§ 2006–2009.

2. Highways ⇐109

County road commissioner, and board of supervisors, were without power to negotiate for purchase of crushed rock to be used on county road without advertising for bids. Streets and Highways Code, §§ 2006–2009; Const. art. 11, § 5; art. 20, § 4.

3. Officers ⇐103

Where power of board or public officer is limited to prescribed method of contracting, mode prescribed becomes measure of power, and if prescribed mode is disregarded, contract is void.

4. Highways ⇐95(1)

The county road commissioner is an officer of the county, not an employee or agent with authority arising out of contract. Streets and Highways Code, §§ 2006–2009; Const. art. 11, § 5; art. 20, § 4.

5. Evidence ⇐65
Officers ⇐103

One who deals with public officer stands charged presumptively with full knowledge of that officer's power and is bound at his peril to ascertain extent of officer's power to bind government of which he is an officer, and any act of officer to be valid must find express authority in the law or be necessarily incidental to power expressly granted.

6. States ⇐66

The courts will go to all reasonable lengths in interpreting statutes conferring powers upon officers of state in order that laws may be given effect and ends of justice subserved, but they cannot by construction confer upon any officer an authority which the legislature has seen fit to withhold.

7. Officers ⇐103

No government, whether local or state, is bound to any extent by an officer acting in excess of his authority even though it has received substantial benefit deriving from the ultra vires act.

8. Officers ⇐103

The void acts of a public officer cannot be ratified.

9. Highways ⇐109

In view of fact that county road commissioner had no power to purchase road materials for county, county board was without power to ratify any act of road commissioner directed to such end. Streets and Highways Code, §§ 2006–2009; Const. art. 11, § 5; art. 20, § 4.

10. Officers ⇐1

A distinguishing feature between an office and an agency is that an office has its origin in the law and an agency originates in contract.

11. Officers ⇐1

The incumbent of a public office is clothed with some part of sovereignty of

the state to be exercised in interests of public and as required by law.

12. Principal and Agent ⇐1

An agent is usually engaged in a temporary employment to perform particular act or acts.

13. Highways ⇐96(1)

In absence of allegation that person, who was county road commissioner, had assumed to act in capacity of agent in contracting for purchase of crushed rock for county roads, complaint seeking damages from estate of such person failed to plead warranty by such person that he had authority to so contract, and, therefore, demurrer to complaint was properly sustained. Civ.Code, § 2342.

Thomas M. Montgomery, Jr., Auburn, for appellant.

T. L. Chamberlain, F. L. Sinclair, Auburn, Al B. Broyer, Dist. Atty. Roseville, and Franklin H. Tuttle, Asst. Dist. Atty., Auburn, for respondents.

JONES, Justice pro tem.

This action was commenced by the Bear River Sand and Gravel Corporation against the County of Placer, and the legal representative of Jerome E. Barieau, former Road Commissioner of the county, now deceased. Three counts were set up in the amended complaint. The second count was dismissed and demurrers to the first and third counts were sustained with leave to amend. Plaintiff declined to amend and judgment was entered for the defendants and it is from this judgment plaintiff has appealed.

Appellant contends that a letter written by it to Barieau and his reply thereto created an enforceable contract against the county and it has sued in its first count for damages for breach of this alleged contract. The third count is against Barieau and is framed upon the theory that the road commissioner warranted himself to be an agent of the county. It is for breach of this alleged warranty that plaintiff seeks to recover damages from his estate.

The letters upon which plaintiff relies are as follows:

"June 1, 1949

"Mr. Jerome Barieau,
Placer County Road Commissioner
130 Commercial Street,
Auburn, California.

"Dear Mr. Barieau:

"Confirming our conversation, it is our proposal to move our portable crushing plant to the County gravel deposit located on the Middle Fork of the American River at Mammoth Bar, and deliver ¾ inch crusher run material produced from crushing the dredge tailings at the Mammoth Bar Deposit into either stockpile or into county trucks *at a price* of $1.00 net per ton of 2000 pounds, plus state sales tax.

"It is further understood that ⅛ x ¼ crushed rock screenings will be produced *at a price* of $1.60 net per ton, and ¼ inch to dust screening material *at a price* of $1.40 net per ton, both plus state sales tax.

"If the County elects, we will also install our portable Barber-Green Pug Mill at the Mammoth Bar Deposit, and produce road mix from the crusher run material produced by the crushing plant *at an additional price* of $1.00 net per ton plus state sales tax, it being understood and agreed that the County will furnish the necessary asphalt for this operation.

"In both the crushing plant and pug mill plant operation, it is understood that the County will furnish sufficient trucks to take the full capacity of the two plants, and that such material not taken by the County trucks will be placed in stockpiles at the Mammoth Bar location for the account of the County, and such additional cost of loading from stockpiles into County trucks will be at the County expense.

"It is understood and agreed that a minimum of 10,000 tons of crushed rock *is to be taken* by the County and a minimum of 5000 tons of road mix under this proposal.

"It is further understood, that *in the event sales can be made* by the Bear River Sand and Gravel Corporation on material

produced from this location *to consumers other than Placer County,* a royalty of $0.25 net per ton will be paid to Placer County on such sales.

"We trust that this is the information you desire, and that we may be favored with this contract.

"Yours very truly,
Bear River Sand & Gravel Corp.
By B. E. Oliver
President"

"BEC/jmr
(Italics added.)

To this letter the Road Commissioner replied as follows:

"June 2, 1949

"The Bear River Sand & Gravel Corporation
Placer County Bank Building
Auburn, California

"Gentlemen:

"We have your letter of June 1, 1949, regarding crushing rock on the river gravel at Mammoth Bar. This is your confirmation to go ahead making your preparation for crushing this rock.

"We will be a little slow in giving you the money for the rock, but we can begin to pay you immediately after July 1, 1949. My understanding is that you are to crush up this material for road mix which we will put on the road just near the top of the hill.

"Your letter says that *you would like to deliver* some of this rock to some other client at $.25 per ton, but I cannot answer this portion of the letter at this time until I take it up with the Board of Supervisors. So as to be ready for this coming summer's work, this is your permission to go ahead and crush rock for the Foresthill Divide road for this summer's work.

"Yours very truly,
Jerome Barieau
Jerome E. Barieau
Road Commissioner"

"JEB/co
(Italics added.)

The position of appellant is that the transaction was in effect a rental of its equipment to the county at a price of so much per ton for rock crushed upon a contract which was ratified by the Board of Supervisors through the allowance of its claim for 1,170 tons of rock crushed. We cannot subscribe to this contention.

Appellant's letter to Barieau states that "* * * *it is our proposal to* * * * *deliver* ¾ inch crusher run material produced from crushing the dredge tailings at the Mammoth Bar deposit into either stockpile or into county trucks *at a price* of $1.00 net per ton of 2000 pounds, plus state sales tax." (Italics added.) The letter also contains the following pertinent paragraph: "It is further understood, that in the event *sales can be made* by the Bear River Sand and Gravel Corporation on material produced from this location *to consumers other than Placer County,* a royalty of $0.25 net per ton will be paid to Placer County on such sales." (Italics added.) That the county should bind itself to accept delivery at the stated price is indicated by this language of appellant: "It is understood and agreed that a minimum of 10,000 tons of crushed rock *is to be taken* by the County and a minimum of 5000 tons of road mix *under this proposal.*" (Italics added.)

Barieau's answer to appellant's letter says: "This is your confirmation to go ahead making your preparation for crushing this rock. We will be a little slow *in giving you the money for the rock,* but we can begin to pay you immediately after July 1, 1949. * * * Your letter says that you would like to *deliver* some of this rock *to some other client* at $.25 per ton, but I cannot answer this portion of the letter at this time until I take it up with the Board of Supervisors." (Italics added.)

[1] In neither letter is mention made of lease or hire of appellant's machinery. On the other hand, the letters treat of the doing of work for the county under contract, i. e., the crushing of rock and the payment therefor after acceptance. The letters negative all idea of rental or lease of the appellant's machinery.

Furthermore, the claims presented to the board of supervisors (Exhibits A and B attached to the complaint) in each instance recite that the demand is for crushed rock

placed in stockpiles at the Mammoth Bar deposit.

[2, 3] The road commissioner was without power to negotiate such a sale, and so was the board of supervisors without advertising for bids. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 353, 291 P. 839, 71 A.L.R. 161; Reams v. Cooley, 171 Cal. 150, 152 P. 293; Mullan v. State, 114 Cal. 578, 46 P. 670, 34 L.R.A. 262; Contra Costa Construction Co. v. City of Daly City, 48 Cal. App. 622, 192 P. 178. When the power of a board or public officer is limited to a prescribed method of contracting, the mode prescribed becomes the measure of the power. If the prescribed mode is disregarded, the contract is void and unenforceable.

[4] The office of road commissioner is created by the Streets and Highways Code. Sections 2006 to 2009 of that code provide for the appointment by the board of supervisors of a single road commissioner for all road districts in each county of the state, fix his qualifications, prescribe from what monies his salary shall be paid, and limit his contractual powers. Our form of state government makes provision for the legislature to establish offices in addition to those created by the Constitution, Const. Art. XX, sec. 4; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249, and to prescribe their duties and fix their terms of office. Const. Art. XI, sec. 5; Reed v. Hammond, 18 Cal. App. 442, 123 P. 346. As is held in Ryan v. Riley, 65 Cal.App. 181, 191–192, 223 P. 1027, the road commissioner is one of those offices and the incumbent is an officer of the county, and not an employee or agent with authority arising out of contract.

The source of the power of the road commissioner is in the sections of the Streets and Highways Code cited. His contractual power is limited by section 2009 of this code to hiring employees and to the purchase, lease or hire of road equipment. This power to so contract is, however, a conditional one, and by virtue of the statute can only be exercised "subject to approval of the board as to the price or rental." By no provision of the law is any authority conferred upon him to purchase road materials of any kind.

[5–7] One who deals with a public officer stands charged presumptively with a full knowledge of that officer's powers and is bound at his peril to ascertain the extent of his power to bind the government of which he is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted. Irwin v. County of Yuba, 119 Cal. 686, 52 P. 35. While the courts will go to all reasonable lengths in interpreting the statutes conferring powers upon the officers of the state in order that the laws may be given effect and the ends of justice subserved, they cannot by construction confer upon any officer an authority which the legislature has seen fit to withhold. Christophel v. Riley, 206 Cal. 242, 245, 273 P. 1064; Allen v. State Board of Equalization, 43 Cal.App.2d 90, 93, 110 P.2d 73. No government, whether state or local, is bound to any extent by an officer acting in excess of his authority even though it has received substantial benefits deriving from the ultra vires act. Reams v. Cooley, supra, 171 Cal. at page 157, 152 P. 293. Since Barieau as Road Commissioner was not authorized by any provision of the law to purchase materials of any character for use on the county roads, the County of Placer could not be bound.

[8, 9] If, as appellant contends, Barieau ordered the crushed rock for the County of Placer, he had no authority in the law to do so and his act was void. The void acts of a public officer cannot be ratified. This principle is pointed out in Miller v. McKinnon, supra, 20 Cal.2d at page 88, 124 P.2d at page 37, 140 A.L.R. 570, where it is stated, " 'that contracts wholly beyond the powers of a municipality are void. They cannot be ratified; * * *.' " The road commissioner having no power in the first instance to purchase road materials for the county, the board was without power to ratify any act on his part directed to this end.

In the third cause of action it is alleged that, "Said Jerome E. Barieau at all times herein mentioned was the duly appointed, qualified and acting Road Commissioner of

defendant County of Placer." It is also alleged that he wrote the letter of June 2, 1949, subscribed by him as road commissioner. There is no allegation that Barieau acted, or purported to act, in any capacity other than that of road commissioner and as a public officer. This failure renders the third count fatally defective.

[10–13] A distinguishing feature between an office and an agency is that the former has its origin in the law while the latter originates in contract. The incumbent of an office is clothed with some part of the sovereignty of the state to be exercised in the interests of the public and as required by law. An agent is usually engaged in a temporary employment to perform a particular act or acts. Curtin v. State of California, 61 Cal.App. 377, 214 P. 1030. It is not here pleaded that Barieau assumed to act in any such capacity, Civil Code, Sec. 2342, and there is, therefore, a failure to plead the warranty upon which appellant relies.

The demurrers in our opinion were properly sustained.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



118 Cal.App.2d 584

RANDOLPH v. RANDOLPH.

Civ. 15432.

District Court of Appeal, First District, Division 2, California.

June 22, 1953.

Rehearing Denied July 22, 1953.

Hearing Denied Aug. 20, 1953.

Divorce action by husband. The wife cross-complained asking for separate maintenance. The Superior Court, County of Alameda, rendered judgment for husband and against the wife on her cross-complaint, and the husband appealed from that portion of the judgment which awarded the wife $17,155.62 as her half of the community property. The District Court of Appeal, Nourse, P. J., held that wife's desertion of husband did not deprive her of her right in community property, but that the evidence was insufficient to sustain the valuation which was placed on floral business.

Affirmed in part and reversed in part with directions.

1. Divorce ⇐252
Husband and Wife ⇐272(1)

Wife's desertion of husband did not deprive her of her rights in community property and on their divorce the wife would be awarded her interest in such property. Civ.Code, §§ 146, 169.

2. Husband and Wife ⇐257

The usual method of determining value of husband's interest in business in which he works and in which he also uses his separate property is to allow husband the amount so invested by him with interest at usual rate for well secured investments, and profits or accruals in excess of that amount are considered community property and attributable to husband's personal labor, ability, energy and character, and it is only when profits and accruals actually attributable to separate property are proved to differ from such interest rate that there is reason to depart from such method.

3. Divorce ⇐252

The value of property to be divided must be taken as of a date as near as possible to the date of dissolution of marital community.

4. Divorce ⇐253

In divorce action, evidence was insufficient to sustain valuation which was placed on floral business as respects amount to be awarded to wife as her share in community property.

Forrest E. Macomber, Stockton, Gordon J. Aulik, Stockton, of counsel, for appellant.

Gilbert D. Calden and M. F. Hallmark, Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for divorce on the grounds of his wife's desertion and cruelty. The

wife cross-complained asking for separate maintenance. Judgment was entered for the husband on the ground of wilful desertion and against the wife on her cross-complaint. The husband appeals from that portion of the judgment which awards the wife $17,155.62 as her half of the community property of the parties.

The parties were married in June 1926 and from then on lived with the husband's mother in Stockton. A daughter was born there on April 6, 1927. On December 26, 1928 the wife left with the child and moved to her mother's place in Oakland. Since then the parties lived separate, the wife with the daughter in Oakland, the husband with his mother in Stockton.

[1] Appellant's primary contention is that by so abandoning her husband the wife terminated the marital community and thereby lost all benefits incident to her marital status or was estopped from claiming them; he relies mainly on Pendleton v. Brown, 25 Ariz. 604, 221 P. 213. De Funiak (Community Property secs. 189–190) defends this theory in part on the basis of old Spanish law, but the later American cases except the Pendleton case, supra, reject it as not recognized in and not in accord with the statutory provisions as to community property, which give the wife an interest in all such property acquired by either party as is community property according to statute until the marital community is terminated by death or judicial decree. See George v. Reynolds, Tex.Civ.App., 53 S.W.2d 490, 493; Beals v. Ares, 25 N.M. 459, 185 P. 780, 793. Although in California the spouses can change the character of their property from community to separate by their agreement, there is no indication in our code or in our decisions that a deserting wife can be deprived of her community interest against her will. To the contrary section 146, Civil Code, provides that in case a marriage is dissolved by decree of court on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties, thus preventing the penalizing of a spouse guilty of desertion only in his or her community property interest. Tipton v. Tipton, 209 Cal. 443, 288 P. 65. It is inconceivable that the legislature should have intended that the courts would have no power to penalize a deserting spouse by taking from him or her any part of the community interest considered to have continued in existence until the decree, but that they would have power to punish him or her by a declaration that he or she had forfeited all of such interest by the act of desertion.

It may also be pointed out that section 169, Civil Code, provides that when a wife lives separate from her husband her earnings and accumulations are her separate property but that no corresponding provision is made for the protection of a deserted husband. If such a provision would be desirable it would be the task of the legislature to make it. Until this is done the deserted husband can find protection in the diligent institution of a divorce suit only.

The Pendleton case, supra, can be distinguished on its facts because in that case there was not only desertion by the wife but also open living in adultery and an agreement of separation and division of property which could be construed as a voluntary relinquishment by her of all her community interest. Moreover the case has never been followed during the 30 years which passed since its decision.

Except for the general contentions rejected above, appellant complains with respect to the several items of community property stated and divided by the court, only of the decision as to his floral business. He had acquired a half interest in it in 1920, paying $2,500 for it. After his marriage he continued to work full time in it. In 1941 he acquired the other half interest for $6,250. Appellant borrowed the money required to take over the second half interest, $3,250 from a bank and an equal amount from his mother. At the time of the trial the bank loan had been fully repaid. No payment had been made on principal or interest of the mother's loan. There were received in evidence a "statement of operations" of the floral company as of December 31, 1949 showing a total capital (net worth) of $20,011.61 and a statement of financial condition of said company as of December 31, 1950, annexed to appellant's

income tax return over 1950, showing a net worth of $12,820.69. Both statements had been drawn up by the same certified public accountant. This accountant testified at the trial and there compared the two statements. Both he and the appellant testified that the decrease resulted from the fact that in the earlier statement was included a special deposit of $4,000 from appellant's personal account which was withdrawn prior to the date of the second statement and further from loss in business and withdrawals for living expenses. Appellant moreover testified that the value of the business at the time of the trial was approximately $12,000 and that the amount of $4,000 withdrawn had become part of the assets he owned over and above the business, which assets he enumerated and which the court included in accordance with said testimony in its statement of all assets to be divided. The court adopted as value of the business $20,011.61, the net capital according to the statement as of December 31, 1949. Of this the court considered an amount of $6,933, being appellant's original investment of $2,500 plus 7% interest, as appellant's separate interest. From the balance $5,120 was deducted for the loan given by appellant's mother with the agreed interest of 7% resulting in a net community interest in the floral business of $7,958.61.

As against this calculation appellant assigns three errors: considering the wife's absence all earnings and accumulations of the business, in which appellant invested his separate property and not only the amount invested plus interest should have been considered his separate property; at any rate the half interest of the business acquired by means of loans in 1941 should have been so considered (over and above the original investment of $2,500 plus interest) and finally the total value of the business should have been fixed at $12,820.69 instead of $20,011.61.

[2] The first two contentions are without merit. The usual method of determining the value of a husband's interest in a business in which he works and in which he also uses his separate property is to allow the husband the amount so invested by him with interest at the usual rate for well secured investments; profits or accruals in excess of that amount are then considered community property as attributable to the husband's personal labor, ability, energy and character, Pereira v. Pereira, 156 Cal. 1, 7, 103 P. 488, 23 L.R.A.,N.S., 880; Stice v. Stice, 81 Cal.App.2d 792, 796, 185 P.2d 402; Berry v. Berry, 117 Cal.App.2d 624, 256 P.2d 646. Only when the profits and accruals actually attributable to the separate property are proved to differ from such interest rate, like in the Berry case, supra, and in Cozzi v. Cozzi, 81 Cal.App. 2d 229, 183 P.2d 739, cited by appellant, is there reason to depart from this system. No such proof was offered here. Therefore the usual system was correctly applied here to the original investment of $2,500. The desertion by the wife is not relevant in this respect; on the grounds stated before it does not influence her community property rights.

The court correctly abstained from deciding whether the funds received as loans were separate or community property because under the circumstances of this case it does not make any difference. Even if the funds of the loans had become appellant's separate property the usual method described above should have been applied to find the separate interest in the business acquired by appellant because of these funds. He would then only have received the principals of these loans with the usual interest and he received all he could be entitled to in this respect when the bank loan was paid back with interest and the loan of his mother with 7% interest deducted from the value of the floral business in calculating the community interest in it.

[3, 4] However we cannot uphold the evaluation of the floral business at $20,011.61, the net worth according to the statement as of December 31, 1949. There was no conflict in the evidence as to the value of the business. The evidence showing that the net worth as of December 31, 1950 was $12,820.69 was of exactly the same kind as the evidence as to the net worth as of December 31, 1949 and did not conflict with it. Evidently the value of property

to be divided must be taken as of a date as near as possible to the date of the dissolution of the marital community. Moreover according to the uncontradicted evidence by taking the value of the business in accordance with the statement as of December 31, 1949 and the assets outside the business as they were at the time of the trial an amount of $4,000 was counted twice to appellant's detriment. On the basis of the evidence available the value of the business must be placed at $12,820.69.

Insofar as the judgment is based on the evaluation of appellant's floral business at $20,011.61 it is reversed with directions to the trial court to change this value to $12,820.69 and to amend accordingly the calculation of defendant's half interest in the community property and the community property awarded to her. In all other respects the judgment is affirmed.

GOODELL and DOOLING, JJ., concur.



THOMPSON v. LACEY.*

Civ. 4515.

District Court of Appeal, Fourth District, California.

June 23, 1953.

Hearing Granted Aug. 20, 1953.

Action for damages arising out of automobile accident. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment for driver's administrator as of nonsuit, and occupant's administrator appealed. The District Court of Appeal, Barnard, P. J., held that where occupant and driver were both required to attend sales meeting, and there was no evidence that driver's offer to give occupant a ride to the meeting was conditioned in any respect, and there was no evidence that any tangible benefit accrued to driver by reason of occupant's accepting ride, occupant was a "guest" within guest statute.

Affirmed.

1. Automobiles ⇐181(2), 242(1)

Mere exchange of social amenities is not sufficient to transform a "guest" into a "passenger" within guest statute, but there must be proof that a special and tangible benefit accrued to driver and that such tangible benefit was motivating influence for furnishing the transportation. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Passenger".

2. Automobiles ⇐181(2)

Where automobile occupant and driver were both required to attend sales meeting, and there was no evidence that driver's offer to give occupant a ride to the meeting was conditional in any respect, and there was no evidence that any tangible benefit accrued to driver by reason of occupant's acceptance of ride, occupant was a "guest". Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest".

3. Automobiles ⇐244(20)

Clear meaning of guest statute should not be abrogated or changed, under guise of interpretation, in such a manner as to permit a recovery on unsubstantial evidence which, at best, amounts to mere speculation or conjecture.

4. Automobiles ⇐181(1)

"Willful misconduct" within guest statute is something more than ordinary negligence and more than gross negligence, and to constitute willful misconduct, conduct of driver must amount to an intentional doing of something with express or implied knowledge that an injury will probably result or must disclose a wanton and reckless disregard of the consequences.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful Misconduct".

5. Automobiles ⇐181(1)

Where driver whose automobile was traveling at 35 miles per hour on foggy

* Subsequent opinion 267 P.2d 1.

morning made several attempts to pass preceding automobile and was prevented from doing so by oncoming traffic, and driver had used his brakes to get back onto his own side of the road, and on last attempt, his automobile collided with oncoming truck, even if conduct of driver constituted negligence or gross negligence it did not constitute willful misconduct within guest statute. Vehicle Code, § 403.

Luce, Forward, Kunzel & Scripps, San Diego, for appellant.

Gray, Cary, Ames & Frye, Ward W. Waddell, Jr., and Alfred S. Wilkins, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from the judgment in an action for damages arising out of an automobile accident which happened about 7:30 a. m. on January 18, 1950, on U. S. Highway 101, two miles south of Irvine, in Orange County. This was a two-lane highway with a white line in the middle. The road was straight at that point but a heavy fog limited the visibility to between 100 and 150 feet, or 175 feet, according to different witnesses.

On that morning Mr. Thompson, Mr. Kerns and a Mr. Dreis left San Diego on their way to Los Angeles, in an automobile owned and driven by Kerns. Thompson and Kerns were in the front seat and Dreis was in the rear seat. Shortly before the accident Kerns, after several unsuccessful attempts, passed a car driven by one Jackson and pulled in behind a truck which Jackson had been following for about half an hour. Kerns then made several attempts to pass this truck and each time returned to his own lane to avoid colliding with a south-bound car. Shortly thereafter, Kerns made another such attempt and while trying to pass that truck he collided headon with another south-bound truck. Kerns and Thompson were both killed in the accident and Dreis, who received a head injury, had no recollection of the accident itself. He testified that prior to the accident there had been some discussion about the fog, which was encountered "in varying intensity" all the way, but that he remembered no comment about the manner in which Kerns was driving.

Kerns was manager of the San Diego branch of the Arrowhead and Puritas Water Company, which included the San Diego and El Centro areas. Thompson was the sales supervisor of the San Diego area and Dreis was the sales supervisor of the El Centro area, Kerns being the immedate supervisor of both. All three had been asked to attend a meeting at the office of the company in Los Angeles for the purpose of discussing business policies for the ensuing year. On several prior trips of this nature these parties had ridden in Kerns' car and on one such occasion they had traveled in Thompson's car. A company official testified that all the employees were free to choose their own transportation, whether by train, plane or automobile, and that the company paid their actual travel expense, paying a certain rate per mile to any employee whose car was actually used. On this occasion Dreis came from El Centro, staying over night at Thompson's home, and the parties started from Los Angeles in Kerns' car. There was no evidence as to what was said by any one concerning the making of this trip, as to who suggested that they travel in Kerns' car, or as to why this arrangement was made.

At the conclusion of the plaintiff's case the court granted the defendant's motion for a nonsuit, and the plaintiff has appealed from the judgment which followed.

The main question on this appeal is whether the evidence is sufficient to show that Thompson was a passenger in this car, and not a guest, within the meaning of Section 403 of the Vehicle Code, which forbids recovery in such an action where the party in question accepts a ride "without giving compensation for such ride". The appellant contends that under the evidence the jury could reasonably have inferred that Thompson was a passenger and not a guest; that in construing this statute "the courts have gradually expanded the definition of compensation so as to afford relief to all persons who are injured while riding in automobiles for other than purely social

reasons"; that a case is taken out of the scope of this statute where the relationship of employer and employee exists or the passenger is performing services for the principal, or where the parties embark upon a joint venture of a business nature rather than of a merely social aspect; that there was a definite business relationship here between Kerns and Thompson, of which this trip was an incident; that both men were interested in the sale program which was to be discussed at the meeting; that the parties had no other goal but the meeting, and Kerns could not reap the full benefit of the meeting without having Thompson present; that the trip was purely a business venture undertaken in pursuit of the mutual business of these parties and their employer; that Kerns and the company would be benefited through the furnishing of this transportation because Kerns would be thus assured that Thompson would hear the discussion at the meeting and be in a better position to increase sales in the San Diego branch; and that the company would further benefit since it would save any mileage allowance to Thompson for the use of his own car.

[1, 2] It is well settled that the ordinary exchange of social amenities is not sufficient, and that this statute requires proof (1) that a special and tangible benefit accrued to the defendant, and (2) that this tangible benefit was the motivating influence for furnishing the transportation. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. In that case, the court said: "It is obvious that if a different result obtained under any construction of the statute its purposes would be defeated and its effect annulled." A showing that the trip was for the purpose of attending a meeting or conference in which both parties were interested, standing alone, is not sufficient; and this is true whether the conference was of a business or social nature. Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53. In the Whitechat case, the court said: "* * * it must be shown that the appellant and the deceased were engaged in a business venture for their mutual advantage and that the ride was an integral part of that business venture." [19 Cal.2d 428, 122 P.2d 50.] In that case the trip was for the purpose of attending a business meeting of a social organization. Four occupants of the car, being delegates, were required or expected to attend the meeting while the driver of the car was not such a delegate. It was held that while the trip was an integral part of a business venture for their mutual advantage, the relationship between the parties was merely one of a social nature. In the Druzanich case, the trip was for the purpose of attending a conference called by a labor union, and all parties concerned were delegates from separate branches of the same local union. It was there contended that compensation for the ride had been given, within the meaning of Section 403, because the parties were engaged in a business venture for their mutual advantage and traveling in contemplation of their mutual business. The court there said:

> "This same contention was made by the respondents in the Whitechat case, supra, and we there held that the relationship between the driver and the deceased was not such as to bring the case within that group of cases headed by Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914, which stands for the above-mentioned proposition. The relationship in the Whitechat case differs from that presented here in that in the former case the driver, although a member of the Young Men's Institute, was not required to attend the meeting in Stockton, whereas in the instant case both parties were delegates to the conference. However, the instant case still does not come within the Walker v. Adamson classification. It is true that both parties desired or, as delegates, were required to attend the conference. It is also true that each would be benefited by individual attendance. However, the attendance of one was not necessary for the enjoyment of the benefits of attendance by the other. This being so, it becomes immaterial whether the conference was of a business or social nature. * * In the instant case either the appellant

or respondent Dorothy Criley could have enjoyed the benefits of the conference without the presence of the other. The fact that the parties were both interested in the general objective of the trip, viz., the attending of the conference, is not the controlling factor." [19 Cal.2d 439, 122 P.2d 55.]

It was then held that because the evidence disclosed that prior to the trip the offer to transport the appellant was made conditional upon his sharing in the driving, without which agreement the car would not have been used, a special tangible benefit appeared which was the motivating influence for furnishing the transportation.

Where an employee was required to make the trip, it was held that the further fact that he was required by his superior officer to make the trip in the defendant's car would be sufficient to show that it was not a mere acceptance of the hospitality of another. Bree v. Lamb, 120 Conn. 1, 178 A. 919. That case and the Druzanich case support the conclusion that the fact that attendance at a business conference is required is not, in itself, sufficient; that where the injured party was free to choose his conveyance there must be some tangible benefit conferred by him through his acceptance of that particular ride; and that this tangible benefit must be the "motivating influence" for furnishing the transportation.

In the instant case, there is no evidence that the offer of a ride was conditional in any respect, and the only evidence concerning the ride itself is that the parties rode in Kerns' car on their way to a business conference which both were expected to attend. If it could be inferred that Thompson's presence at this meeting was of benefit to Kerns, or to the company, there is no evidence to justify a further inference that this was the motivating influence for furnishing this ride. Thompson could have gone in his own car or otherwise, with his expenses paid, and there was no benefit arising from the ride itself. While they were on a business trip there was no mutual advantage in going together since neither would profit financially from so doing, and the ride was in no way an integral part of the business they had in mind. There was nothing in the ride itself whereby either enjoyed a business benefit from the presence of the other, and there was nothing in connection with the conference which made the presence of either on the ride necessary to the enjoyment of the benefit of the conference by the other. There is no evidence justifying an inference that Thompson would not have attended the conference had this ride not been made available to him. It is argued that Thompson saved the company a small sum by relieving it from the necessity of paying his travel expense. The manager of the company testified that the company was not concerned in such a matter, and any such benefit was furnished by Kerns and should not be considered tangible compensation given by Thompson or any one on his behalf. In any event, the evidence is not sufficient to justify an inference that this element constituted any motivating influence for furnishing this transportation.

Even if the presence of Thompson at this conference might have been of some benefit to Kerns or the company, there is no evidence justifying an inference that this was so connected with the ride as to constitute the motivating influence for any offer of the ride. The only reasonable inference from the evidence produced is that Kerns decided to drive his car and took Thompson along by express or implied invitation; that while both were interested in attending the conference, the idea of any tangible benefit accruing from the acceptance of the ride was in no way a "motivating influence"; and that no such idea was in the mind of anybody concerned. There is no evidence of any regular alternative use of cars, and nothing to indicate any "giving compensation for such ride" other than the fact that both parties were interested in attending the same meeting. Under such circumstances, as was said in the Druzanich case, "it becomes immaterial whether the conference was of a business or social nature."

[3] This statute was very clearly intended to require that some real and tangible benefit conferred on another by the party accepting the ride was the underlying

reason for the ride, in order to change his status from that of guest to passenger, and the clear meaning of the statute should not be abrogated or changed, under the guise of interpretation, in such a manner as to permit a recovery on unsubstantial evidence which, at best, amounts to mere speculation or conjecture.

The appellant further contends that there was sufficient evidence of willful misconduct to require a submission of this case to a jury. It is argued that this accident happened on a foggy morning on a two-lane highway with visibility limited to about 150 feet; that Kerns made several attempts to pass the Jackson car but was forced back by oncoming traffic; that after he passed the Jackson car he made several attempts to pass the truck but was forced back; that on one of these occasions one of the southbound automobiles was forced partly off the highway because Kerns was unable to get back in time; that he made a final attempt to pass the truck knowing that it was almost impossible to do so; and that, while there is no evidence of any verbal warning by any occupant of his car, the evidence indicates that Kerns was guilty of deliberate and intentional conduct with knowledge of the fact that danger was likely to result therefrom.

[4] Willful misconduct is something more than ordinary negligence and more than gross negligence. Under the accepted definition, the conduct of a driver must amount to an intentional doing of something with the express or implied knowledge that an injury will probably result, or must disclose a wanton and reckless disregard of the consequences, in order to constitute willful misconduct. Turner v. Standard Oil Co. of California, 134 Cal. App. 622, 25 P.2d 988; Van Fleet v. Heyler, 51 Cal.App.2d 719, 125 P.2d 586. When the guest law was adopted in 1929, it included gross negligence as one of the exceptions. This element was later eliminated, leaving intoxication and willful misconduct as the only exceptions, and it seems apparent that this change was intended to further the original purpose of the law, by making it clear that some misconduct greater than that involved in even gross negligence, was required.

[5] While this was a foggy morning, this is a common condition which affects all motorists at times. The evidence is that Kerns had been traveling at about 35 miles per hour, and there is no evidence indicating that his manner of driving disclosed a continued or persistent course of intentional disregard for the consequences. Mr. Dreis testified that he remembered no protests or criticism of Kerns' driving. Jackson testified that before Kerns passed his car "He made one or two attempts to pass and oncoming traffic would kind of hinder him just a little"; that after Kerns passed his car Kerns made several attempts to pass the truck; that he could see by the stop lights on Kerns' car that Kerns had used his brakes to get back on his own side of the road behind the truck; and that on one of these occasions the other car "had to go off the road just a little bit." The evidence clearly shows that while Kerns made several prior attempts to pass the Jackson car and the truck, he did not then recklessly proceed but on each occasion he returned to his own lane when he found that he could not safely complete such passing. This discloses the usual situation where a driver pulls out far enough to see whether or not he can safely pass another vehicle, and returns to his own lane when he finds that this cannot be done. The fact that Kerns did this several times before he could safely pass the Jackson car, and also several times before his final attempt to pass the truck, strongly indicates an attempt to drive safely rather than an act intentionally done with knowledge that it would result in probable injury, or an act done with intentional or wanton disregard for the consequences. The only reasonable inference is that he made a mistake in judgment on the last occasion. If it be conceded that the evidence was sufficient to show negligence on Kerns' part, or even gross negligence, it was not sufficient to have supported a finding that he was guilty of willful misconduct, within the meaning of this statute. Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Weir v. Lukes, 13 Cal.

App.2d 312, 56 P.2d 987; McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189; Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 679

HORNEY v. HORNEY et al.

Civ. 8238.

District Court of Appeal, Third District, California.

June 24, 1953.

Action by man against former wife for accounting of proceeds from sale of realty in sister state, and to have trust declared on California realty which was allegedly purchased with proceeds from sold property, and for other relief. The Superior Court, Siskiyou County, Claude E. Gillis, J., entered judgment in favor of the former wife, and the plaintiff appealed. The District Court of Appeal, Jones, J. pro tem., held that where one of findings complained of disposed of all issues, it was immaterial whether other findings made by trial court were supported by evidence.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

Where there was substantial evidence in the record to support a finding of the trial court, such finding was conclusive upon the District Court of Appeal.

2. Pleading ⇐150

Where plaintiff made no answer to defendants' cross-complaint, the allegations thereof stood admitted.

3. Appeal and Error ⇐931(7)

If one finding, supported by substantial evidence, will sustain trial court's judgment, it will be presumed that trial court predicated its judgment upon such finding, and questions relative to other findings become immaterial upon appeal.

4. Trial ⇐391

Although it is unnecessary for trial court to find upon admitted facts, nevertheless, a finding of admitted facts affords no grounds for complaint, except when the findings are made contrary to the admitted facts.

5. Trial ⇐396(7)

Since all allegations of fact which are admitted are conclusive, any finding adverse to admission must be disregarded.

6. Trial ⇐396(6)

In action against plaintiff's former wife for accounting of proceeds from sale of realty in sister state, and to have trust declared on California realty which was allegedly purchased with proceeds from the sold realty, and for other relief, finding to effect that former wife, acting under power of attorney, sold the realty but spent funds received for her maintenance and support, for bills of the parties, and sent money to the plaintiff at his request, disposed of all of the issues, and rendered immaterial question whether findings as to marriage relationship of the party, times when plaintiff was in military service, and form of deed to the sold realty, were supported by evidence.

Mark M. Brawman, Yreka, for appellant.

Samuel R. Friedman, Yreka, for respondent.

JONES, Justice pro tem.

In this action the plaintiff has sued in four counts. The first count is for an accounting of the proceeds from the sale of real property in the State of Kansas, and to have a trust declared in real property in this State upon the theory that the proceeds from the Kansas real property were invested in the property in California. The other three counts are respectively for conversion of the proceeds of said sale; for money had and received; and for general damages. No point is made by appellant concerning any of the findings made in the case except as to the first count. As to this count it is charged that the findings are not supported by the evidence, and the appeal is based on this ground alone.

In addition to answering all of the material allegations of each count of the complaint the defendant Kathleen J. Buchanan filed a cross-complaint, setting up three counts in the cross action. By two of these counts she alleged title to the California property in herself and her present husband. The third count is to recover damages in the amount of $3,000 against the plaintiff, her former husband, for slandering the title to the California realty. Judgment went for her, decreeing title to this property in her and her present husband. All relief was denied on the third count. The appeal is from this judgment.

The record discloses that the plaintiff and defendant were married at Neodesha, Kansas, on the 25th day of July, 1937, and continued to be husband and wife until she was granted a decree of divorce in the State of Nevada on the 8th day of April, 1947. On June 13, 1939, while the parties were living together, a deed of Lots 13, 14, 15 and 16 of Block 56 of the original townsite of the City of Neodesha in the State of Kansas was made and delivered to the plaintiff. This property was improved with a duplex dwelling house. In 1942 the parties removed to California. Thereafter, and on August 30, 1943, plaintiff entered the armed forces of the United States. On July 7, 1944, he executed to his wife a full power of attorney to act for him in all matters and things, and on the 25th day of November, 1946, exercising this power, she entered into a contract to sell the Kansas property for $5,000. And in further exercise of the power she subsequently executed a deed of the property to the buyer. It is conceded that she received the $5,000 out of which there were deductions of a broker's commission of $150 upon the sale of the property; $776.02, the balance on a mortgage; $87.21, county taxes; and $17, a refund of rent already paid.

[1] Appellant contends that the balance of the proceeds was used by his former wife for the purchase of the California realty upon which he seeks to impress a trust. The additional contention is made by him that if the proceeds were not so used, he is entitled to a money judgment for one-half of their net amount. The respondent's position is that she exhausted the net returns in payment of community debts; in providing support for herself prior to her divorce; and in advances made to the husband. Her position is sustained by the express finding of the trial court "that the defendant and cross-complainant Kathleen Jane Buchanan sold said property of the parties hereto for Five Thousand and no/100 Dollars ($5,000.00) and received said sum less all liens and encumbrances and costs of sale and that she subsequently spent said funds for her maintenance and support, bills of the parties hereto and sums of money sent to plaintiff at his request." Since there is substantial evidence in the record to support this finding it is conclusive upon this court. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.

[2] The record discloses no answer made to the cross-complaint. Therefore, its allegations stand admitted. Notwithstanding this admission, the court found the allegations of the first two causes of action to be true, and that the title to the Siskiyou County property vested in Kathleen Jane Buchanan and W. A. Buchanan by virtue of a deed and a homestead declaration.

The findings are complex in that they are made, with few exceptions, by reference to paragraphs of the pleadings as being true or untrue. Of these findings so made, appellant challenges those designated as I, II, III and V as not being supported by the evidence. Finding I deals with the marriage relationship of the parties; Finding II with the times when appellant was in the military service of the United States; Finding III with the form of the deed to the Kansas property; and Finding V is that which is hereinabove set out and held to be conclusive on this Court.

[3] With respect to these findings it is pointed out by the respondent that since Finding V disposes of the issues, the other findings complained of are rendered immaterial. Respondent cites as authority Luckhardt v. Mooradian, 92 Cal.App.2d 501, 207 P.2d 579; Mershon Co. v. Pachmayr, 88 Cal.App.2d 901, 199 P.2d 687; and Rosenfield v. Vosper, 86 Cal.App.2d 687, 195 P.2d 530. As is said in Mershon Co.

v. Pachmayr, supra, 88 Cal.App.2d at page 904, 199 P.2d at page 688: "If one finding, supported by substantial evidence, will sustain the trial court's judgment, as in the present case the above finding does, it will be presumed that the trial court predicated its judgment upon such finding, and questions relative to other findings become immaterial upon appeal." The case at bar falls squarely within this rule.

[4, 5] Although it is unnecessary to find upon admitted facts, nevertheless, a finding of admitted facts affords no grounds for complaint. Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 104, 44 P.2d 670; City of Los Angeles v. City of Huntington Park, 32 Cal.App.2d 253, 265, 89 P.2d 702. Error is to be charged only when findings are made contrary to the admitted facts. Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 698, 41 P.2d 378. Inasmuch as all allegations of fact which are admitted are conclusive, any finding adverse to the admission must be disregarded. This rule is stated in Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626, 636, as follows: " 'Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true.' " Code Civ.Proc., § 462. It was said in Burnett v. Stearns, 33 Cal. 468, 474: "The finding should be confined to the facts in issue. The province of the Court in respect to facts is to determine but not to raise the issue." See, also, Ortega v. Cordero, 88 Cal. 221, 26 P. 80. "Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of the fact being admitted, is conclusive. A finding against the admission is therefore outside the issues, * * *." White v. Douglass, 71 Cal. 115, 119, 11 P. 860, 862. It was declared in In re Doyle, 73 Cal. 564, 570, 15 P. 125, 128: "When a trial is had by the court, without a jury, a fact admitted by the pleadings should be treated as 'found.' * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." See, also, Hutchison v. Barr, 183 Cal. 182, 190 P. 799; Sutherland on Code Pleading, section 1167. "There can be no necessity of a finding as to a fact admitted by the pleadings. The finding is required only when an allegation of a material fact in the complaint is controverted by the answer, so as to raise an issue." Swift v. Muygridge, 8 Cal. 445. In Sacre v. Chalupnik, 188 Cal. 386, 390, 205 P. 449, 451, it is said that, "The finding, which implies an ouster at a date one year later than that admitted by the defendants, was irrelevant and aside from the concluded issue on that point, and may be disregarded as nugatory." (Citing authorities.)

[6] Under the authority of the cited cases we are bound to disregard the findings challenged by the appellant, and whether they are supported is immaterial.

The judgment is affirmed

VAN DYKE, P. J., and SCHOTTKY, J., concur.



118 Cal.App.2d 611

PEOPLE v. McCAFFREY.

Cr. 4935.

District Court of Appeal, Second District, Division 2, California.

June 22, 1953.

Defendant was convicted of assault by means of force likely to produce great bodily injury and of assault. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that evidence sustained conviction of police officer of assault upon two prisoners by means of force likely to produce great bodily injury.

Judgment affirmed.

1. Assault and Battery ⇐95

In prosecution of police officer who had allegedly kicked and beaten prisoners

after they had already been injured, for assault by means of force likely to produce great bodily injury, questions whether assaults in each instance were made by means of force likely to produce great bodily injury or whether officer was guilty of simple batteries were for jury. Pen. Code, §§ 242, 245.

2. Assault and Battery ⇐55

It is not essential for conviction of assault by means of force likely to produce great bodily injury that great bodily injury actually results from such force and it is only necessary that force applied was likely to have effected such result. Pen.Code, § 245.

3. Assault and Battery ⇐92

Evidence sustained conviction of police officer of assault upon two prisoners by means of force likely to produce great bodily injury. Pen.Code, § 245.

4. Criminal Law ⇐1159(1)

Fact that a reviewing court might reasonably reconcile innocence of defendant with circumstances of crime does not warrant interference with determination of jury.

5. Criminal Law ⇐1159(2)

Where a jury by its verdict rejects hypothesis pointing to innocence and there is evidence to support implied finding of guilt as the more reasonable of the two hypotheses, District Court of Appeal is bound by verdict.

6. Criminal Law ⇐1159(2)

Before District Court of Appeal can reverse a conviction, it must assume in favor of the verdict the existence of every fact which jury could have reasonably deduced from evidence and then determine whether the jury could not fairly have returned its verdict.

7. Assault and Battery ⇐48

Assault and battery are not synonymous terms, and an "assault" is an attempt to strike, while a "battery" is the successful attempt. Pen.Code, §§ 240, 242.

See publication Words and Phrases, for other judicial constructions and definitions of "Assault" and "Battery".

8. Assault and Battery ⇐48

A battery cannot be committed without assaulting the victim but an assault can occur without committing a battery. Pen. Code, §§ 240, 242.

9. Assault and Battery ⇐55

The gravamen of the crime of assault by means of force likely to produce great bodily injury is the likelihood that the force applied or attempted to be applied will result in great bodily injury. Pen.Code, § 245.

10. Assault and Battery ⇐55

Evidence of an actual blow is not necessary for conviction of crime of assault by means of force likely to produce great bodily injury. Pen.Code, § 245.

11. Assault and Battery ⇐96(9)

In prosecution for assault by means of force likely to produce great bodily injury, trial court properly refused instruction defining battery and providing that jury could find defendant guilty of any offense necessarily included in charge and that offense of assault by means of force likely to produce great bodily injury necessarily includes crime of battery. Pen.Code, §§ 242, 245.

12. Criminal Law ⇐1186(4)

In prosecution for assault by means of force likely to produce great bodily injury, where court gave instruction which enabled jury to find defendant guilty of simple assault on a prosecuting witness, no detriment was suffered by court's rejection of proposed instruction defining battery. Pen.Code, §§ 240, 242, 245, Const. art. 6, § 4½.

13. Criminal Law ⇐1144(8)

Presumption was that answers of jurors on voir dire indicating that they had not formed or expressed opinion regarding guilt or innocence of defendant and that they could disassociate radio and press reports from their minds in weighing such guilt or innocence were true.

14. Criminal Law ⇐957(3)

In prosecution of policeman for assault by means of force likely to produce great bodily injury, affidavits of jurors setting forth alleged declarations of fellow

jurors to effect that policemen are tough, overbearing and like to beat people constituted attempt by jurors to impeach their verdict and such affidavits had no standing. Pen.Code, § 245.

15. Criminal Law ⇐957(2)

Jurors may not impeach their verdict whether by affidavits, testimony, or extrajudicial statements, except in cases of chance verdicts.

Ward Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

On December 25, 1951, appellant was a member of the police force of Los Angeles. At 5:30 a.m. he was serving as booking officer at the Lincoln Heights Jail. At that time six prisoners were booked, to wit, Manuel Hernandez, William Wilson, Jack Wilson, Elias Rodela, Eddie Nora and Raymond Marquez. By reason of the events that immediately occurred, appellant was indicted in three counts of having assaulted Nora, Jack Wilson, and Marquez "by means of force likely to produce great bodily injury, a felony." Penal Code, § 245. He pleaded not guilty, but following a trial he was convicted as charged in counts 1, and 3; and of "Assault, a misdemeanor, a lesser offense necessarily included within the charge set forth in count 2."

[1] Appellant now contends that the evidence did not prove the batteries were of such force as to inflict "great bodily injury"; that the court erred in refusing certain instructions, and in denying his motion for a new trial based upon asserted prejudice on the part of certain trial jurors. Appellant admits having applied unlawful force to all three victims named in the indictment and contends, therefore, that he is guilty of only simple battery. Penal Code, § 242. The point of his appeal is that there is not substantial proof that the force applied was such as was "likely to produce great bodily injury" and therefore he is not guilty of violating section 245. Our inquiry is therefore confined to a consideration of whether under the evidence the jury could not have been justified in finding that appellant's assaults on Nora and Marquez were by "means of force likely to produce great bodily injury".

Assault on Nora

Nora testified that he is a civil engineer; that he had not participated in the barroom fracas between the police and civilians for which he and the other prisoners had been arrested and hence carried no injuries as a result thereof. However, at the time of reaching the jail, his head and lips were swollen; his arms, chest and back were bruised and he had a deep gash in his right shin. Before going to jail Nora and his friends were examined at the Receiving Hospital where the physician found contusions of his face, legs, knees and arms. After he had been booked and taken with his five friends into a room on the second floor, the six men were seated on a bench. A policeman commanded Nora to stand, then struck him. Thereupon, another officer conducted him across the hall to another room, ordered him to sit in a chair, then joined four others in beating Nora "real hard" with their fists, one blow to the stomach causing a bowel evacuation. "Then I saw what was coming so I went down on the ground and when I got down on the ground they started hitting and kicking me * * * about three or four minutes." After a bath he was placed in his individual cell. Appellant entered it with several officers, knocked Nora down, stood upon him, "raised up his foot, his leg and he threw it down into my side real hard," in the area of his left kidney. The shoes appellant wore made a hard contact. Subsequently appellant returned, raised his foot as if to kick Nora, when the latter lost consciousness. Thereafter the prisoner's urine was red, as was the blood he vomited at the hospital on December 26, and continued reddish for several weeks. When Marquez left the jail he saw Nora's lips were so swollen he could not speak; his face was so bruised his appearance was

"quite" changed, and two days later still showed the effects of a violent beating; also, he was still hunched over as he walked.

Assault on Marquez

Marquez was also one of the party arrested after the barroom altercation. Along with Nora and the others he was taken to the Receiving Hospital and examined by Dr. Ho, then booked at Lincoln Heights. He was taken into the interrogation room where appellant and two other officers rained about thirty blows upon him. One struck the back of his head with his fist, picked him up and knocked him down again. He was then returned to the booking office. While waiting there he saw Hernandez and William Wilson escorted into the interrogation room from which then came a noise and commotion "as though something was hitting the walls of the room." Appellant visited Marquez' cell three or four times and on each occasion struck the prisoner with his fist in the face or stomach ten times without giving a reason for his cruelties. When Marquez left the jail on December 26 his condition had undergone a radical change since his entry. His face was swollen, his body black and blue, his feet were very sore, his kidneys and testicles suffered pain, and blood was in his urine.

Assault on Jack Wilson

While Jack Wilson's condition at the jail is not important so far as count 2 is concerned, yet it should be recited as further proof of the unbridled audacity of appellant and his confederates. Jack was a Marine. On leaving the jail his left eye was closed; his face and hair full of blood, his groin discolored and his body bore brown and black marks. After he had been booked he was taken to a large room. Three officers waited with rolled up sleeves. They quizzed him, knocked him against the wall and asked if he would "hit cops anymore." One officer observed: "This guy's too skinny; bring in the next one." Wilson was confined to his cell about ten hours before he was released in a condition far different from that at the time of his arrest. A black area circled his eyes; his bare feet hurt; he had bled from nose and mouth, and was still bleeding.

Corroboration

The testimony of the victims was corroborated by the following:

Officer Nett testified that the three prisoners were in pretty bad shape when they were booked. He saw Jack Wilson escorted to the interrogation room by appellant and three other officers. This prisoner was shoved around the room for about three minutes and was struck by appellant only. Officer Strange observed a fellow officer deliver a forearm smash to the shoulder of one prisoner and officer Sullivan saw two prisoners taken separately into the interrogation room and testified they were "pushed and justled around for two or three minutes." Prisoner Rodela saw Marquez led into a room and for two or three minutes heard "scuffling and banging against the wall" and when Marquez returned his hair was "all mussed up, his clothes were off to the side and he was shaking his head." Also, he saw Nora taken into the interrogation room and heard sounds of scuffling and banging the walls. The same facts given in testimony by the above named corroborating witnesses were testified to by prisoner Hernandez.

Appellant's Testimony

[2] Appellant now assumes the air of injured innocence. He waives aside the factual mountain of the prosecution evidence, presents the testimony he gave as though it had been adopted by the jury and as though the State were trying to overcome an established record of one found not guilty. He denied having entered the cell of any victim, or that he struck Marquez or kicked Nora. But he admits that the prisoners looked bad when he first saw them; that he struck each of them three or four times, possibly more; that he was angry with them at the time and entered the interrogation room with each of them. By such admissions he did not dispel the testimony of the victims that they had been savagely attacked by him; that they were knocked to the floor, struck on the face, nose and eyes, kicked in the stomach, ribs and groins and were, in the

cases of Nora and Marquez, left with injured testicles and kidneys. That the assaults were made with "means of force likely to produce great bodily injury" was a fact in each instance for the determination of the jury. It was for them to hear the victims talk, to see their behavior as they detailed the tragedies, their reactions to cross-examination, their apparent powers of resistance. By observing the men who had been assaulted, the jury—as reasonably intelligent men and women—could fairly estimate the likelihood of the batteries to "produce great bodily injury." People v. Pullins, 95 Cal.App.2d 902, 904, 214 P.2d 436, 437; People v. Orona, 72 Cal. App.2d 478, 486, 164 P.2d 769; People v. Score, 48 Cal.App.2d 495, 498, 120 P.2d 62; People v. Bumbaugh, 48 Cal.App.2d 791, 797, 120 P.2d 703. While the proof indicates a serious condition in both Nora and Marquez after the assaults, it is not indispensable to a verdict under section 245 that "great bodily injury" be the actual result. If the force applied is found to have been likely to effect such a result, the statute is violated. In People v. Score, supra, it was held that blows administered with the fist to the face justified the verdict of guilt under section 245.

It is not essential to a conviction of such charge that the victim be held over a blazing furnace or be fired upon with an atomic weapon. The stroke of a fist or the kick with a shoe has invalided many a man or caused him to go into decline, or to suffer neurasthenic disorders for his remaining years. But whether the blow of a fist or the kick of a shod foot was of such force as was likely to produce great bodily injury was a question for the jury. See People v. Hinshaw, 194 Cal. 1, 17, 227 P. 156; People v. Bumbaugh, supra; People v. Nudo, 38 Cal.App.2d 381, 385, 101 P.2d 162. In People v. Hinshaw, supra, the court held, 194 Cal. at page 16, 227 P. at page 163, that the language, "means" and "force," can be interpreted in the disjunctive. In People v. Bumbaugh, supra, it was held that in view of the injuries sustained by the complainant, as well as the manner of the assault upon her, the jury was authorized to conclude that the manner of making the attack as well as the means used to perpetrate it were properly considered in determining whether the crime was a violation of section 245. Not only did appellant apply severe blows to Nora and Marquez, but he knew when he first saw them that they were suffering from batteries recently dealt out to them. He had the diagnoses of Dr. Ho who had examined them closely, had sutured Marquez' lacerated ear, had inspected the contusions and abrasions of the limbs and bodies of both men. He testified that they looked badly beaten up and that he thereafter struck each of them three or four times and possibly more. Marquez estimated the number of blows administered to him by appellant to have been ten on each encounter.

[3–6] From such proof it cannot be said that "upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. The fact that a reviewing court might reasonably reconcile the innocence of the defendant with the circumstances of the crime does "not warrant interference with the determination of the jury." Ibidem. Where a jury by its verdict rejects the hypothesis pointing to innocence and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, the court of appeal is bound by the verdict. People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631. Before it can reverse a conviction it must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether the jury could not fairly have returned its verdict. People v. Tom Woo, 181 Cal. 315, 184 P. 389.

Appellant cites People v. Fuentes, 74 Cal. App.2d 737, 169 P.2d 391, 393, in support of his contention that the evidence is insufficient to establish a felonious assault. Section 245. The court there reduced the judgment to one for simple assault. The facts justified such reduction. Fuentes struck only one blow, and that with his fist. The only abrasion found on the body of his victim "was not caused by the blow

struck by defendant". That is a radically different story from that at bar. McCaffrey's victims were already ailing from previous assaults, yet appellant struck Marquez thirty or forty times in the face and stomach and knocked Nora down and kicked him violently in the kidney. Appellant appears to regard the punishments suffered by his victims before they came under his protection as good cause for regarding the force he applied as inconsequential. On the contrary, the likelihood that great bodily injury would likely result from his own assaults was increased by the lowered resistance of the men.

No Error in Rejecting Instructions

[7–10] Assignment is made of the trial court's rejection of instructions [1] to convict appellant of battery if the jury should find such crime necessarily included in those charged, if the evidence supported such a verdict. Appellant impliedly assumes (1) that the jury found that he never struck or kicked any victim and (2) that battery is "necessarily" included within the crime denounced by section 245. In the first place, the proof is such that this court is constrained by reason thereof to hold that the jury properly found that appellant did more than simply strike his victims, but also that he ferociously and vehemently assaulted them. Simple assault is nothing more than an unlawful attempt to commit a violent injury on another. Penal Code, § 240. A battery cannot be committed without assaulting the victim. But an assault can occur without committing a battery. The gravamen of the crime defined by section 245 is *the likelihood that the force applied or attempted to be applied* will result in great bodily injury. Therefore, to make one guilty of violating section 245, evidence of an actual blow is not necessary; but it is requisite that proof be made of an attempt to beat another (1) with a deadly weapon or other instrument not ordinarily defined as a deadly weapon, or (2) by a means or with a force likely to produce great bodily injury. Because a battery is not essential to the crime here charged and because one may violate section 245 without actually striking another, a battery [2] is not a "necessarily" included offense in the crime defined by section 245. Therefore, the trial court properly refused to give defendant's instructions IV and V. People v. Meichtry, 37 Cal.2d 385, 390, 231 P.2d 847.

[11, 12] Evidently, by virtue of an instruction on the necessarily included offense of simple assault, the jury declined to find appellant guilty under count 2 of assault on Jack Wilson. While the State proved that all three men were struck in the interrogation room, and appellant admitted striking them, the jury must have found aggravated assaults committed on Nora and Marquez in their respective cells. Such assaults were denied by appellant. If the jury had believed him, they could have—under the instructions—found him guilty of simple assault only on all three counts. Inasmuch as the instruction on the "necessarily included offense" enabled the jury to find defendant guilty of simple assault, no detriment was suffered by the court's rejection of appellant's proposed instruction V even though it had been a proper instruction. (See Art. VI, § 4½ of the California Constitution.)

1. Defendant's Proposed Instruction No. IV:

"You may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, if, in your judgment, the evidence supports such a verdict under my instructions.

"To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of assault by means of force likely to produce great bodily injury, of which the defendant is charged in each of the three counts of the indictment, necessarily includes the crime of battery."

Defendant's Proposed Instruction No. V:

"Battery is any wilful or unlawful use of force or violence upon the person of another."

2. There seems to be a slight confusion in the Fuentes opinion in that the words assault and battery are used indistinguishably. They are not synonymous. Assault is an attempt to strike; battery is a successful attempt.

New Trial Properly Denied

Appellant sought a new trial on the ground that some of the jurors were prejudiced against him during their deliberations. To prove his claim he filed the affidavits of three jurors setting forth the declarations of fellow jurors to the effect that policemen are tough, overbearing, like to beat people.[3] It is argued that such a motion should be granted for the misconduct of a juror on voir dire examination where such misconduct was not discovered prior to the verdict.

[13, 14] There is no proof that any juror concealed the true state of his mind at the time of the voir dire inquiry. Each juror answered that he had not formed or expressed an "opinion regarding the guilt or innocence" of the persons named over the radio or in the press in connection with reports of police brutality; that he could disassociate any such report from his mind in weighing the guilt or innocence of the accused. The presumption is that such answers were true. There is no evidence to the contrary. So far as the record goes, the only evidence of an unfriendly state of mind on the part of the jurors is their declarations while deliberating *after* having heard the testimony of the young men who had been punished by appellant. While the jurors referred to in the affidavits may have made inappropriate arguments for conviction, their statements do not prove that they held such opinions *prior* to the trial of appellant. The authorities cited by appellant are not apropos. In People v. Galloway, 202 Cal. 81, 259 P. 332, a new trial was granted, not by reason of anything said by a juror in the course of deliberations, but because a juror was shown to have declared two days before commencement of trial that she would hang anybody that would get drunk, and on the next day stated that if called as a juror, she would hang Galloway. Such prejudice was concealed by the juror at the time she qualified. In re Estate of Mesner, 77 Cal.App.2d 667, 176 P.2d 70, a will contest, a new trial was granted by reason of a juror's concealment on voir dire of his animosity toward the proponent's attorney. Similar reasons were given for ordering new trials in Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407; Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701.

[15] The affidavits filed in support of a new trial have no standing. They constitute an attempt by jurors to impeach their verdict. They cannot do so "by affidavits or by testimony or by extrajudicial statements", except in cases of "chance" verdicts. People v. Reid, 195 Cal. 249, 261, 232 P. 457, 462, 36 A.L.R. 1435; People v. Chapman, 91 Cal.App.2d 854, 857, 206 P.2d 4.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

3. "Cops are the type of men that get that job because they like to tell people what to do, and if you don't, they beat you up."

"I know cops are tough and overbearing and they hit and mistreat people just because they are protected by that badge."

"If we were in that jail they would beat us too."

"We should make an example of this guy so it will be a warning to all cops that they can't beat people and get away with it."

"You can't tell anything by their looks—sometimes the best looking cops are the meanest."

"These prisoners were beaten terribly—that's plain to see—so somebody beat them—we should give McCaffrey the maximum verdict for having anything to do with it."

"You read in the paper all the time where policemen beat up somebody or shoot them—and then get off because the police department protects them. That's not right. Policemen aren't entitled to special privileges. So it's our duty to see that McCaffrey doesn't get off."

"They aren't entitled to any special consideration. If it looks like he is guilty, then he's guilty of a felony. We shouldn't waste a lot of time deciding to what degree."

"Those boys said McCaffrey beat them and the grand jury said those were felonies—it's our duty to vote for felonies, not misdemeanors."

That although affiant cannot now recall the names of all the jurors who made one or more of the foregoing remarks, affiant does recall that some of the hereinabove statements were made by Joseph H. Billingsley, one of the trial jurors.

WILLIAMS et al. v. CITY OF LONG BEACH.*

Civ. 19398.

District Court of Appeal, Second District, Division 2, California.

June 22, 1953.

Hearing Granted Aug. 20, 1953.

Action against city by property owners who alleged that defendant had negligently allowed gas to escape from its mains, thereby causing plaintiffs' property to sustain severe fire damage. The Superior Court, Los Angeles County, entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the action was a proper case for application of res ipsa loquitur, and that city's evidence was insufficient to refute the inference of negligence raised by such doctrine.

Reversed and remanded.

1. Negligence ⇐121(2)

Doctrine of res ipsa loquitur raises an inference of negligence and not a presumption.

2. Negligence ⇐121(2)

Defendant in res ipsa loquitur case has neither burden of proving himself free from negligence nor burden of producing evidence of actual cause of accident, but rather he must show either a satisfactory explanation of accident, from which explanation no element of negligence on his part is to be found, or such care as would necessarily impel conclusion that accident could not have happened from want of defendant's care, but must have been due to some unpreventable cause, although the exact cause is unknown.

3. Gas ⇐17

Gas is a dangerous substance, and a party who undertakes to control it must use a high degree of care to prevent its leaking.

4. Gas ⇐20(2)

Where, as property owner lit cigarette in his home, an explosion occurred, igniting the property, and after fire was extinguished presence of gas in adjoining street was detected, and investigation disclosed a leak in city gas line about 55 feet west of point where fire started, doctrine of res ipsa loquitur was applicable.

5. Negligence ⇐121(2)

Doctrine of res ipsa loquitur is rightly applied when a thing which causes injury, without fault of injured person, is shown to be under exclusive control of defendant and injury is such as, in ordinary course of things, does not occur if the one having such control uses proper care.

6. Gas ⇐20(2)

In action against city by property owners who alleged that city had negligently allowed gas to escape from its mains, thereby causing plaintiffs' property to sustain severe fire damage, city's evidence was insufficient to refute inference of negligence raised by doctrine of res ipsa loquitur.

Thomas P. Menzies and James O. White, Jr., Los Angeles, for appellants Kansas City Fire & Marine Ins. Co. and Empire State Ins. Co.

J. Merrill Lilley, Long Beach, for appellants Arthur F. Williams and Corrine E. Williams.

Irving M. Smith, City Atty., John R. Nimocks and Alfred D. Williams, Deputies City Atty., Long Beach, for respondent.

MOORE, Presiding Justice.

Appellants Arthur and Corrine Williams in their suit against the respondent alleged that the city had negligently allowed gas to escape from its main and thereby caused appellants' property to sustain severe fire damage. Following the trial, the court found appellants' damage to have been the result of "gas which had escaped from the pipe lines" of respondent on February 27, 1951, but that the harm "was not proximately caused by any negligence" of the city. Judgment was thereupon entered for respondent whence comes this appeal.

The city maintained a gas line in Marine Way which lies adjacent to the home of Mr. and Mrs. Williams. In the early hours of February 27, 1951, as the husband lit a cigarette in his home an explosion occurred and his property was ignited. After the fire was extinguished, the presence of gas in the adjoining street was detected. Crews of the Gas Department excavated to

* Subsequent opinion 268 P.2d 1061.

the west of the home over the service connection, but no leak was found. After further excavations a leak was exposed about 55 feet to the west of the point at which the fire started and 21 feet west of Williams' most westerly property line. The main was bent downward and "a weld had broken in the lower left quandrant of the pipe."

Since appellants relied entirely on the doctrine of *res ipsa loquitur* in asserting respondent's negligence, the sole question raised on appeal is whether that doctrine was properly applicable.

[1] Despite considerable confusion in the earlier California cases, see Prosser, Res Ipsa Loquitur in California, 37 Cal.L. Rev. 183, 218–220, it is now clear that the evidentiary effect of the doctrine is not a presumption, but an inference. "Res ipsa loquitur * * * 'authorizes the inference of negligence in the absence of a showing to the contrary.'" Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 440, 247 P.2d 344, 346. "The res ipsa loquitur doctrine raises 'an inference of negligence, not a presumption.'" Scott v. Burke, 39 Cal.2d 388, 398, 247 P.2d 313, 319.

[2] What is the effect of this inference? In Hinds v. Wheadon, 19 Cal.2d 458, 461, 121 P.2d 724, it was held to be incumbent upon the defendant to bring forth evidence to rebut the inference of negligence. That decision was recently followed in Calame v. Stevens, 110 Cal.App.2d 45, 48, 242 P.2d 109. Such inference of negligence "is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff." Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, 417. The nature of the defendant's task in an action where the doctrine of res ipsa loquitur has been invoked was recently stated to be neither the burden of proving himself free from negligence nor the production of "evidence of the actual cause of the accident." Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12, 14. Rather, he must show either (1) a satisfactory explanation of the accident, a definite cause for it from which explanation no element of negligence on the part of the defendant is to be found, or (2) such care as would necessarily impel the conclusion that the accident could not have happened from want of defendant's care, but must have been due to some unpreventable cause, although the exact cause is unknown. "In the latter case, inasmuch as the process of reasoning, is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented." Id.; Bourguignon v. Peninsular R. Co., 40 Cal.App. 689, 694–695, 181 P. 669.

[3–5] That the instant case is a proper one for the application of *res ipsa loquitur* is beyond dispute. Gas is a dangerous substance. Where a party undertakes to control it he must use a high degree of care to prevent its leaking. Lewis v. Bjornestad, 111 Cal.App.2d 409, 412, 244 P.2d 497. Because it is an essential commodity and one that is within the exclusive control of the supplier, the very nature of the responsibility undertaken makes justifiable the imposition of the "burden of explanation" for the disaster. Appellants herein are no more able to sustain that burden than are plaintiffs in the common carrier-passenger, physician-patient, and bailor-bailee relationships to which the doctrine is often applied. See Prosser, op.cit., pp. 222–224. Their situation is not dissimiliar to that of plaintiffs in the classical case of San Juan Light & Transit Company v. Requena, 224 U.S. 89, 32 S.Ct. 399, 401, 56 L.Ed. 680. After Mr. Requena had been killed by the electric current supplied to his home by the company, the United States Supreme Court affirmed the judgment for his wife with the observation that the doctrine of *res ipsa loquitur* is rightly applied "when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." Paraphrasing the figure fancied by that illustrious tri-

bunal in having the lethal voltage speak to the Court, we might have the gas of the city of Long Beach say, "Your Honors: ordinarily my place is within the gas main provided for conducting me to consumers. The only time I can get out of the pipe and into the home of a consumer (otherwise than by the devices used for my control) is when the City becomes so careless as to permit an aperture or a crack to occur in a main and therefrom allow me to escape and fill a house. Your Honors must take *judicial notice* that the City was negligent in permitting me to escape into the Williams' home."

To refute the inference of negligence, the city's witnesses testified that "it would be more or less of a settling condition that would make that angle in there, and split in that place"; that the sag was three-eighths of an inch, roughly; that "the movement of the earth could stretch that pipe, make quite a strain on it; not only that one place but up and down the alley, and it would snap at its weakest point"; that it was not known whether any special precautions were taken to prevent sagging in sandy soil; that the probable cause of the break was "slight compression in the main" caused by an "earth movement of some nature" but that the latter opinion was not "a very strong opinion."

But in view of all the evidence of the explosion "it seems reasonably clear that the accident probably would not have occurred without negligence by someone." Zentz v. Coca-Cola Bottling Co., 39 Cal.2d 436, 447, 247 P.2d 344, 350. The gas pipe may have been defectively constructed, laid or welded. There may have been a failure to make a timely replacement of the pipe. There was no proof that it had been inspected after it was laid in 1924 prior to the time of the fire. At the time of inspection there was a half-inch of rust on the pipe.

[6] Taking the testimony as a whole, it cannot reasonably be said that the city's evidence satisfactorily explained the leak. Neither does it allow the inference of reasonable care. In the light of human experience, it is far more likely than not that the agency with exclusive control over the defective pipe was negligent. The speculation as to a possible earthquake is worthless in view of the only evidence on the subject—a stipulation that Professor Richter of the California Institute of Technology would, as a qualified expert witness, testify that no perceptible earthquake occurred between February 24, 1951, and March 11, 1951.

Black v. Partridge, 115 Cal.App.2d 639, 252 P.2d 760, cited by respondent contains nothing pertinent to the instant factual situation.

Reversed and remanded for further proceedings not inconsistent with the views expressed herein.

McCOMB and FOX, JJ., concur.



118 Cal.App.2d 556

PARRISH et al. v. GRECO et al.

Civ. 4643.

District Court of Appeal, Fourth District, California.

June 18, 1953.

Rehearing Denied July 16, 1953.

Hearing Denied Aug. 13, 1953.

Action by holders of note against makers and third person, who allegedly assumed note, for deficiency due after sale of collateral security. The Superior Court of Tulare County, W. G. Machetanz, J., entered judgment for holders, and third person appealed. The District Court of Appeal, Griffin, J., held that reduction in amount of payments on trust deed as well as collateral security note was valid consideration for third person's oral promise to assume payment of note.

Judgment affirmed.

1. Chattel Mortgages ⇐226

In action by holders of note against makers and third person, who allegedly assumed note, for deficiency due after sale of collateral security, evidence was sufficient to sustain trial court's finding that third person orally agreed to assume obligations set forth in note and purported chattel mortgage.

2. Frauds, Statute of ⇐23(1), 32

A new promise which discharges another obligation by novation or one in which no obligation of another exists or is contemplated, is necessarily original. Civ. Code, §§ 1624, subd. 2, 2794, 2922.

3. Frauds, Statute of ⇐23(1)

Where debt of another continues to exist, a new promise by third party to pay such debt is outside statute of frauds if such third party's promise is made under circumstances which renders third party a debtor. Civ.Code, §§ 1624, subd. 2, 2794, 2922.

4. Mortgages ⇐278, 283(1)

Grantee taking mortgaged property "subject to mortgage" is bound only to extent of property, but grantee "assuming mortgage" becomes principal debtor and mortgagor becomes surety. Civ.Code, §§ 1624, subd. 2, 2794, 2922.

5. Chattel Mortgages ⇐226

Obligees' reduction of size of payments due under trust deed and collateral security note constituted valid consideration for third person's oral promise to assume obligation of note. Civ.Code, § 1605.

6. Chattel Mortgages ⇐41

Where properly drawn note and purported chattel mortgage were printed on same sheet, but that portion of mortgage which pertained to right to sell collateral security upon failure to perform, omitted names of parties with whom personal property was to be deposited and names of persons empowered to sell but was properly signed by obligors, such instrument fairly indicated what parties were intended to be named therein, and, therefore, as between such parties and persons who, before parting with value, had actual notice thereof, such instrument was valid. Civ.Code, §§ 1605, 2956, 2973.

7. Chattel Mortgages ⇐260

Where holder of purported chattel mortgage sold mortgaged property in accordance with terms of agreement wherein notice of said sale was specifically waived, such sale was valid regardless whether holders gave personal notice to parties to be charged and posted notice of time and place of sale in three public places. Code Civ.Proc. § 692.

Ralph Moradian, Fresno, for appellant.

Fuller & Christenson, Porterville, for respondents.

GRIFFIN, Justice.

On February 16, 1950, defendants Charles P. Greco and Mary P. Greco executed and delivered to plaintiffs and respondents their "Installment Note—Collateral Security" in the sum of $8,798.50, payable $100 per month, plus interest, to secure a loan made to them. It was recorded on April 22, 1950. Attached was an inventory of certain furnishings of the "Hotel Lindsay" owned by the Grecos. The Grecos were also indebted to plaintiffs for a note in the sum of $15,000, secured by a first trust deed on the hotel, which sum was payable at the rate of $100 per month. In July, 1950, the Grecos entered into an Exchange Agreement with appellant Frank Martorano for the exchange of that hotel and the furnishings for his properties in Campbell, California. By the terms of that agreement the Grecos agreed "to pay or assume" indebtedness on appellant's property to the extent of $37,000 and appellant agreed "to pay off or assume indebtedness" on said Lindsay Hotel in the amount of $37,000, and Martorano agreed to pay to Grecos an additional $14,000.

Subsequently, on September 15, 1950, appellant signed an escrow instruction listing the collateral security note in the sum of $8348 on the credit side, with the notation "Subject to chattel". Along with it are listed deeds of trust for $15,000 and one for $5,300, with the notation "Loan Assumed". Appellant admittedly agreed to assume the payment of the two trust deeds. (One was a second trust deed in default and appellant subsequently liquidated that indebtedness.) Each party gave a valuation of $60,000 on their respective properties. The instruction signed by the Grecos listed the collateral security note at $8548, with the notation "Loan Assumed".

There are several variances as to the listed items on the respective instructions

and also between them and the terms of the original agreement of exchange. Shortly after the escrow instructions were signed, about October, 1950, appellant called on plaintiffs and inquired about the trust deeds and notes held by them and made an inquiry as to the amount due thereunder and inquired in reference to the payment thereof. There is conflicting evidence as to what was said on that occasion. It is plaintiffs' contention that appellant orally agreed with them that he would assume and pay the notes secured by the trust deeds and also the "Installment Note—Collateral Security", if plaintiffs would agree to reduce the monthly payments on each obligation from $100 to $50 per month plus interest; that plaintiffs accordingly agreed and appellant paid the accrued interest thereon and made monthly payments on the principal thereafter at the rate of $50 per month plus interest, on each obligation until January, 1951, at which time he refused to make any more payments on the "Installment Note—Collateral Security", and plaintiffs declared the unpaid balance due, sold the furnishings for $1000, and as a result plaintiffs credited this sum on said note and instituted this action against the Grecos as original obligors and appellant on his oral agreement "to assume the payment of said obligation". Judgment was rendered against the Grecos and appellant for the deficiency.

Martorano appealed and contends (1) that the evidence is insufficient to show that appellant ever legally assumed the payment of the so-called "Installment Note—Collateral Security"; (2) that the so-called chattel mortgage was not legally executed; and (3) that no valid sale was had thereunder.

The trial court found that appellant purchased the encumbered hotel and personal property from the Grecos, and at that time appellant did enter into an "oral agreement" assuming the obligation evidenced by the collateral note, in consideration of the reduction by plaintiffs of the monthly installments of $100 thereon, as well as a similar reduction upon the deed of trust; that in furtherance of the agreement, appellant went into possession of the furnishings and retained such possession until they were sold in accordance with the terms of the original written note and chattel mortgage.

Plaintiffs' testimony is that, after appellant signed the agreement of exchange agreeing "to pay off or assume" the indebtedness on the Lindsay Hotel and signed an escrow instruction agreeing to assume the trust deed loan and to take the furniture "subject to chattel" mortgage of $8348, he came to them to verify the amounts and the fact that it could be done. Mrs. Parrish's testimony is that appellant asked to see the chattel mortgage and list of furniture given as security; that he was disturbed because he did not think all of the furniture listed was in the hotel; that he told her "You needn't worry; the hotel is worth it"; that "he said he was taking over, and he would pay them; later we arranged the amounts that we would accept $50 on each, with interest, and he asked permission to pay more at any time so he could pay it off quicker"; that Mr. Parrish wanted the amount due on this chattel mortgage added to the first trust deed and appellant said "No, let it ride, I want to pay it off as fast as I can and I prefer to pay it this way"; that plaintiffs agreed to reduce the monthly payments as suggested by appellant; that appellant requested them to apply payments made by him accordingly; that appellant "fixed up" a receipt book in which to enter the payments and they were accordingly kept. The regular monthly payment reductions on the furnishings were shown on the reverse side of the installment note. She then testified that appellant took the chattel mortgage, inventory and trust deed home with him for further study and later returned them.

Greco testified Martorano originally agreed "that he would assume the two obligations (trust deeds) * * * assume it and make the payments". It is appellant's story that he agreed to pay $50 per month "toward the chattel plus interest, as long as I see fit * * * so long as I had any use for the furniture; that when the time came that I didn't have no more use for the furniture, and I notified Mr. and Mrs. Parrish they were to take that furniture out of there"; that he told them he "didn't want to assume the chattel" and that he never

agreed to assume it nor take it over as his own obligation.

[1] Although the evidence is conflicting, there is sufficient evidence justifying the trial court in finding that the appellant orally agreed to assume the obligations set forth in the so-called chattel mortgage and note. It is appellant's contention that such an oral agreement would not be sufficient to support the judgment since, under section 1624 of the Civil Code, paragraph 2, a special promise to answer for the debt, default or miscarriage of another must be in writing and be subscribed by the party to be charged, and that under section 2922 of the Civil Code "A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property." Citing such cases as Miller v. Roach, 15 Cal.App.2d 427, 59 P.2d 418; Brichetto v. Raney, 76 Cal.App. 232, 247, 245 P. 235, 94 A.L.R. 1329, and cases cited; and 4 McKinney's Digest, Chattel Mortgages, p. 976, § 86. In this connection it is argued that no consideration was received by appellant to assume the obligation; that no detriment resulted to plaintiffs because appellant was paying the interest and payments as agreed upon; that it was not the intention of plaintiffs to bind appellant personally for the entire obligation; that plaintiffs denied the validity of their own theory of novation when they sought to hold and the court found that the Grecos were equally liable with appellant on the original note.

It is plaintiffs' contention that the facts here recited bring them within the exception noted in section 2794 of the Civil Code, which reads: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * * (2) Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made, his surety".

[2-4] In the Miller and Brichetto cases relied upon by appellant, there was no evidence of any claimed oral agreement to assume liability. In fact, those cases recognize that there may be either a written or oral agreement to assume a mortgage. The law is that a new promise which discharges another obligation by novation, or one in which no obligation of the other exists or is contemplated, is necessarily original since there can be no debt of another. Where, however, the debt of the other continues to exist, a new promise by a third party to pay it has, from the beginning, been considered outside of the statute where made under such circumstances as to render the new promisor himself a debtor. The rule is stated in Brichetto v. Raney, supra, to be, quoting from syllabus 8, that:

> "There is a broad distinction, in the effect thereof upon the rights of the parties, between the taking of mortgaged property subject to a mortgage subsisting thereon at the time of such taking and the assumption or agreement by the grantee to pay the debt secured by such mortgage, in that, where the purchaser or grantee of the mortgaged property takes it subject to the mortgage only, there being no expressed or implied agreement to assume the mortgage debt, he is bound only to the extent of the property, but if the debt be assumed by the grantee he becomes the principal debtor, while the mortgagor becomes the surety." See, also, Professor Simpson on Statute of Frauds, 36 Cal.Law Review, p. 405; and Braun v. Crew, 183 Cal. 728, 192 P. 531.

[5] The argument that there was no consideration for the promise of appellant to assume the obligation is without merit. The evidence shows that the agreement for the reduction of the payments on the trust deed, as well as the collateral security note to the sum of $50 per month each, was a valid consideration within the meaning of section 1605 of the Civil Code. Bank of America v. Hollywood Improvement Co., 46 Cal.App.2d 817, 821, 117 P.2d 13; Stein v. Leeman, 161 Cal. 502, 511, 119 P. 663;

Miller v. Roach, supra, 15 Cal.App.2d at page 431, 59 P.2d 418. Whether defendants Greco were properly held liable is not a question before us since they have not appealed from the judgment rendered against them.

Next, appellant argues that the so-called chattel mortgage was not legally executed because of the failure of the parties to be charged to fill in certain blanks in the printed form. He cites in support of this contention 59 C.J.S. Mortgages, § 122, p. 166; and Sec. 2956, Civ.Code. The evidence shows that the note and collateral security agreement are printed on the same sheet. It was drawn up by a notary public and real estate agent. The note is properly drawn, made payable to plaintiffs and was signed by the parties to be charged. However, the portion pertaining to the right to sell the collateral security upon failure of the parties to perform, omits the names of the parties with whom the personal property was deposited and omits the names of the persons empowered to sell it "at public or private sale without any previous notice to us of any such sale". This portion of the instrument is properly signed by the Grecos.

[6] The instrument, as executed, fairly indicates what parties were intended to be named therein. As between the parties and persons who, before parting with value, have actual notice thereof, the instrument is valid. No release of liability was effected by such omission. Teater v. Good Hope Development Corp., 14 Cal.2d 196, 209–211, 93 P.2d 112; Sec. 2973, Civ.Code; 17 Cal.Jur. p. 731, § 33.

[7] Lastly, the claim that no evidence was produced by plaintiffs showing that a valid sale of the furniture was had under the collateral security instrument because plaintiffs failed to fully comply with Sec. 692 of the Code of Civil Procedure and show that in addition to giving personal notice to the parties to be charged that plaintiffs also posted notice of the time and place of sale in three public places is without merit. Dohrman v. Durston, 90 Cal.App.2d 236, 202 P.2d 607. In support of the argument appellant cites Metheny v. Davis, 107 Cal.App. 137, 290 P. 91; J. I. Case Threshing Machine Co. v. Copren Bros., 32 Cal.App. 194, 162 P. 647; and Kee v. Becker, 54 Cal.App.2d 466, 470, 129 P.2d 159.

Here the sale was made according to the terms of the collateral security agreement, and therein notice of such sale was specifically waived. Accordingly, the cases relied upon by appellant are factually distinguishable.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



119 Cal.App.2d 29

MILLER & LUX, Inc. v. BOARD OF SUP'RS OF MERCED COUNTY et al.

DES JARDINS et al. v. BOARD OF SUP'RS OF MERCED COUNTY et al. (two cases).

SAN JOAQUIN CANAL CO. v. BOARD OF SUP'RS OF MERCED COUNTY et al.

MILLER & LUX, Inc. et al. v. BOARD OF SUP'RS OF MERCED COUNTY et al.

Civ. 8347.

District Court of Appeal, Third District, California.

July 3, 1953.

Hearing Denied Aug. 27, 1953.

Proceedings for formation of an irrigation district. From a judgment in certiorari rendered by the Superior Court, Merced County, Thomas P. O'Donnell, J., affirming in all respects the proceedings taken before the county board of supervisors, an appeal was taken. The District Court of Appeal, Van Dyke, P. J., held that there had been sufficient evidence before the board of supervisors to establish the jurisdictional facts necessary to sustain the board's authority to adopt and pass the formation resolutions.

Affirmed.

1. Waters and Water Courses ⇐225

On issue as to existence of jurisdictional facts necessary to sustain authority of board of supervisors to adopt and pass resolutions for formation of irrigation district, evidence sustained board's finding that proposed district was sufficiently described in petition, that signatures of persons purportedly signing petition as landowners were genuine, that petition and notice had been published in all counties whose lands were included within proposed district and that petition had been signed by holders of title to not less than 20 per cent in value of land to be included within proposed district. Water Code, §§ 20527, 20700, 20720 (a, b), 20740, 20800 to 20802, 20804, 20820 to 20823, 20840, 20842, 20846 to 20848, 20890.

2. Waters and Water Courses ⇐225

Petition for formation of irrigation district is required to give only a "general" description of land proposed to be included, and absolute accuracy is not required. Water Code, § 20720.

3. Evidence ⇐10(4)

The Madera county line is judicially known to be center line of San Joaquin River.

Linneman, Burgess, Telles & Van Atta, Dos Palos, J. E. Woolley and Vincent J. McGovern, San Francisco, for appellants.

Don C. Mayes, Dist. Atty., Merced County, C. Ray Robinson and James A. Cobey, Merced, Stephen W. Downey, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

Petitioners below appeal from a judgment in certiorari affirming in all respects the proceedings taken before the Merced County Board of Supervisors to form the Central California Irrigation District. Miller & Lux Incorporated, a corporation, the San Joaquin Canal Company, a corporation, John N. Bettencourt, Manuel V. Bettencourt, George A. Zimmerman, William S. Koda and Edward K. Koda have dismissed their appeals.

Stated briefly, the Water Code, Division 11, Part 2, lays down the following requisites to the formation of an irrigation district. A petition for the formation of such a district must be prepared and circulated; the petition must contain, among other things, generally, a description of the land proposed to be included, a statement as to the source or sources of water supply and the signatures of the requisite number of qualified petitioners. Water Code, § 20720 (a) and (b). The requisite number of petitioners is either a majority in number and assessed value of the landowners or at least 500 petitioners, each of whom is an elector residing in the proposed district, or the holder of title to land therein, and who in the aggregate own not less than 20% in assessed value of the land proposed to be included within the contemplated district. Water Code, § 20700. After the petition has been prepared, circulated and signed by the requisite number of qualified persons, the petition, together with the notice of a hearing thereon before the board of supervisors must be published for at least two weeks, in newspapers of general circulation within the counties wherein the land lies. Water Code, § 20740. Following such publication, a preliminary formation hearing is held before the board. Water Code, § 20800. At this hearing the petition is presented to the board. Water Code, § 20801. Evidence is received in support of and in opposition to the *sufficiency of the petition* and *the publication thereof*. Water Code, § 20802. At the conclusion of this hearing the board determines by resolution whether or not the petition and the publication are sufficient. Water Code, § 20804. If it finds that they are it adopts what may be called the preliminary formation resolution. Following the adoption of this resolution a copy thereof is sent to the State Department of Public Works which has already received a copy of the petition. Water Code, §§ 20821 and 20820. The department then makes a feasibility investigation of the irrigation project proposed in the petition and reports thereon in writing to the board of supervisors. Water Code, §§ 20822, 20823. Upon receipt of a report from the department the board of supervisors then sets, and gives notice of, the final formation hearing. Water Code, §§ 20840, 20842. At this hearing the board

hears any newly discovered evidence against the sufficiency of the petition and the publication, and evidence in rebuttal thereof. Water Code, § 20846. At the conclusion of the final formation hearing the board of supervisors, if still so minded, adopts a final formation resolution which, among other things, reaffirms the sufficiency of the petition and the publication and describes the boundaries of the proposed district. Water Code, §§ 20847, 20848. The board then calls for an election to determine whether the qualified voters residing within the proposed district do or do not desire the district's formation. Water Code, §§ 20890, 20527.

In the matter of the formation of Central California Irrigation District these procedural steps were taken, and the election having resulted favorably, the district was duly declared by the board to have been formed. Thereafter the trial court, responsive to petition for certiorari, rendered the decision from which this appeal is taken, affirming and approving in all matters the proceedings had in the formation of the district.

[1–3] Appellants here contend for reversal of the judgment appealed from as follows: That there was no evidence before the board of supervisors to establish the jurisdictional facts necessary to sustain the board's authority to adopt and pass the formation resolutions. Specifically they urge that jurisdiction on the part of the board was lacking, because: (a) It did not have before it a sufficient petition in that the description of the proposed district is indefinite and uncertain, with the consequence that the lines of the proposed district cannot be ascertained; (b) It did not have before it any evidence as to the genuineness of signatures of persons purportedly signing the petition as landowners; (c) The petition and notice were not published in Madera County, such publication being required as the petition included lands in Madera County; (d) There was a failure to prove at the preliminary hearing that the petition had been signed by holders of title to not less than 20% in value of the land to be included within the proposed district.

We will treat, first, of the matter of the sufficiency of the description. It appears that the San Joaquin Canal Company is and was at all times during the proceedings for the formation of the district a public utility engaged in supplying water to lands approximating 150,000 acres in extent and lying generally on the westerly side of the San Joaquin Valley within the counties of Fresno, Merced and Stanislaus. The petition stated "That a *general* description of the land proposed to be formed into a district is all that land embraced within the present service area of the San Joaquin Canal Company, a public utility, together with the land presently occupied by Canal rights of way and headworks and lands immediately adjacent to said headworks, all of said public utility, but excluding from said service area the lands of Hamburg, et al., * * *, as having limited water service rights only." The petition then stated that there followed a written description of the boundaries of the proposed district as scaled from a certain map entitled "The San Joaquin Canal Company, Map of Service Area", said map being further identified by dates and by the name of the civil engineer who sponsored the map. The petition stated that the written description so prepared had been modified to show an exclusion of land from said service area which had been made by order of the Public Utilities Commission in a designated decision, and it was further stated that the map referred to had been filed for record in the offices of the county recorders of the three named counties, the recording data being given. There then followed a metes and bounds description of the exterior boundaries of the various non-contiguous parcels of land proposed to be included within the district. There was also a description of lands proposed to be placed within the proposed district, but which lay outside of the service area of the utility and a description of certain lands proposed to be excluded from the proposed district which lay within said service area. The petition then stated, "The said land is situated in the following three counties: Fresno, Merced and Stanislaus; and the greatest portion of the area of the land is

situated in the county of Merced." (Under the provisions of the Water Code the Board of Supervisors of Merced County, that being the "principal" county, was given jurisdiction to act in the formation proceedings. Water Code, § 20518.) Those proposing the formation of the irrigation district employed a licensed civil engineer to undertake the preparation of the description of the land proposed to be included. He appeared as a witness before the board and testified as follows: That he had been instructed to prepare a description "of the service area in the three counties" of Merced, Stanislaus and Fresno; that the "correct" way of going about that would be by making an actual field survey; that such a method would have entailed great expense and much time and that in many cases the service lines of the utility lay across ownership lines so that many property owners did not know just where the service line lay; that he eliminated the idea of describing the lands by a survey; that it was desired to include in the district roughly the service area of the San Joaquin Canal Company; that he found no recorded maps on record at that time which showed this service area, so far as any line of demarcation was concerned; that he obtained a map outlining the service area which had been prepared by a Mr. Mott, Chief Engineer and Manager of the utility, and a licensed surveyor; that he knew from experience that Mott's work was accurately done; that he took this map and from it delineated the descriptions around the perimeter with inclusions and exclusions; that it was a difficult job and very unsatisfactory, for many of the courses were short and it was difficult to determine their length and bearing (a photostatic copy of this basic map was received in evidence, the original of which had been recorded during the time the petition was being prepared); that he had been instructed to "go around that service area and by metes and bounds indicate the land that was proposed to be incorporated in the district" and "to include therein only land in the three counties of Merced, Stanislaus and Fresno"; that he endeavored to do this; that he took the entire service area map and broke it up into three sections, one for each county; that he then made large scale maps of sections of the lands in each county and upon these projected the ownership plats of the county assessors, so that these enlarged sections showed the ownership of the included lands, together with a statement of the acreage involved in each ownership; that the perimeter of the service area alone measured over 200 miles and with the various exclusions and inclusions another 50 miles or more of boundary lines would be added; that in scaling the service area map to obtain the metes and bounds described he plotted over 1,100 courses; that the metes and bounds description included about 20 acres of barren swamp and overflowed land situated in Madera County; that the inclusion of this land was a mistake; that the statement in the completed description following the metes and bounds that the land described was within the three counties of Fresno, Merced and Stanislaus he considered as eliminating the parcel included within the metes and bounds description and lying in Madera County; that although the method he followed in arriving at a metes and bounds description of the area of the proposed district was unsatisfactory, yet it was probably within two or three per cent plus or minus correct in each area and that to the best of his ability he had arrived at the exact areas.

We think that the description of the proposed district was sufficiently definite to meet the requirements of the statute. Absolute accuracy, even by survey, was hardly to be expected when so large an area of land and so many varying courses and distances were involved. The statute does not require absolute accuracy, but by its very terms calls only for a "*general*" description of the land proposed to be included. The problem presented to the engineer employed to work out a description of the land was in this instance peculiarly difficult. In the main, and except for some inclusions and exclusions, it was the intent of petitioners, as shown by the petition itself, to form a district of all the land embraced within the existing service area of the Canal Company. But this service area did not coincide with the ownership of the various

bodies of land, that is, as to owners whose lands lay along the perimeter the service line often crossed the ownership lines, leaving some land within and some without the service area. Under these circumstances, as the engineer testified, he procured a map prepared by the Canal Company engineer, which showed the service area, and which map had been used over many years for that purpose. With this as a foundation he took the steps hereinbefore outlined in his testimony. We think the evidence before the board which we have related, together with the maps prepared and described by the engineer, and received in evidence by the board, furnish sufficient foundation for the finding of the board that the petition contained a description *generally* of the lands proposed to be included. We say this notwithstanding that there was evidence that in some particulars the work had been inaccurately done so that parcels of land were included in the description found in the petition that were not within the service area as portrayed by the basic map.

Appellants contend that the board did not have before it any evidence as to the genuineness of signatures of persons signing the petition as landowners. At the preliminary hearing it was incumbent upon the board to determine whether or not the petition presented to it had been signed by the required number of electors residing within the proposed district and of owners of land owning not less than 20% of the assessed value of all lands. Miller & Lux v. Board of Supervisors, 189 Cal. 254, 208 P. 304. Upon this matter the board took evidence, and we will summarize that of the principal witness, a Mr. Pearson. He testified that he had had considerable experience in title examination work and had been employed by the sponsors of the irrigation project to check the petition in the matter of signatures; that he and certain persons working under him had spent a period of four or five months in that work. He said that he first employed people familiar with the work in the assessors' offices in the various counties involved to make the actual search of the records in their respective counties and through this work to arrive at the total assessed valuation of all the land within the proposed boundaries of the district; that when this result had been achieved he then undertook with the same aid to determine the assessed valuation of land belonging to those people who were landowners who had signed the petition; that he had been furnished with the maps referred to in the testimony of the engineer for the proponents (that testimony we have hereinbefore narrated), which were the maps received in evidence to show the lands proposed to be included within the district; that the sectionalized maps showed the ownership of the various parcels of land and the acreage thereof; that he checked these owners' names against the last equalized assessment roll to ascertain if the names of owners on the sectionalized maps corresponded with the names of owners shown on the assessors' records; that he also checked the signatures appearing on the petition with the signatures upon the uncanceled affidavits of registration to determine whether the people who signed the petition were presently registered voters; that from this examination and comparison he ascertained that 672 of the persons who signed the petition were either electors residing within the district proposed to be formed or the holders of title to land and improvements therein according to the assessment rolls; that he further ascertained from such examination and comparison that the total assessed value of all the land within the proposed district was the sum of $7,819,571 approximately; that the persons whose signatures were affixed to the petition included the holders to title of land within the proposed district aggregating approximately 24.69%; that he had excluded about 130 names from his final lists for various reasons, but that after eliminating these names there were 672 signers remaining, which number included property owners having considerably in excess of 20% of the assessed value of land within the proposed district. On cross-examination by counsel for opponents to the petition the witness further testified as follows: That he used the sectionalized maps as the basis for determining the assessed valuation in each county and that the information on these maps was checked against the maps

in the respective assessors' offices; that where there was lack of identity between the names as they appeared on the petition and the documents of title he had searched he had made further inquiry to determine if the same person was involved; that there were few discrepancies of this sort and in some such cases he had gotten information from people who were familiar with the land itself, such as title office people; that if a signature in one place showed as John W. Jones and in another as J. W. Jones with the same acreage of land involved he assumed identity of person; that most of the people who owned land were registered voters; that as to those who were not he had no actual signatures to check against and in such cases checked the signature on the petition against the assessment records showing the ownership of the property.

We think the foregoing testimony was sufficient to support the board's findings that the petition had been signed by the requisite number of electors and landowners. To qualify as a signer the person must either be an elector within the district or a landowner therein. The witness ascertained that there were 672 signatures which included both classifications. This met the numerical requirement, assuming the witness properly reached his conclusion as to qualifications. This we think he did. These 672 were, as he said, for the most part electors and in those cases he checked their signatures on the petition with their signatures on the affidavits of registration. This was sufficient proof that the persons who signed the petition were also persons who were registered voters and whose affidavits of registration with their signatures were on file in the registrars' offices of the various counties. Included in the list of electors were owners of land, and some signers, although not electors, were owners of land within the district and so qualified to sign. This latter fact was sufficiently shown by a comparison of the ownership plats of the assessors' offices projected on to the district maps, it being competent for the board to conclude from the witness' testimony that the names of these signers corresponded with the names on the ownership books, and that there was in fact identity of signer and owner. C.C.P. § 1963, subd. 25. Thus there was substantial proof that 672 qualified persons had signed the petition and that included among them were the owners of land aggregating more than 20% of the total assessed land value in the district, as reflected by the last equalized assessment roll appearing in the offices of the county assessors. The Water Code provides that for the purposes of a petition to form a district the county assessment roll of the county in which the land is situated last equalized at the time of the first publication of the petition is conclusive evidence of value and title. Section 20569. Appellants assert that although the uncanceled registration affidavits formed a proper basis for ascertaining that signatures on the petition were those of electors yet since no signatures appear upon the assessment rolls the persons purportedly signing as landowners were not identified nor in any way proved to be the actual persons of the same name owning land within the district. We do not agree. The witness sufficiently testified that while in such cases there was no chance to make a comparison of signatures, nevertheless sufficient names appeared upon the petition that also appeared as owners upon the records checked that with the assumption of identity of person from identity of name the requisite percentage in assessed valuation was represented. We are unable to see, therefore, in what particular there was lack of substantial evidence before the board to justify its finding that in the matter of signers the petition met the statutory requirements.

Appellants contend that because the petition was not published in Madera County the board failed through want of the statutory notice to obtain jurisdiction to act. A sufficient answer to this contention is to be found in the description of the land proposed to be included as it appeared in the petition when correlated with the right of the board in passing upon the matter of jurisdiction to construe the description. Concededly the metes and bounds description included some 20 acres of land in Madera County, but the metes and bounds description was in this respect in conflict with

two other limiting descriptions contained in the petition. The petition stated: "That a *general* description of the land proposed to be formed into a district is all that land embraced within the present service area of the San Joaquin Canal Company, a public utility, together with the land presently occupied by canal rights of way and headworks and lands immediately adjacent to said headworks." There then followed the metes and bounds description, which concluded with the statement, "The said land is situated in the following three counties: Fresno, Merced and Stanislaus." Undoubtedly the metes and bounds description included some 20 acres of land in Madera County, but this 20 acres was without the service area of the San Joaquin Canal Company and within the area of another like utility. The description does not expressly describe any land as lying within Madera County, but at the point in question, the metes and bounds description states that it crosses the San Joaquin River from west to east and further on recrosses from east to west, embracing the 20 acres of land east of the river. The Madera County line is judicially known at this point to be the center line of the San Joaquin River. The most that can be said with respect to the claimed inclusion of Madera County land is that the metes and bounds description conflicts with the statements that all of the lands described are within the service area of the San Joaquin Canal Company and within the counties of Fresno, Merced and Stanislaus. The uncertainty thus created could be resolved by the board and from its finding we must assume that the board did resolve it when it found that publication in the three counties last named complied with the statutory requirement that the notice be published in all counties affected. Appellants argue that this conclusion cannot be arrived at in view of the declaration that the land proposed to be formed into a district included the headworks of the Canal Company service system. It was shown to be a fact that the headworks of the system consisted of the Mendota Dam across the San Joaquin River, so that, as appellants argue, the very specific description of this dam, one-half of which lay within Madera County, must be held to control the statement that the lands described lay within Fresno, Merced and Stanislaus Counties. We think, however, that this also was a matter for the board to determine, as was the matter of the 20 acres.

Finally, appellants contend that in sectionalizing those portions of the basic maps showing lands in Merced and Stanislaus Counties the sectionalized maps omitted a total of approximately 1,000 acres of land lying in those two counties and they argue that the witness Pearson, whose testimony we have narrated, did not take into his totals of assessed value the value of this omitted land, with the result, say appellants, that his calculations as to percentage of land value represented on the petition must be discarded. This contention involves an assumption that the witness arrived at his totals wholly from the sectionalized maps. While the testimony of the witness would support this assumption, it does not compel it. The witness testified that the proportion of the land and improvements included within the proposed district, the title to which was held by persons whose signatures were affixed to the petition, was approximately 24.20%, and in any event not less than 23.09%. When on cross-examination —and it is this testimony on which appellants rely—he said that he used the maps as a basis for determining the assessed valuation in each county, that he did not pay detailed attention to the metes and bounds description, that he assumed for the purpose of his work that the metes and bounds description contained the same area of land as shown on the maps, he did no more than to weaken, and not destroy, his testimony as to the total valuations and the percentage thereof represented in the petition. Appellants' objection is, in reality, that it is impossible to ascertain 20% of an unascertained whole. Mathematically speaking, appellants are correct. But the law must often be satisfied with approximations and we think that such is the situation here. The area of the land omitted amounted to but .66% of about 150,000 acres of land. For this small percentage of land to have an assessed value high enough to de-

stroy the 4% excess over the required 20% would require it to be enormously valuable when compared with the average value throughout all the included area. We think it cannot be assumed that such disproportionate value existed and consequently that the evidence was sufficient, notwithstanding the omission, to justify the board's jurisdictional finding in respect of values.

The judgment appealed from is affirmed.

SCHOTTKY, J., and BEDEAU, Justice pro tem., concur.



PEOPLE v. CALIFORNIA CENTRAL AIRLINES.*

Civ. 19332.

District Court of Appeal, Second District, Division 1, California.

June 22, 1953.

Hearing Granted Aug. 6, 1953.

Proceeding by state public utilities commission in the name of the People to collect penalty from airline for increasing rates prior to effective date of order increasing passenger rates for air coach service between Los Angeles and San Francisco. The Superior Court of Los Angeles County, Philbrick McCoy, J., sustained general demurrer to complaint without leave to amend, and from the judgment which followed the People appealed. The District Court of Appeal, Drapeau, J., held that the public utilities commission had no jurisdiction over air transportation companies.

Affirmed.

1. Carriers ⇐12(11)

Decisions of Public Utilities Commission increasing passenger rates for air coach service between Los Angeles and San Francisco did not preclude airline from raising jurisdictional issues in proceeding by state for penalty for increasing rates prior to effective date of order. Public Utilities Code, § 2107, Const. art. 12, § 1 et seq.

2. Public Service Commissions ⇐6.2

Since the common law did not recognize administrative bodies, jurisdiction of Public Utilities Commission must be derived from constitution and statutes. Gen.Laws, Act 6386, §§ 2(*l*), 2¼(d), 2¾(e), 2(dd); Const. art. 12, §§ 17 to 24.

3. Carriers ⇐5

In view of precise particularity used in Public Utilities Act in denoting types of businesses sought to be regulated, the Legislature must be deemed to have intentionally excluded air transportation companies from operation of the Act. Gen.Laws, Act 6386, §§ 2(*l*), 2¼(d), 2¾(e), 2(dd).

4. Carriers ⇐10
Public Service Commissions ⇐6.3

The jurisdiction of Public Utilities Commission extends only to such common carriers and public utilities as are specifically designated in the Public Utilities Act. Gen.Laws, Act 6386, §§ 2(*l*), 2¼(d), 2¾(e), 2(dd); Const. art. 12, §§ 17 to 24.

5. Public Service Commissions ⇐6.2

The Public Utilities Commission possess no adherent power but only such jurisdiction as is specifically given to it. Const. art. 12, § 1 et seq.; Gen.Laws, Act 6386, § 1 et seq.

6. Carriers ⇐12(1), 20(1)

Public Utilities Commission had no such jurisdiction over air transportation companies as would permit commission to fix passenger rates for air coach service between Los Angeles and San Francisco, and hence airline was not liable for penalty for increasing rates prior to effective date of order. Gen.Laws, Act 6386, §§ 2(*l*), 2¼(d), 2¾(e), 2(dd); Const. art. 12, §§ 17 to 24.

Everett C. McKeage and J. Thomason Phelps, San Francisco, for appellant.

John W. Preston, Jr., Los Angeles, for respondent.

* Subsequent opinion 268 P.2d 744.

DRAPEAU, Justice.

The State Public Utilities Commission, proceeding in the name of the People, seeks to collect a penalty from defendant pursuant to the terms of section 2107 of the Public Utilities Code, to-wit:

"Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

The complaint alleges the jurisdiction of the commission over intrastate rates, fares, charges and tariffs of all transportation companies, common carriers and public utilities operating within the State of California.

It also alleges that defendant is a transportation company, a common carrier and a public utility within the contemplation of Article XII of the State Constitution and of the Public Utilities Code, as amended;

That ever since January 1, 1949, to and including May 8, 1951, the rates, fares, charges and tariffs set forth in defendant's Tariff No. 1 were the lawful rates applicable to air coach service between Los Angeles and San Francisco;

That effective May 9, 1951, said commission by its decision of April 24, 1951, reported in 50 Cal. P.U.C. 563, authorized defendant to increase its passenger rates for that service;

That without prior or any authorization, permission or consent of the commission, defendant put the increased rate into effect on March 1, 1951, which it continued to charge up to and including May 8, 1951, a period of 69 days, thereby incurring a penalty to the State of California, to wit: $2,000 for each day's violation of section 2107, supra, a total of $138,000.

A general demurrer to the complaint was sustained without leave to amend. From the judgment which followed, the People appeal.

Appellant urges that the complaint herein states sufficient facts to constitute a cause of action. This for the reason that Article XII of the California Constitution "contains absolute, unqualified prohibitions *directed to all transportation companies.*" Also, that all doubt of respondent's legal status as a transportation company, common carrier and public utility within the meaning of sections 20 and 22 of said article have been removed by the commission's decision in 50 Cal.P.U.C. 563, as to which a petition for review was denied by the Supreme Court (37 A.C. 633.)

That proceeding was "an investigation upon the Commission's own motion into the reasonableness, lawfulness and propriety of the fares, rules, regulations, charges, services, operations and practices of respondent air lines for the transportation of passengers between the San Francisco Bay area and the Los Angeles area. * * *

"This investigation was instituted by the Commission upon receipt of information that fares were being assessed for so-called 'coach' transportation in excess of those named for such service in the tariffs on file with the Commission." (50 Cal.P.U.C. 563, 564–565.)

It is pointed out in said opinion of the commission that on March 1, 1951, the respondent, Western Air Lines, Inc., and United Air Lines, Inc., were collecting the increased fare for coach service and that prior to that date, all three companies had filed with the commission applications for authority to make the fare increase. At the hearing the companies challenged the commission's power to regulate the activities and business of air transportation companies, contending that "the increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the companies construed as tantamount to a demand. * * * The record in this proceeding is clear that the $11.70 fare was developed, recommended and in fact urged upon the carriers, by that Board."

The final outcome of the hearing before the commission was the latter's approval of the increased rate theretofore approved by the Civil Aeronautics Board and which the

airlines had been charging since March 1, 1951. The commission's order was dated April 24, 1951 and its effective date was specifically stated to be May 9, 1951.

[1] In Sale v. Railroad Commission, 15 Cal.2d 612, 104 P.2d 38, 40, our Supreme Court said: "It is true that the commission's decisions and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law. (Citations.) This is not to say, however, that such a decision is *res judicata* in the sense in which that doctrine is applied in the law courts. Stratton v. Railroad Comm[ission of State of California], 186 Cal. 119, 127, 198 P. 1051."

In the Stratton case it was stated: "The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the Commission is not of that character." [186 Cal. 119, 198 P. 1055.]

On this phase of the case, appellant argues: "Whether or not the above cited decision of the Commission is *res judicata* upon the question of respondent's status, there can be no doubt that it firmly establishes the proposition that a carrier of passengers by air whose services are held out to the public generally, for compensation, and which operates intrastate in California, is a common carrier, a transportation company, and a public utility within the meaning of Article XII of the Constitution."

At the hearing before the commission, the only issue was the propriety of an increase in passenger fares. Here, the State of California is attempting to exact a penalty under section 2107 of the Public Utilities Code. As a result, respondent is not precluded by the prior administrative rate decision from raising jurisdictional issues in the instant case.

[2] Since the common law did not recognize administrative bodies, the jurisdiction of the Public Utilities Commission must necessarily be derived from the Constitution and statutes of this state: specifically Article XII, sections 17 to 24, inclusive, of the Constitution, the Public Utilities Act of 1911, as amended, and the Public Utilities Code enacted in 1951.

Section 17 of Article XII provides: "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control."

Section 20 thereof prohibits any railroad or other transportation company from raising rates except upon a showing before the commission that such increase is justified.

Section 22 gives the commission the power to establish rates for transportation of passengers and freight by railroads and other transportation companies. In addition it provides: "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon (the commission) additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon (it) in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 of Article XII, supra, specifically enumerates the kinds of public utilities under control of the commission; every common carrier is declared to be a public utility, "subject to such control and regulation by (the commission) as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. * * * and the right of the Legislature to confer powers upon (the commission) respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Section 24: "The Legislature shall pass all laws necessary for the enforcement of the provisions of this article."

Respondent urges that the provisions of Article XII, supra, are not self-executing, and that action by the Legislature was and is necessary in order to give the commis-

sion jurisdiction over air transportation companies. Further, that jurisdiction to fix and establish rates, fares, rules and regulations of an intrastate air transportation company has not been conferred upon the commission by statute.

The Public Utilities Act, 2 Deering's Gen. Laws, Act 6386, enacted to implement the constitutional provisions hereinbefore referred to, provides that the term "common carrier" includes every railroad, street railroad, and express corporation; every freight forwarder, dispatch, sleeping-car, dining car, drawing-room car, freight, freight line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading and every other car corporation, section 2(*l*); every passenger stage corporation, section 2¼ (d); every highway common carrier, section 2¾(e).

Said act also provides that the term "public utility" includes every common carrier, toll bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman and heat corporation. Section 2(dd).

Neither in the constitutional provisions nor in the enabling acts is any mention made of air transportation.

[3, 4] In view of the precise particularity used in denoting the types of businesses sought to be regulated, the Legislature must be deemed to have intentionally excluded air transportation companies from operation of the Public Utilities Act. In other words, the jurisdiction of the commission extends only to such common carriers and public utilities as are specifically designated in the statute.

Our Supreme Court in the case of In re Martinez, 22 Cal.2d 259, 138 P.2d 10, had occasion to pass upon the question of the jurisdiction of the Railroad Commission, now Public Utilities Commission, over common carriers of a kind which were not specifically described in the constitution or specifically provided for by the legislature.

In that case petitioner had been convicted in a city police court for violating a municipal ordinance regulating the fixing of taxicab fares. Petitioner sought release on a writ of habeas corpus, contending that the ordinance was unconstitutional because the exclusive power to fix such rates was vested in the commission.

It was there held that the commission must first be given a specific legislative mandate to act before it could exercise jurisdiction over a particular class of common carrier.

It was there stated, 22 Cal.2d at page 261, 138 P.2d at page 11, that petitioner's contention "entirely disregards that portion of the quoted constitutional provision [section 23 of Article XII] which declares that the public utilities therein defined (including common carriers) shall be 'subject to such control and regulation by the Railroad Commission *as may be provided by the Legislature.*' The section further provides that 'The Railroad Commission *shall have and exercise such power and jurisdiction to supervise and regulate public utilities* * * * *and to fix the rates to be charged* for * * * services rendered by public utilities *as shall be conferred upon it by the Legislature* * * *.' (Italics ours.)

"The italicized language is clear in its declaration that only such of the utilities therein designated, including common carriers operating within a municipality, may be regulated by the Railroad Commission as are made subject to such regulation by legislative enactment. In other words, while a taxicab is a common carrier (code § supra [sec. 2168, Civ.Code]; Bezera v. Associated Oil Co., 117 Cal.App. 139, 143, 3 P.2d 622; 45 A.L.R. 300) and section 23 of article XII of the Constitution declares every common carrier to be a public utility, the constitutional section further expressly declares that the public utilities therein designated shall be subject to such control and regulation by the Railroad Commission 'as may be provided by the Legislature.' To determine whether taxicabs and the rates thereof are subject to the jurisdiction of the Railroad Commission we must therefore look to the statutes enacted by the Legislature. * * *

"Nowhere in the quoted provisions of the Public Utilities Act, nor in its other provisions, do we find any reference to taxicabs

or taxicab companies. Each of the many agencies designated in subdivisions (dd) and (*l*) is specifically mentioned and described in detail or is included in groups carefully described in the act. If the Legislature had intended to include taxicabs it would not have omitted reference to them while including detailed descriptions of all other agencies covered by the act, some of which perform similar services. Moreover, references in other parts of the act to common carriers 'subject to the provisions of this act' indicate a legislative intention not to include all common carriers."

[5] By this decision the Supreme Court has reaffirmed the principle that the commission possesses no inherent power but only such jurisdiction as is specifically given to it. (See 33 C.L.R. 125.)

[6] As a result, the commission has no jurisdiction over air transportation companies.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



PEOPLE of the State of California, Plaintiff and Appellant, v. WESTERN AIR LINES, Inc., a corporation, Defendant and Respondent.*

Civ. 19333.

District Court of Appeal, Second District, Division 1, California.

June 22, 1953.

Hearing Granted Aug. 6, 1953.

Appeal from a judgment of the Superior Court of Los Angeles County, Philbrick McCoy, Judge.

Everett C. McKeage and J. Thomason Phelps, San Francisco, for appellant.

Guthrie, Darling & Shattuck, Los Angeles (Hugh W. Darling, Donald K. Hall and Matthew S. Rae, Jr., Los Angeles, of counsel), for respondent.

* Subsequent opinion 268 P.2d 723.

PER CURIAM.

This appeal presents the same issues as those decided in People v. California Central Airlines, Cal.App., 258 P.2d 577, and that decision is controlling herein.

The judgment is affirmed.



118 Cal.App.2d 572

ROEDER v. ROEDER.

Civ. 15473.

District Court of Appeal, First District, Division 1, California.

June 19, 1953.

Hearing Denied Aug. 13, 1953.

Great uncle brought action against grandniece to have deed from great uncle to grandniece set aside, on ground that deed had been secured by fraud, undue influence, and mistake. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment adverse to great uncle, and he appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that deed was voluntary and implied finding that deed was not the result of a mistake.

Judgment affirmed.

1. Deeds ⇐211(1)

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, evidence sustained finding that great uncle was rational and mentally competent when deed was executed.

2. Appeal and Error ⇐1071(6)

Failure to find on a material issue is reversible error.

3. Trial ⇐397(2)

Trial court need not make specific findings as to each of several material issues, where findings, taken as a whole, or construed together, clearly show that they

include the trial court's conclusion on the material issues.

4. Trial ⇐397(2)

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, trial court's findings that deed, subject to agreed intent to reserve a life estate, was valid and binding, and that great uncle was competent and aware of what he was doing, and that transfer of title was pursuant to great uncle's voluntary act and intention to transfer title, and that his consent was not secured by misrepresentation or domination of grandniece, precluded possibility that great uncle was misled or mistaken, and therefore failure of trial court to find specifically that there was no mistake, was not error.

5. Deeds ⇐211(5)

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, evidence sustained finding that great uncle voluntarily executed the deed.

6. Deeds ⇐211(2)

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, evidence sustained implied finding that deed was not the result of mistake.

7. Deeds ⇐196(2)

If confidential relationship existed between great uncle and grandniece, to whom great uncle conveyed realty, any transaction by which grandniece secured benefit would be presumptively fraudulent, and burden would rest on grandniece to show full disclosure and that no unfair advantage was secured.

8. Deeds ⇐196(2)

Presumption of invalidity of deed because of confidential relationship between grantor and grantee is rebuttable. Civ. Code, § 2235.

9. Deeds ⇐78

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, whether there was fair disclosure, whether there was any overreaching, and whether great uncle acted voluntarily and with full understanding, were fact questions for court as trier of the facts. Civ.Code, § 2235.

10. Deeds ⇐70(6), 72(3)

Where confidential relationship between grantor and grantee exists, absence of legal advice is a factor, and an important one, to be weighed by trier of facts in determining whether relationship has been violated, but it is not an absolute essential to a valid conveyance.

11. Deeds ⇐78

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, wherein evidence sustained findings of fairness and no overreaching, showing that great uncle had no independent legal advice did not establish fraud as a matter of law, even if a confidential relationship existed.

12. Deeds ⇐196(2, 3)

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, burden of showing existence of confidential relationship rested on great uncle.

13. Deeds ⇐211(3, 4)

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, evidence sustained finding that there was no confidential relationship.

14. Appeal and Error ⇐762

The practice of raising new points in reply brief is not to be commended.

15. Reformation of Instruments ⇐36(4)

Where defendant, in action to have deed set aside, did not specifically pray for

reformation of deed, but she did plead facts in relation to oral agreement whereby plaintiff was to reserve life estate, and did pray for general relief, pleading was sufficient to permit trial court, in exercise of its broad equity powers, to reform deed.

16. Cancellation of Instruments ⇐53

In action by great uncle against grandniece to have deed from great uncle to grandniece set aside on ground that deed had been secured by fraud, undue influence, and mistake, findings that great uncle was elderly and that after date of deed he married a much younger woman and shortly thereafter sought to regain realty were relevant on issue of motive of great uncle in executing deed.

Joseph A. Brown, San Francisco, for appellant.

Lemuel H. Matthews, Joseph A. Kiernan, Jr., and Maddux, Kiernan & Jonas, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, August Edward Roeder, brought this action against his grandniece, Margaret Jane Roeder, to set aside a deed and to compel a reconveyance of certain real property on the ground that such deed had been secured by fraud, undue influence and mistake, and that there had not been a valid delivery. The trial court found a valid delivery, and that there was no fraud or undue influence, that plaintiff was competent at the time of delivery, and that the parties intended (defendant having so averred in her answer) that a life estate should be reserved to plaintiff. Judgment was entered reforming the deed and determining that defendant was the owner of the property subject to a life estate in plaintiff. Plaintiff appeals, contending that, as a matter of law, the evidence shows that the deed was executed as the result of mistake, that it was secured by fraud and undue influence and in violation of a confidential relationship, and that it was error to grant him the partial remedy of reformation.

The evidence most favorable to defendant shows the following:

The deed by which plaintiff conveyed the property in question to defendant was delivered December 2, 1949, at which time plaintiff was 77 years of age. The property involved is a twelve-unit apartment house in San Francisco which produces an income of $450 to $500 a month, plaintiff's only substantial source of income. Plaintiff lived in the apartment house and managed its operations. For many years prior to 1949 plaintiff and the family group of defendant had been friendly, and exchanged visits, they being his only blood relatives known to any of the witnesses. Plaintiff is defendant's great uncle, her father, Emory Roeder, being plaintiff's nephew. The Emory Roeders live in Alameda. Commencing in about September, 1949, plaintiff began to discuss with the Emory Roeders problems concerning the management of the apartment house, inasmuch as he was having difficulties with some of the tenants and with repairmen and contractors. Defendant, who was working as a secretary, frequently had dinner with plaintiff at his apartment and would remain an hour or so thereafter and listen to her uncle talk about his management and tenant problems. During these conversations plaintiff urged his niece to come and live in the apartment house to assist him in its management. He told her that he was getting old and needed someone he knew to help him. At one stage in the discussions he offered defendant a full-time job as manager of the apartment house at the same salary she was earning as a secretary. He told defendant that several years before 1949 he had made a will leaving the property to her, and he told her and other witnesses that sooner or later defendant would own the property and that she might as well come over and get acquainted with it and at the same time relieve him of some of the work.

Sometime in November of 1949 plaintiff agreed to convey the property to defendant, and she agreed to come and live at the apartment house and assist her uncle in its management. After plaintiff had told defendant that he had willed the property to her, she told plaintiff that inheritance taxes might be costly and that she wanted, if possible, to avoid paying this tax. She

suggested that a deed of gift might avoid complications at his death. She also told him that such a deed would not change the status of the property so far as he was concerned. Plaintiff evidenced an interest in this method of handling the transaction and suggested that she investigate its possibilities. Defendant consulted with one Howen, an old friend of plaintiff and an old friend of defendant and of her family. Howen confirmed her impression that a deed was a proper method of handling the transaction. Thereafter, and later in November, defendant told plaintiff what she had discovered. In this conversation she told plaintiff that "I had found out that there was an instrument called a gift deed that would transfer the property into my name * * * and would eliminate any difficulty at the time of his death, but at no time was I interested in any of the revenue or the income from the property, that that was all to still be his and he was to still live in the apartment house as he had done during the years, and that in effect the only thing that would be changed would be the fact the property would be in my name and not in his." At this, or a subsequent, conversation defendant told the plaintiff that if he executed the deed he would retain all the rights of an owner except that the title would be in her name, and that the deed would make no difference in his right of control over the property. It did not enter her mind to tell him that the oral agreement limiting the deed would not be binding if she should die, or that she could mortgage or sell the property without his consent. While she knew her general legal rights as owner, she did not give the matters relating to the legal consequences of the transaction another thought, because it never entered her mind that she would ever deprive plaintiff of his rights to the rents or other control of the property.

Defendant testified that, after plaintiff had told her to do so, she asked Howen to draft the deed, and that he did so from a legal description secured from the original deed which plaintiff had secured from his safe deposit box. The plaintiff went to his bank alone and secured the original deed and delivered it to defendant to be used for this purpose. The deed was prepared by Howen and delivered to defendant on November 30, 1949. On December 2nd she delivered it to plaintiff. Then she and plaintiff visited a notary in San Francisco and the deed was executed, acknowledged and delivered. The notary testified that plaintiff presented the deed to her and asked if she would acknowledge it. Upon being asked by the notary, plaintiff stated that he knew what he was signing, and did so in her presence. After the signature was acknowledged the deed was handed to plaintiff who, in turn, handed it to defendant. The defendant had the deed recorded.

Defendant, thereafter, commenced to assist plaintiff in the management of the apartment house. Early in February of 1950, defendant, after redecorating one of the apartments, moved in and proceeded to assist her uncle in the management of the project as she had agreed. She managed the apartment, collected the rents, deposited them in her uncle's commercial account, paid the bills, and handled the complaints of the tenants and contractors. Plaintiff expressed to defendant, her family, and to various friends, his pleasure at this arrangement. This continued until April 10 or 11, 1950, when defendant contracted pneumonia, and returned to her home in Alameda for treatment. She remained in Alameda until the first week in May, when she returned to the apartment house and resumed her duties as manager. At no time did she attempt to retain the rents for her own use, or exercise her legal rights under the deed.

About this time plaintiff became engaged to and married a divorcee, Jeanette by name, then about 34 years of age. Plaintiff was then 77. Plaintiff had known Jeanette for about a year prior to the marriage, she being the renter of a garage in the apartment house. In May, plaintiff introduced Jeanette to defendant as his fiancee. Apparently at this conversation it was suggested that Jeanette would like defendant's apartment. Defendant told Jeanette that the apartment building was in defendant's name and that it was her responsibility to stay on the premises. Plaintiff

married Jeanette on May 8, 1950. Thereafter, relations between the parties rapidly deteriorated. On May 10th or 11th the plaintiff and his new wife visited the Emory Roeders in Alameda. Emory Roeder was then sick in bed. Jeanette demanded the key to plaintiff's safe deposit box, then in the possession of Emory Roeder, and demanded that defendant convey the apartment house back to plaintiff. Plaintiff did not participate in this conversation, although he was present. Mrs. Emory Roeder protested discussing such matters while her husband was ill, and the conversation was terminated. A few days later the safe deposit key was sent to plaintiff.

A few days after this occurrence plaintiff came to defendant's room hungry and temporarily deserted by his new wife. Defendant took him to Alameda, and her family fed and cared for him. By that time the complaint in this action had already been filed, but such fact was unknown to defendant until several months later when she was served. Nevertheless, on this visit, plaintiff said nothing about the property, nor did he mention the action then on file. Howen also testified that, about this time, plaintiff complained to him about being lonesome, and being compelled to prepare his own meals.

As a result of these controversies, the defendant moved out of the apartment on June 10, 1950, and was served with process in this action several days later.

[1] At the time of trial, which was in November, 1951, plaintiff gave the definite impression that he was then incompetent. He could not recall the execution of the deed; claimed that his signature was a forgery; denied deeding the property to defendant; denied ever willing the property to her; denied ever discussing deeding the property to defendant; denied that there was a mortgage on the apartment although the existence of such was an admitted fact; was unable to remember marrying Jeanette, and could not recognize her in the courtroom; and could not identify his signature on the complaint. But whatever plaintiff's mental condition was in November of 1951, the evidence clearly supports the finding that in December of 1949, when this deed was executed, plaintiff was rational and competent. This was testified to not only by defendant and her family, but also by Howen, the notary public who acknowledged the deed, the bank teller where plaintiff had his account, and by plaintiff's wife.

It is one of the major contentions of plaintiff that, as a matter of law, this evidence compels a finding that his consent to the deed was secured either as a result of a mutual mistake of law, or as the result of a mistake of plaintiff known to and taken advantage of by defendant. Plaintiff also objects to the failure to find specifically on the issue of mistake.

[2–4] Insofar as this last contention is concerned, while the trial court made no specific finding on mistake, it did find that the deed, subject to the agreed intent to reserve a life estate, was valid and binding; that plaintiff was competent and aware of what he was doing; that the transfer of title was pursuant to plaintiff's "voluntary act and intention * * * to transfer title," and that such consent was not secured by misrepresentation or domination of defendant. While it is reversible error not to find on a material issue, it is also the law that "it is not necessary to make specific findings as to each of several material issues where the findings, taken as a whole, or construed together, clearly show that they include the court's conclusion upon the material issues." Petersen v. Murphy, 59 Cal.App.2d 528, 533, 139 P.2d 49, 52; see, also, Bowers v. Union Trust Co., 117 Cal. App. 259, 3 P.2d 614; Chamberlain v. Abeles, 88 Cal.App.2d 291, 198 P.2d 927. The findings that were made preclude the possibility that plaintiff was misled or mistaken, so that failure to specifically find thereon was not error.

[5, 6] As to whether these findings to the effect that plaintiff executed the deed voluntarily and, by implication, not as the result of a mistake, are supported, there is ample evidence and reasonable inferences therefrom to support them. Plaintiff argues the facts at some length. He places his main reliance on defendant's statement that she told plaintiff that if he executed

the deed there would be no change in the status of, or his control over, the property, but knew generally at that time that she could sell the property if she wanted to. Of course the deed did change the control of plaintiff over his property. But the record shows that what defendant meant was that, insofar as plaintiff's control and right to income from the property and his right to manage it during his lifetime were concerned, the deed would make no difference. The only "mistake" was in failing to reserve to plaintiff, in express terms instead of by oral agreement, a life estate, and that oversight has been recognized by the reformation of the deed granted in the judgment. The evidence supports the reasonable inference that plaintiff so understood the transaction. He had been a successful contractor for many years, and had managed this property for a long time. It is reasonable to infer that, by executing and delivering a deed to the property to defendant, he knew that he was parting with title. He wanted defendant to have the property and was content that she should have the title as long as his right to the income was not impaired during his lifetime. Defendant told him that a gift deed would put the property in her name. Once the trial court found that he was competent (and we have already held that the finding on that issue is supported), the trial court was entitled to infer that plaintiff knew what defendant intended by her statement, and knew that he was conveying title to her.

The plaintiff next contends that the parties were in a confidential relationship, that the facts disclose that she handled the transaction and controlled it for her own benefit, and that such facts raise a presumption of invalidity because plaintiff was not afforded independent legal advice. It is urged that in the absence of such advice, and in the presence of fraud, actual or presumed, the trial court was, as a matter of law, bound to set aside the deed.

[7–9] Of course, if a confidential relationship existed between the parties, any transaction by which she secured a benefit over her uncle would be presumptively fraudulent and the burden would rest on defendant to show full disclosure and that no unfair advantage was secured. Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289; Brison v. Brison, 75 Cal. 525, 17 P. 689; Payne v. Payne, 12 Cal.App. 251, 107 P. 148. These were cases involving the affirming of the finding of the trial court that there existed a confidential relationship and an abuse of it. But even where the presumption of invalidity arises because of the confidential relationship, § 2235, Civ.Code, the presumption is rebuttable. It is a question of fact as to whether there was a fair disclosure, any overreaching, and as to whether the grantor acted voluntarily and with full understanding. O'Neill v. Dennis, 109 Cal.App.2d 210, 240 P.2d 376; Ginn v. Podesta, 8 Cal.2d 233, 64 P.2d 1090; Cella v. Cosgro, 115 Cal.App. 2d 816, 253 P.2d 57; Goldman v. Goldman, 116 Cal.App.2d 483, 253 P.2d 483. The findings on these issues are all adverse to plaintiff, and such findings are amply supported by the facts already set forth.

[10] Plaintiff places considerable reliance on the fact that he did not have independent legal advice, and apparently contends that where a confidential relationship exists the absence of independent legal advice establishes fraud as a matter of law. That is not the law. The absence of legal advice, where a confidential relationship exists, is a factor, and an important one, to be weighed by the trial court in determining whether the relationship has been violated, but it is not an absolute essential to a valid conveyance to a confidant. In O'Neill v. Dennis, 109 Cal.App.2d 210, at page 214, 240 P.2d 376, at page 379, the court stated the proper rule as follows: "Appellant makes the point that she was entirely without the benefit of independent advice in the transaction and urges reversal of the judgment on this ground. Lack of independent advice by the grantor is not of and in itself a ground for vitiating a deed under such circumstances as we have here presented, but is a fact to be weighed by the trial court in determining whether the grantor acted voluntarily and with a complete understanding of the transaction. Brown v. Canadian Indus. Alcohol

Co., 209 Cal. 596, 289 P. 613; Laherty v. Connell [64 Cal.App.2d 355, 148 P.2d 895], supra; Azevedo v. Leavitt [76 Cal.App.2d 321, 172 P.2d 704], supra."

[11] Thus, even if a confidential relationship here existed, the findings of fairness and no overreaching being supported, the transaction would not have to be set aside as a matter of law.

[12, 13] But the trial court has found that no confidential relationship existed. The question as to whether such a relationship did or did not exist, in the legal sense, was, under the facts, a question of fact, and the burden of showing its existence rested on the one asserting it, in this case on the plaintiff. The evidence does not compel the conclusion that such burden was sustained. To the contrary the evidence supports the finding of no confidential relationship. When the deed was executed the defendant was a young woman. The plaintiff was an experienced business man, who, while elderly, had been taking care of himself and his business affairs for many years. Defendant, when the deed was executed, did not live in the apartment house. She saw her great uncle only intermittently, and did not then assist him in the handling of his business affairs. The most the record shows is that defendant, on occasion, talked with him about his affairs. Plaintiff had ample opportunity to secure independent advice if he wanted it, and defendant did nothing to prevent him from securing it. It was plaintiff who suggested that defendant look into the procedure of executing a deed of gift, and he, it was, who went to his bank, alone, and secured his old deed. These facts do not compel a finding that a confidential relationship in the legal sense existed. Wilson v. Sampson, 91 Cal.App.2d 453, 205 P.2d 753, involved a factual situation somewhat similar to the one here involved. In sustaining a finding of no confidential relationship the court, 91 Cal.App.2d at page 459, 205 P.2d at page 756, stated: "We cannot say that there is no substantial evidence to sustain the findings. Even the evidence set forth in appellant's brief does not establish a confidential relationship between William H. Sampson and appellant as all it shows is that Sampson roomed at appellant's rooming house on the Tennessee Street property, sometimes helped her with her work, and that they frequently sat together and 'talked very friendly.' Appellant testified that Sampson made love to her, but even so, friendship, affection, and even intimacy existing between two parties does not constitute a confidential relationship. Meyer v. Zuber, 92 Cal.App. 767, 772, 268 P. 954; Jackson v. Gorham, 98 Cal.App. 112, 116, 276 P. 391."

The parties quarrel extensively over the proper application of the rules announced in Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, to the facts of this case. There, it is true, the Supreme Court held that, although the evidence was somewhat conflicting, an implied finding of the trial court that the confidant of an aged and feeble old man had rebutted the presumption that she had secured a $500,000 note from him by fraud, was unsupported. As was said in Taylor v. Wright, 69 Cal.App. 2d 371, 387, 159 P.2d 980, 988, that case has been "frequently relied upon [by litigants] but seldom followed [by the courts]." Certainly the case does not stand for the proposition that the appellate courts can or should reweigh the evidence or upset findings based on substantial credible evidence or upon reasonable inferences therefrom. The case has no application to the facts here presented.

The next contention of plaintiff is that it was error to grant to him the partial remedy of reformation and to deny to him the requested complete remedy of rescission. This contention is largely a repetition of the arguments that defendant misrepresented the legal effect of the deed, was fraudulent, and exercised undue influence. Of course, if such charges were true, it would have been error to reform the deed so as to grant to plaintiff a mere life estate and to deny to him rescission. But those charges, as already pointed out, were found to be untrue, and the findings are supported. The granting of reformation was fair and enforced the intent of the parties. Both parties intended from the

beginning of this transaction, that plaintiff should retain, during his lifetime, the income from the property and the general management of the apartment house. Defendant at no time has asserted that an absolute grant was intended. She has at all times conceded, not only by words but by her actions, that a life estate was to be retained by plaintiff. She made that agreement but did not insert it in the deed. Both parties were then content to rest upon her oral assurances. The reformation grants to plaintiff the protection that did not exist under the oral arrangement, and it is in accord with the intent of the parties.

[14, 15] In his reply brief for the first time plaintiff argues that reformation was outside the issues raised by the pleadings. This practice of raising new points in the reply brief is not to be commended. The point now sought to be raised, however, is without merit. While defendant did not specifically pray for reformation, she did plead the facts in relation to the oral agreement, and did pray for general relief. That was sufficient to permit the court, in the exercise of its broad equity powers, to grant the relief here involved.

[16] Plaintiff also argues that, because the trial court found that plaintiff was elderly and, after the date of the conveyance, married a much younger woman, and shortly thereafter sought to regain the property, the trial court must have been motivated by these facts, which are claimed to be immaterial. All of these challenged facts as found are amply supported. The challenged facts were not immaterial. The basic question was the motive of plaintiff in executing the deed. On this issue it was relevant to try to show that the attempted renunciation of the transaction was based on a change of mind after marriage rather than upon a lack of the requisite intent at the time of the conveyance. The challenged findings were relevant on this issue.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

WORTHLEY v. WORTHLEY.*

Civ. 19585.

District Court of Appeal, Second District, Division 2, California.

June 22, 1953.

Opinion Corrected and Rehearing Denied July 8, 1953.

Hearing Granted Aug. 20, 1953.

Action to enforce a judgment of New Jersey court for separate maintenance. The Superior Court, Los Angeles County, rendered judgment sustaining a plea in bar, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that wife's rights under judgment in personam for separate maintenance obtained in chancery court of matrimonial domicile were not affected by divorce decree subsequently obtained by husband in another state on substituted service.

Judgment reversed.

1. Divorce ⇐330

Judgment for separate maintenance obtained by wife in chancery court of matrimonial domicile against husband in personam was the personal property of wife and her rights thereunder were not affected by divorce decree subsequently obtained by husband in another state on substituted service on wife.

2. Husband and Wife ⇐288

Proof of prior dissolution of marriage is a complete defense to action for separate maintenance.

Kenny & Morris, Los Angeles, for appellant.

Slane, Mantalica & Davis, Los Angeles, by Frank Barclay, Los Angeles, for respondent.

MOORE, Presiding Justice.

In an action to enforce a judgment of a New Jersey court for separate maintenance, the court below sustained a plea in bar of a divorce decree subsequently obtained in Nevada. Mrs. Worthley appeals from the judgment which bars her from further attempts to enforce payments under her New Jersey decree.

The parties were married March 6, 1943, and separated November 21, 1946. On May 19, 1947, she obtained a judgment, in

* Subsequent opinion 267 P.2d 23.

personam, by a chancery court of New Jersey, the state of her matrimonial domicile. Respondent was thereby ordered to pay his wife $9 every week for her support and to pay other sums aggregating $433. The husband, on the records of the same court, consented to the entry of such judgment.

Respondent departed from New Jersey in March, 1948, became a resident of Nevada and promptly initiated proceedings for divorce. Having obtained substituted service on his wife in New Jersey, thereafter, on June 7, 1948, he caused a final decree of divorce to be entered in the District Court of Washoe County, Nevada. No mention was made in that decree of the former judgment in chancery. Respondent, having ceased to make payments required of him, moved into California and thereafter ignored his obligation to his former spouse.

The sole question, therefore, is whether the judgment, *in rem,* entered in the court of Nevada, serves to nullify the judgment *in personam* previously entered in New Jersey. Sound reason and eminent authority seem to negate such thesis.

[1] The judgment obtained by appellant in New Jersey is her own personal property. It can be taken from her neither on the *ipse dixit* of the judgment debtor nor by the formal entry of a judicial decree entered in a state which she never entered and to whose jurisdiction she never submitted. Whatever property or rights appellant owned on the day the divorce decree was granted continued to be hers despite the solemnity of the *ex parte,* judicial proceedings and despite the fact that the Nevada decree dissolved her marital status and made respondent free from future marital obligation to her. Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 1215, 92 L.Ed. 1561, 1 A.L.R.2d 1412, 1416. The Estin story is a rank parallel to that at bar. The couple were married in New York in 1937 and separated in 1942. In 1943 Mrs. Estin sued her husband for separate maintenance. Though she had no issue, she was awarded "permanent alimony" of $180 per month. In 1944 he located in Nevada; in 1945 he sued for divorce and obtained constructive service on her, but she made no appearance. He was awarded an absolute divorce on the ground of "'three years continual separation, without cohabitation.'" He thereupon ceased to make payments. When she sued him in New York for arrearages of alimony he appeared and moved to eliminate the alimony provision of her judgment by virtue of the Nevada decree. The court's denial of his motion was not disturbed by the United States Supreme Court.

The Estin case is followed by a holding of the Supreme Court to the effect that although a decree of a court of Wisconsin, where the wife had never resided and made no appearance, awarded custody of the two children to their father in an *ex parte* divorce action, the court of Ohio was not obligated under the full faith and credit clause to accept the Wisconsin judgment as to the children. Hence, the decree of the Ohio court denying the wife support for her children was reversed. "Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody." May v. Anderson, 73 S.Ct. 840, 843; see also Campbell v. Campbell, 107 Cal.App.2d 732, 736, 846, 238 P.2d 81.

[2] Respondent cites authorities, Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351; De Young v. De Young, 27 Cal.2d 521, 165 P.2d 457; Calhoun v. Calhoun, 70 Cal.App.2d 233, 160 P.2d 923; Wilson v. Superior Court, 31 Cal.2d 458, 465, 189 P. 2d 266, which he contends establish the paramountcy of his divorce decree and that it must be given full faith and credit; and he asserts that appellant has no right to collect support money from him since they are divorced. In the Cardinale case the wife had obtained at San Diego an *ex parte* decree for separate maintenance. The husband continued the payments for ten years. Then he sued her in Nevada for divorce on the ground of extreme cruelty and served her by publication. Thereafter, Mrs. Cardinale procured a judgment for $998, the unpaid monthly arrearages. Thereupon the husband moved to set aside the last mentioned judgment and to modify her decree for separate maintenance. The court found upon conflicting evidence all factual issues in favor of the husband and ad-

judged the nullity of the decree for $998 and terminated the separate maintenance decree as of the date of the Nevada divorce. She made no attempt to prove her innocence of wrongdoing after March 2, 1923, but by her pleading alleged her condonation of her husband's prior offenses. The Nevada decree was valid, and she was in no position to maintain the separate maintenance decree. Mrs. De Young sued for separate maintenance some six years after her husband's divorce and failed to prove his lack of domicile or compliance with the laws of Chihuahua. Proof of a prior dissolution of the marriage is a complete defense to such action. Mr. Calhoun had a bona fide domicile in Nevada, and obtained a valid decree of divorce on the three-year-law of no cohabitation, and Mrs. Calhoun did not ask for maintenance while still the wife of Calhoun. Wilson v. Superior Court decided that the final decree of divorce includes the interlocutory provisions unless otherwise stated.

Judgment reversed.

McCOMB and FOX, JJ., concur.



118 Cal.App.2d 628

BOARD OF STATE HARBOR COM'RS FOR SAN FRANCISCO HARBOR v. DEAN, Director of Finance.

Civ. 8466.

District Court of Appeal, Third District, California.

June 22, 1953.

Hearing Denied Aug. 20, 1953.

The Board of State Harbor Commissioners for San Francisco Harbor brought original proceedings against the Director of Finance of the State of California to compel respondent to perform alleged duty with respect to bonds proposed to be issued by the petitioner. The District Court of Appeal, Van Dyke, P. J., held that the San Francisco Harbor Revenue Bond Act of 1951 does not violate constitutional provision that the legislature shall not in any manner create any debt or liability in a sum exceeding $300,000 without approval of the people by majority vote cast at a general election.

Writ issued.

1. States ⇐115

Generally, an indebtedness within meaning of constitutional provision that the Legislature shall not in any manner create any debt or liability in sum exceeding $300,000 without approval by the people by majority vote cast at general election does not arise unless there is a legal, equitable, or moral obligation to pay sum of money to another who occupies the position of creditor, and who has a legal or moral right to call on or constrain the debtor to pay. Const. art. 16, § 1.

2. States ⇐115

A debt limitation under constitutional provision that the Legislature shall not in any manner create any debt or liability in a sum exceeding $300,000 without approval by the people by majority vote cast at a general election, is not concerned with an obligation which is payable out of a special fund, if there is no accompanying liability or constraint to pay from the general fund should the special fund prove insufficient. Const. art. 16, § 1.

3. States ⇐115

Where bonds under the San Francisco Harbor Revenue Bond Act of 1951 were to be payable solely from revenues collected for use of harbor facilities and then only when payments on outstanding general obligations bonds and cost of maintenance and operation had been first met out of such revenues, there was no violation of constitutional provision that the Legislature shall not in any manner create any debt or liability in sum exceeding $300,000 without approval of the people by majority vote cast at a general election. Harbors and Navigation Code, § 3300 et seq.; Const. art. 16, § 1.

Edmund G. Brown, Atty. Gen., and Miriam E. Wolff, Deputy Atty. Gen., for petitioner.

Frank K. Richardson, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Petitioner, which is a public agency of the State, proposes under enabling legislation, San Francisco Harbor Revenue Bond Act of 1951, Harbors and Navigation Code, § 3300 et seq., Stats.1951, ch. 1712, to issue bonds in the principal amount of Six Million Dollars with which to construct certain facilities and improvements to existing facilities, for San Francisco harbor. Respondent, as Director of Finance of the State of California, has refused to perform a duty cast upon him by the controlling legislation in connection with the issuance of these bonds. Herein petitioner seeks the writ of this Court directed to respondent to compel the performance of that duty. Respondent expressly bases his refusal to act upon the ground that the legislation under which these bonds are proposed to be issued is unconstitutional as violating the provisions of Article XVI, Section 1, of the State Constitution, which provides that the legislature shall not in any manner create any debt or liability in a sum exceeding Three Hundred Thousand Dollars without the approval of the People by majority vote cast at a general election. The issues are presented to this Court by petition and demurrer thereto.

The petitioner, hereinafter called the Board, has for long been in charge of San Francisco harbor. In the main, the progressive improvement of the harbor, by the construction of appropriate facilities, has been financed out of charges made to those using the harbor facilities. From time to time, however, the legislature has authorized the issuance and sale of general obligation bonds of the State, in each instance submitting such legislation to popular vote. It is stated in petitioner's brief that the harbor has never received any money from the State save as it received the proceeds of various bond issues, and that it has paid its own way entirely out of its own revenues, including the payment of moneys necessary for servicing the bonds. With these funds and with its own revenues it has constructed and maintained the facilities which now exist and has met its own operative expenses. It is further stated that the value of the harbor property now administered by the Board is approximately One Hundred and Twenty Million Dollars; that the harbor has always paid its obligations on all bonds issued; that it has complied with all sinking fund requirements of these issues and that it now has a cash balance of nearly Three and One-half Million Dollars.

The "San Francisco Harbor Revenue Bond Act of 1951" marks a change made by the legislature in the method of financing the facilities of the harbor. Generally under the act it is proposed that the Board shall issue its own bonds upon compliance with the statutory requirements and shall pay them wholly from revenue collected. The act sets up a "San Francisco Harbor Bond Finance Board" composed of the Governor, the Director of Finance, the State Controller, the State Treasurer and the President of the Board of Harbor Commissioners. It is provided that whenever the Board determines by resolution that a bond issue is necessary or desirable in order to carry into execution any of the plans or projects authorized by the act, and so certifies to the San Francisco Harbor Finance Board, then the Finance Board shall, if it approves the resolution, direct the Board to cause bonds to be prepared by the State Treasurer in accordance with the resolution. Thereafter, and when further statutory requirements have been met, the State Treasurer, before selling the bonds, is required to advertise for bids therefor, and Government Code Section 11080 requires that such advertisement shall be delivered to the Department of Finance, which shall publish it. This advertisement respondent has refused to approve or publish upon the ground hereinbefore stated.

The act provides that the bonds to be issued thereunder by the Board shall be revenue bonds; that the bonds shall not be or become a lien, charge or liability against the State or against the Board or against the Finance Board or against their funds or property, except that for the payment of the bonds the Board may pledge

all or part of the revenue to be derived from harbor facilities; that every bond must contain on its face the recital that the same is not such lien, charge or liability except to the extent of the pledge of revenues. As to the outstanding obligations in the form of general obligation bonds of the State the act provides by Section 3308 that the bond indenture must provide the means by which payment of principal and interest of bonds shall be secured and shall specifically provide that the revenue by which the payment of principal and interest of bonds issued under the act is secured, shall not include such revenue as may have been or may be required for servicing any and all outstanding general obligation bonds. Maintenance and operational expenses also are prior demands upon the revenues. With these limitations, however, it is proposed to pledge the total revenue from all harbor facilities. It is alleged and not denied that all of the statutory requirements have been complied with up to the point where petitioner met with respondent's refusal.

Summing up the situation presented here, bonds are proposed to be issued under the challenged legislation which will be payable as to both principal and interest solely from revenues collected by petitioner for the use of harbor facilities and then only when payments on the outstanding general obligation bonds, and cost of maintenance and operation, have been first met out of such revenues. It is the clearly expressed plan of the legislature that the Board shall continue to be a self-supporting agency and that the tax revenues of the State shall not be called upon to meet its obligations. We have here a proposed application of the "special fund" doctrine laid down by courts in connection with the creation of debt by states, municipalities and other public bodies whose debt creating powers are limited by constitutional or statutory provisions.

[1, 2] It is the general rule that an indebtedness, within the meaning of a constitutional limitation imposed upon a legislative body, does not arise unless there is a legal, equitable or moral obligation to pay a sum of money to another who occupies the position of creditor and who has a legal or moral right to call upon or constrain the debtor to pay; and that such a debt limitation is not concerned with an obligation which is payable out of a special fund if there is no accompanying liability or constraint to pay from the general fund should the special fund prove insufficient. See Annotation to Miller v. Buhl, 72 A.L.R. 687. Our courts have subscribed to this rule. Mesmer v. Board of Public Service Com'rs, 23 Cal.App. 578, 138 P. 935; Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421; California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 298 P. 485; Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725; California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P.2d 425; Department of Water, etc. v. Vroman, 218 Cal. 206, 22 P.2d 698; City of Glendale v. Chapman, 108 Cal.App.2d 74, 238 P.2d 162.

In Garrett v. Swanton, supra, 216 Cal. at page 227, 13 P.2d at page 728, our Supreme Court stated:

"It is the contention of respondents that since by the terms of this contract the indebtedness or liability is made payable solely out of a specified fund created entirely from the income of the water system, and is not a general obligation of the city, the constitutional provision has not been violated. This so-called 'special fund' doctrine finds ample support in the decisions of other jurisdictions where constitutional debt limit provisions similar to the one here involved exist. It seems to be the majority rule in other jurisdictions that a limitation upon municipal indebtedness is not violated by an obligation which is payable out of a special fund, if the municipality is not liable to pay the same out of its general funds should the special fund prove to be insufficient, and the transaction by which the indebtedness is incurred cannot in any event deplete the resources of the municipality. [Citing cases.] * * *

"The recent decisions of this court would seem to leave no room for doubt that the 'special fund' doctrine has been adopted in this state."

The doctrine has been applied to indebtedness created by state agencies. In re California Toll Bridge Authority, supra; California Toll Bridge Authority v. Kelly, supra.

[3] It is the position of respondent that the "special fund" doctrine has not been in this State, and should not be, extended to cover the situation in the instant case; that while the special fund doctrine is accepted in California, nevertheless that doctrine is so limited that it cannot relieve the bonds proposed to be issued from the constitutional requirements. Respondent relies in the main upon Garrett v. Swanton, supra, and argues that these bonds are banned by the limitations therein stated. In that case the court declared that there were at least two well-settled limitations or exceptions to the special fund doctrine. Said the court, 216 Cal. at page 229, 13 P. 2d at page 729: "* * * [I]t is well established that an indebtedness or liability is incurred when by the terms of the transaction a municipality is obligated directly or indirectly to feed the special fund from general or other revenues in addition to those arising solely from the specific improvement contemplated. It also seems to be well settled, as a second limitation to the doctrine, that a municipality incurs an indebtedness or liability when by the terms of the transaction the municipality may suffer a loss if the special fund is insufficient to pay the obligation incurred." The court held that the contract involved in that case came within both exceptions or limitations. We think, however, that the legislation here involved is not within either exception, as a consideration of the facts will prove. The City of Santa Cruz owned its waterworks system. It had been acquired with money raised from the sale of its own bonds, some of which were still outstanding. By the contract under attack the city had agreed that all moneys collected from the operation of the entire waterworks system would be placed in a fund to be used solely for the "operation, maintenance, construction, improvement, extension, enlargement and upkeep" of the system and for the payment of any existing bonded indebtedness. Said the court: "In other words, it is not only the income *earned by the property purchased* that constitutes the special fund from which the payments are to be made, but the income from the *entire water system* constitutes such special fund." The court concluded that the situation created was one whereby if the water fund should be depleted by payments on the contract for the purchase of the new pumping plant the fund created for the payment of interest and principal on the bonds would be depleted and since such bonds were a general obligation of the city the taxpayers would have to be ready at all times to feed the special fund whenever the income from the system was not sufficient to pay the interest and principal on the bonds and the payments on the contract. The court held that it therefore followed that by the contract the taxpayer became indirectly liable to pay the amount thereof and that the special fund doctrine would not apply. With reference to the second limitation, the court noted that the contract required an initial payment from the general funds of the city in the amount of $30,000, which had been paid and that by the provisions of the contract if these payments were not made from the special fund the property being purchased, that is, the pumping plant, would be forfeited to the seller, thus taking from the taxpayers money paid by them from their general funds. Said the court: "It seems clear that, after a large cash payment has been made out of the general funds, if the special fund is not sufficient to pay the installments, and a failure will result in the losing of the cash payment as well as the installments, as a practical matter the installments will have to be paid from the general fund in order to protect the investment already made."

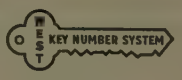
It is clear that the situation presented in Garrett v. Swanton has no parallel here. By the proposed contract between the Board and those who may buy the bonds, it is not agreed that all the income earned from the existing and proposed harbor facilities will constitute the special fund from which payments on the bonds are to be made. On the contrary, the contract is specific in providing that only the surplus of such income shall constitute such special fund after all

prior claims upon income, including maintenance and operation of the harbor facilities have been met. As to the second limitation stated in the cited case the contract proposed here specifically provides that no lien or charge on the existing property is bargained for. There can therefore be no forfeiture of State interests nor any constraint whereby the State may be impelled to protect its interests by use of its general funds.

The reasoning in Garrett v. Swanton holding that where property, already owned and operated as a utility and providing revenue, was to be extended or improved by borrowed funds, a contract pledging the revenue of the whole system—that already owned and that to be acquired—would not be within the special fund doctrine, is fundamentally based upon the proposition that such a pledge of revenue might so operate to deplete the special fund as to make it necessary that general taxes be levied to make up the lack. It is the possible future effect of such a pledge of revenue that bans the contract. Garrett v. Swanton does not hold that such a pledge, in itself, inevitably creates a prohibited debt. If the contract be in such form that the general revenues cannot be drawn upon, even though the special fund proves insufficient for all of the demands that may be made upon it, if no forfeiture of State interests can occur, then the case will not be one outside the scope of the doctrine. Each case must rest upon its own facts. Here, under the statutory and contractual provisions we have stated there is no possibility that a prohibited result can follow if the revenues do not prove sufficient. If that happens the bondholders will be limited to subjecting to their demands such portions of the income as will in fact remain, after the requirements of the general obligation bonds, and the cost of maintenance and operation, have been met. Under the clear terms of the statute and the proposed contract that is the only result that can follow any diminution of the revenues to a point where from time to time they may not be sufficient to meet all demands. The statute provides that it shall be the duty of the Board to so fix its rates and charges for the use of the harbor facilities as to yield an income sufficient to meet all such demands. When this fact is considered, along with the other matters hereinbefore discussed, including the long and successful history of the Board as a self-sustaining agency, it is seen that in all probability the revenues will over the years prove adequate to meet all demands. This expectation is soundly supported by the Board's estimate of revenue, expense and the net amount available for debt service. But however the future shall develop in this respect, the actual pledge of revenue proposed to be made is, as we have said, limited to the surplus remaining after servicing prior debts and providing for maintenance and operation, and under those contractual provisions bondholders cannot under any contingency make demand, legal, moral or by way of constraint, upon the general credit of the State.

Let the writ issue as prayed for.

SCHOTTKY, J., and BEDEAU, J. pro tem., concur.



118 Cal.App.2d 589

ORTEGA v. ORTEGA.

Civ. 19374.

District Court of Appeal, Second District, Division 1, California.

June 22, 1953.

Divorce action by wife. The Superior Court of Los Angeles County, Leon T. David, Judge pro tem., rendered interlocutory judgment of divorce in favor of wife, and husband appealed. The District Court of Appeal, White, P. J., held that evidence warranted finding that marriage of husband to his wife suing for divorce was valid either because wife's prior marriage was void as being an incestuous marriage to her uncle or because prior marriage had been dissolved.

Affirmed.

1. Marriage ⇐50(1)

Evidence warranted finding that marriage of husband to his wife suing for divorce was valid either because wife's prior marriage was void as being an incestuous marriage to her uncle or because prior marriage had been dissolved. Civ.Code, §§ 59, 61, 82.

2. Marriage ⇐40(5, 11)

When a person has entered into two successive marriages, a presumption arises in favor of validity of second marriage, and burden is upon party attacking validity of second marriage to prove that first marriage had not been dissolved by death of spouse or by divorce or had not been annulled at time of second marriage.

3. Appeal and Error ⇐1011(1)

Decision of trier of fact in respect to conflicting evidence cannot be disturbed on appeal.

4. Husband and Wife ⇐254

Where husband owned inchoate rights to property before marriage but paid purchase price in its entirety after marriage, property should be apportioned on divorce with reference to original value as evidenced by contract of purchase and value after payments made out of community funds.

5. Husband and Wife ⇐254

Where $600 paid on purchase price of automobile was separate property of husband and balance of $1,400 was paid out of community funds, on divorce the husband was properly found to have an undivided 35 percent interest in the automobile.

6. Appeal and Error ⇐989

Where the evidence upon any issue is in conflict, power of appellate tribunal begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, to support the conclusion arrived at by the duly constituted arbiter of the facts.

Manuel Ruiz, Jr., Los Angeles, for appellant.

Fred G. Kennedy, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant husband, Ramon Ortega, appeals from an interlocutory judgment of divorce granted to plaintiff wife. His attempted appeal from "the denial of defendant's motion for new trial and ruling thereon amending Findings of Fact and Conclusions of Law, and Modification of Judgment," must be dismissed, since no appeal lies from such order, the correctness thereof being reviewable upon appeal from the judgment.

Appellant asserts that the court erred in holding, "after motion for new trial, which the court abused its discretion in having denied, that the marriage of the parties was a valid marriage." Appellant's second contention is that the court erred in holding that the wife had a community interest in certain real and personal property held in the name of appellant.

Upon trial of the action, there was testimony that the parties were married in August, 1946, and separated shortly before the trial. Mrs. Ortega testified upon cross-examination that "Quintin Bulnes was my first husband and my uncle"; that she married him in September, 1930, in the City of Los Angeles. The marriage certificate was received in evidence. Mrs. Ortega testified that she never obtained a divorce from Mr. Bulnes.

The trial court, in its memorandum opinion, made the following observations:

"Mr. Ortega claims that his marriage to Mrs. Ortega was invalid, because on the date of their marriage, August 8, 1946, she was the wife of one Quintin Bulnes, then living, having been married to him in this country on September 30, 1930, and that this marriage was undissolved. Civ.Code, Secs. 61, 82. Mrs. Ortega, in return, contended by her counsel that her marriage to Mr. Bulnes was invalid because he was married at the time of her marriage to him (1930) and had a family in Mexico; and secondly, that by reason of the doctrine of Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, and In re Estate of Borneman, 35 Cal.App.2d 455, 458, 96 P.2d 182, it is presumed that the marriage between her and Mr. Bulnes had been terminated,

and that the present marriage is presumptively valid; and that the burden is upon Mr. Ortega to disprove the presumption. Apart from the Mexican certificate, both parties apparently concede that Mr. Bulnes was living at the time of defendant's marriage in 1946 to plaintiff, and that he died in September, 1947. There is some evidence based on search of the Mexican records at Mr. Bulnes' legal domicil under Mexican law revealing he never was divorced from this plaintiff there, and was not divorced from her in this country.

"This war of presumptions and inferences, however, is made immaterial by the plaintiff's own testimony. She testified * * * that she came into the country as Mr. Bulnes' niece and upon trial she testified that he was her uncle. This not being disputed, the marriage to Mr. Quintin Bulnes was incestuous and void ab initio (Civ. Code, Sec. 59), whether or not it was bigamous."

Upon motion for a new trial the husband stated by affidavit that on the day following the trial he received an anonymous telephone call to the effect that Delfina A. Ortega was not related to Mr. Bulnes, but that she had claimed to be his niece in order to facilitate her entry into the United States. The husband further stated upon information and belief that neither the mother nor the father of Delfina A. Ortega bore the name of Bulnes or were related to Mr. Bulnes by consanguinity.

Upon the hearing of the motion for a new trial, the following occurred:

"Mr. Ruiz (Counsel for the husband): * * * Mrs. Ortega, under the findings of the Court, failed to prove that Mr. Bulnes had a valid, earlier marriage, which was not dissolved at the time she married him. The Court, however, found that her marriage to Mr. Bulnes was void because he was her uncle, and that the marriage was incestuous, not because Mr. Bulnes, her alleged uncle, was supposed to have been married to someone else. I understand that it is conceded by counsel that he was not her uncle.

"Mr. Kennedy (Counsel for Mrs. Ortega): I understand that those are the facts, your Honor.

"The Court: Then she lied.

"Mr. Kennedy: Well, I can explain when I have an opportunity, Your Honor. * * *

"Mr. Kennedy: If the Court please, I was as much surprised, as no doubt Mr. Ruiz was, at the findings of the Court, in finding that the Court had found that Mrs. Ortega was not married to Mr. Bulnes because of an incestuous relationship.

"The Court: She sat here on the stand and said he was her uncle. She had said to the Immigration authorities that he was her uncle.

"Mr. Kennedy: Yes.

"The Court: Now, I am told that that is not the fact. Now, what am I going to do? Am I going to commit her for perjury, or am I going to believe now that that wasn't the fact?

"Mr. Kennedy: I was never ever led to believe, your Honor, that she wasn't married to her uncle. She always referred to this man as her uncle. She said, 'He is my uncle.' She told me that several times, but in asking her about the surnames of the parties, she was never able to give me a correct surname. You will please note, your Honor, no argument was ever made as to any incestuous marriage, or anything else.

"The Court: If it is void on the face of the record, I have to hold it is void whether there is any argument about it or not."

[1–3] The holding of the trial court must be upheld for two reasons.

First, the trial court had heard the sworn testimony of Mrs. Ortega that Mr. Bulnes was her uncle. Upon the hearing of the motion for a new trial, the court had before it only the affidavit of Ramon Ortega concerning an anonymous telephone call, statements on information and belief as to the surnames of plaintiff's family, and statements of counsel which indicated that counsel's information was sketchy, at best. The second ground for upholding the trial

court's judgment is found in the rules concerning presumptions applicable to the situation here presented. When a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage. Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, 52 Am.St.Rep. 180; In re Estate of Smith, 33 Cal.2d 279, 281, 201 P.2d 539, and cases cited. "* * * the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage." Hunter v. Hunter, supra, 111 Cal. at page 267, 43 P. at page 757.

The trial court rejected certificates of Mexican authorities as to a previous marriage of Mr. Bulnes and as to his death upon the ground that they were not authenticated as required by sections 1901, 1906, and 1918, subd. 8, of the Code of Civil Procedure. There was, as the trial court stated, "some evidence based on search of the Mexican records at Mr. Bulnes' legal domicil under Mexican law revealing he never was divorced from this plaintiff there, and was not divorced from her in this country." But the domicile or residence of Mr. Bulnes after his separation from plaintiff remains uncertain, aside from the fact that he died in Monterey, Mexico. The burden was upon defendant to present evidence sufficient to convince the trial court that the first marriage had not been dissolved. In re Estate of Chandler, 113 Cal.App. 630, 636, 299 P. 110. This he did not do, but at most succeeded in creating a conflict in the evidence. This conflict was resolved by the trier of fact in favor of the validity of the second marriage, and under well settled rules the decision of the trier of fact in such circumstances may not be disturbed on appeal. The evidence here is no stronger than that presented in Re Estate of Borneman, 35 Cal.App.2d 455, 460, 96 P.2d 182, 184, where it was held on appeal that the "proof was insufficient to rebut the presumption of innocence."

Finally, appellant complains that the evidence is insufficient to justify the finding that respondent was entitled to an undivided 21⅞% interest in and to Lots 17 to 22, inclusive, referred to as the Fontana property. While it is true that the property was being purchased by appellant husband prior to his marriage, the purchase was being made under an executory contract. The payments on the property were being made by installments of some $10 per month, both before and after the marriage of the parties. As to the source of such payments after marriage, the evidence was in conflict, the appellant contending that some of such payments resulted from the proceeds of the sale of crops grown on the land and some from his earnings after marriage. Respondent, on the other hand, testified that none of the payments were derived from the proceeds of the sale of crops because no profits ensued from the use to which the realty was put.

Confronted with this conflict in the evidence, the court concluded: "That some of the funds used to purchase the property at Fontana, lots 17 to 22 inclusive Tract 2721, as per map recorded in Book 38 of Maps, page 16, official records * * * were earned by defendant for personal services after marriage but the precise amount cannot be determined from the evidence; that such amount did not exceed $900.00 and that one-half of said sum or $450.00 at the time paid represented approximately 21⅞% of the value of the properties."

[4] There was substantial evidence to support the conclusion of the trial court that the husband owned an inchoate right to the property before marriage, but paid the purchase price in its entirety afterwards. It was therefore proper to apportion the property with reference to the original value, as evidenced by the contract of purchase and the value after payments made out of community funds. Vieux v. Vieux, 80 Cal.App. 222, 229, 251 P. 640; In re Estate of Caswell, 105 Cal.App. 475, 482, 288 P. 102.

Where, as here, there was substantial evidence that the required conditions of the husband's inchoate rights to the property were met in part with funds furnished by the community, aided by other funds arising directly from the property to be purchased, justice requires that the rights of the respective parties should be measured by the direct contributions made by the respective parties to the purchase price of the property.

[5] With reference to the 1949 Pontiac automobile, the court upon substantial evidence found that it "was purchased for $2,000.00, which was paid; that of said sum, $600.00 was credited from a trade-in of an automobile owned by defendant as his separate property." From the foregoing finding the court concluded: "That the plaintiff has an undivided * * * 35% interest in and to the 1949 Pontiac automobile * * *."

The automobile having been purchased after marriage, the court was justified in concluding that $600 paid on the purchase price thereof was the separate property of appellant and that the balance of $1,400 was paid out of community funds.

[6] Where the evidence upon any issue is in conflict, the power of an appellate tribunal begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, to support the conclusion arrived at by the duly constituted arbiter of the facts. With that rule in mind, we are not authorized to disturb the findings of the trial court that respondent had a 35% interest in the vehicle.

For the foregoing reasons, the attempted appeal from "the denial of defendant's motion for new trial and ruling thereon amending Findings of Fact and Conclusions of Law, and Modifications of Judgment," is dismissed. The judgment is affirmed.

DORAN, J., and ROBERT H. SCOTT, J. pro tem., concur.

41 Cal.2d 150

PEOPLE v. GOMEZ.

Cr. 5359.

Supreme Court of California, in Bank.

June 19, 1953.

Defendant was convicted of first degree murder. The Superior Court of Sacramento County, Raymond T. Coughlin, J., entered judgment, and defendant appealed. The Supreme Court, Schauer, J., held that action of Superior Court in ordering inquiry into mental condition of defendant, based on affidavits of defendant's counsel and a psychiatric expert, was not evidence that Superior Court had a doubt as to defendant's sanity within meaning of statute providing that if at any time during pendency of an action and prior to judgment a doubt arises as to sanity of defendant, court must order question as to his sanity to be determined by a trial.

Affirmed.

1. Criminal Law ⇐625

The "doubt" referred to in statute providing that if at any time during pendency of action and prior to judgment a "doubt" arises as to sanity of defendant, court must order question as to sanity to be determined by a trial by court without a jury, or with a jury, if trial by jury is demanded, is a "doubt" in the mind of the trial judge. Pen.Code, § 1368.

See publication Words and Phrases, for other judicial constructions and definitions of "Doubt".

2. Criminal Law ⇐625

The "sanity" contemplated by code section providing for determination of question as to defendant's "sanity" at time of trial is tested by appraising the present ability of defendant to so understand nature and purpose of proceedings taken against him as to be able to conduct his own defense in a rational manner. Pen. Code, § 1368.

See publication Words and Phrases, for other judicial constructions and definitions of "Sanity".

3. Criminal Law ⇐625

A strong showing is required before abuse of discretion is deemed to result from failure of trial court to order determination of sanity of defendant. Pen. Code, § 1368.

4. Criminal Law ⇐1148

When doubt of defendant's sanity at time of trial, as contemplated by statute providing for separate trial on issue of insanity, appears on face of record as a matter of law, an abuse of discretion is shown and failure to order a determination of question of sanity results as a miscarriage of justice and a reversal is required. Pen. Code, § 1368.

5. Criminal Law ⇐625

The circumstances of hearing on motion to suspend criminal prosecution for purpose of trying issue of defendant's sanity does not establish that trial judge had a doubt of defendant's sanity, nor does record of proceedings on motion and subsequent developments during the trial conclusively show that trial judge should have had such a doubt. Pen.Code, § 1368.

6. Criminal Law ⇐625

Determination of motion to suspend criminal prosecution for purpose of trying issue of defendant's sanity rests within sound discretion of trial judge. Pen.Code, § 1368.

7. Criminal Law ⇐1148

An appellate court cannot measure with nicety the basis for the ruling of the trial judge on motion to suspend criminal prosecution for purpose of trying issue of defendant's sanity, and trial judge must always be allowed a wide latitude. Pen. Code, § 1368.

8. Criminal Law ⇐625

The latitude which the trial judge is allowed in ruling on motion to suspend criminal prosecution for purpose of trying issue of defendant's sanity, is a latitude within which the trial judge himself should never speculate on a nicety of balance. Pen.Code, § 1368.

9. Criminal Law ⇐625

Action of trial judge in ordering an inquiry into mental condition of defendant, based on affidavits of defendant's counsel and a psychiatric expert, was not evidence that a "doubt" as to sanity of defendant

existed in mind of court within meaning of statute providing that if at any time during pendency of action and prior to judgment a "doubt" arises as to sanity of defendant, court must order question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded. Pen.Code, § 1368.

10. Criminal Law ⇐625

Fact that trial judge asked alienists whether they had a doubt of sanity of defendant did not indicate that the trial judge was applying an improper test of whose the doubt must be, where the trial judge repeatedly stated that he had no such doubt, and his questions and comments seemed to indicate a willingness to acquire a doubt if a basis therefor, which appeared substantial to him, were established. Pen. Code, § 1368.

11. Criminal Law ⇐126(2)

Where trial judge, district attorney, and defense counsel united in conducting trial of murder prosecution on high standard, and trial judge's admonitions were repeated, vigorous, and in varied and appropriate terms, rather than mere recital of formula, and presumably the jurors heeded the admonitions, denial of defendant's motion for change of venue because of extensive, adverse newspaper publicity concerning defendant's confession to a large number of homicides was not error.

12. Jury ⇐116

Trial judge did not err in refusing to discharge jury panel in murder prosecution because of the fact that defendant attempted to escape during voir dire examination of prospective jurors.

13. Criminal Law ⇐1174(1)

Where defendant has been represented by able and experienced counsel, and evidence of guilt is ample, and presentation of case is fair, appellate court should not reverse conviction because of mere speculation that jurors might unconsciously have been improperly influenced adversely to defendant in performance of their duties.

14. Criminal Law ⇐736(2)

In murder prosecution, trial court properly admitted evidence of content or substance of confessions and extrajudicial statements of defendant and properly submitted question of their voluntariness to jury.

15. Criminal Law ⇐736(2)

In murder prosecution, effect of circumstance that at time defendant wrote confession he was confined in a room with a number of other prisoners, and that he did not like the company of the other persons, and that his motive in writing the confession was a desire to be taken from the room, was for the jury.

16. Criminal Law ⇐1171(1)

Where references in murder prosecution to homicides by defendant other than that involved in prosecution were inadvertent on part of counsel for the people and were relatively trifling, references thereto were not prejudicial error.

17. Homicide ⇐294(1)

In murder prosecution, instructions that because of an abnormal mental condition a person might be less likely or unable to have or hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime, and directing attention of jury to relation between evidence as to a defendant's mental condition and qualities of malice aforethought, deliberation and premeditation were not erroneous.

Peter Mannino and C. K. Curtright, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., and J. Francis O'Shea, District Atty., Sacramento, for respondent.

SCHAUER, Justice.

Defendant was charged with the murder of Warren Hood Cunningham. He pleaded not guilty and not guilty by reason of insanity. A jury found him guilty of first degree murder and fixed the penalty at death. Thereafter the jury found that defendant was sane at the time of the commission of the crime. This is an appeal (as provided for by subdivision (b) of section 1239 of the Penal Code) from the re-

sulting judgment of conviction and from an order denying defendant's motion for a new trial. We have concluded that defendant was fairly tried and, under applicable law, correctly sentenced.

The record establishes the pertinent facts as hereinafter related. Defendant is a schizophrenic with an intelligence quotient of 61. Five psychiatrists, three of whom were appointed by the court and two of whom were witnesses for defendant, gave expert testimony, at the first stage of the trial, as to defendant's ability to form a wilful, deliberate, and premeditated intent and to harbor malice aforethought at the time of the killing, and, at the second stage of the trial, as to his legal sanity at the time of the killing. These were the principal matters in issue at the trial. Another important question on which there was psychiatric testimony arose before the trial, when defendant's counsel sought to raise in the mind of the trial judge a doubt as to defendant's then existing sanity, so as to require the suspension of the prosecution and the trial (before a jury, if requested) of the issue of such sanity.[1] The facts pertinent to resolution of the suggested legal questions follow.

The killing took place in the "American River Jungles," an undeveloped area near Sacramento where from time to time migratory workers made camps. The deceased Cunningham, the defendant Gomez, and John Kapusta, the one witness of the killing, were staying at separate places in the area. Defendant had stolen two cans of beer from Cunningham. On November 11, 1950, Cunningham encountered defendant, charged him with having stolen the beer, and brandished two knives. Defendant fled. Cunningham pursued defendant for a short distance, then abandoned the chase. Defendant went to his camp, prepared and had supper, and dug up a .22 bolt action rifle which he had buried there. He then went to Kapusta's camp, where Kapusta and Cunningham were listening to the radio. Concealed by trees, defendant fired three shots at Cunningham from a distance of about 100 feet. One of these shots hit Cunningham in the head and he fell to the ground. Defendant then approached Cunningham, meanwhile firing three more shots, the last from a distance of about five feet. Four of the six shots entered Cunningham's body. At about the time he fired the last shot defendant said, "I don't care what I get. I knock him down. * * * He pulled a knife on me. That is why I shoot him down." Defendant then walked away.

Kapusta at once went to another camp and sent its occupant to report the shooting. Meanwhile, defendant hid in some weeds near a railroad until a freight train passed. He boarded the train and thus escaped. At some time during his escape he destroyed the rifle. During the next 14 months he migrated about California. As will hereinafter appear, he was then apprehended on a charge other than the killing of Cunningham and, while held in jail, volunteered a confession to the slaying.

Defendant does not challenge the sufficiency of the evidence to support his conviction but he does suggest that it is weak because the only two witnesses who described the shooting were Kapusta, who was nearly blind, and defendant himself, who was psychotic and a moron. There is nothing in the record which tends to raise a doubt as to the fact that defendant shot Cunningham; the only close questions concern his mental (and, therefore, his legal) responsibility.

Defendant took the stand. His testimony on direct examination is confused and contradictory. For example, he testified that he never owned a gun, then some

1. Pen.Code, § 1367: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

Pen.Code, § 1368: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined."

minutes later testified that he bought a .22 rifle in Stockton and described the shooting in a manner substantially similar to that of his extra-judicial statements; he testified that he had never seen Kapusta before the trial, then some minutes later testified that Kapusta had been present at the time of the killing. According to counsel for both parties defendant was very slow and hesitant in his testimony. The effect of defendant's testimony in relation to the main issues was, of course, a matter to be determined by the jury.

On January 16, 1952, defendant was arrested in Sacramento. He was charged with escape from a county road camp (where he had been held under a vagrancy conviction) and on January 21 Mr. Orville Kline, assistant public defender, was appointed to represent him. Mr. Kline interviewed defendant on the 22d concerning the escape charge. On the morning of January 24, 1952, defendant wrote a note and addressed it "To Jailer." The note read in part, "I shot one man six times in jung*ile*." (The remainder of the note contained confessions of other homicides; the note was not shown to the jury and only the above quoted sentence of it was read to them.) Defendant gave the note to a deputy sheriff, who took it to the undersheriff. Defendant was at once taken from the jail to an office and questioned. Defendant admitted having written the note and when one of the deputies expressed skepticism as to its contents defendant said that he was telling the truth. Defendant was not threatened or promised immunity during the questioning. He was told that he need not talk unless he wanted to. The officers who questioned him did not know and did not ask whether he had an attorney and did not tell him that he was entitled to one. They did not tell him that anything he said could be used against him. He voluntarily described shooting a man, whose name he did not know, in the "American River Jungles," giving details which indicated that the crime to which he confessed was the killing of Cunningham.

On the afternoon of January 24, 1952, defendant, questioned by the district attorney, made a voluntary statement in which he described the killing of Cunningham. (Defendant also described his killing of a number of other migrants in other counties; these accounts were in accord with records of other actual, unsolved crimes; there was wide newspaper publicity as to the series of killings but at defendant's trial diligent effort appears to have been made by both prosecution and defense to keep from the jury any mention of homicides other than the one for which he was on trial.) The next day, at the request of the deputy sheriffs, defendant voluntarily directed them to the scene of the shooting and described to them where and how it took place.

On the morning of January 24, 1952, shortly after defendant had first confessed and while he was first being questioned as to the killing, his attorney, Mr. Kline, assistant public defender, came to the jail to see him in connection with the escape charge. Mr. Kline was informed by the under-sheriff who had initiated the investigation into the truth of defendant's confession of homicide that defendant was being questioned by the district attorney. Mr. Kline did not see defendant at this time; the record does not show that he asked to see defendant relative to the homicide or his confession thereto, nor does it show when defendant first saw an attorney after his confession.[2]

2. The following matters concern the adequacy of defendant's representation by counsel and indicate the commendable care with which counsel for the People and the trial judge joined in protecting defendant's rights: The information charging defendant with homicide was filed on February 11, 1952, eighteen days after defendant's first confession. At the preliminary hearing defendant was represented by Mr. Kistle, the public defender. On February 18, 1952, defendant appeared for arraignment; Mr. Kline, assistant public defender, was present; the court advised defendant of his rights to employ private counsel or to have the public defender appointed; defendant stated that he did not wish the services of the public defender but that he did not know how long it would take him to decide whether he wished to employ private counsel; the trial judge

On May 13, 1952, defendant, through counsel, moved to suspend the proceedings on the ground that he was so mentally deranged that he could not understand the nature and object of the proceedings against him and could not aid his counsel to conduct his defense in a rational manner. Defendant's notice of motion was accompanied by affidavits to that effect made by Mr. Mannino and by a private psychiatrist who had examined defendant at Mr. Mannino's request. The judge read the affidavits and, without comment as to whether he did or did not have a doubt as to defendant's then existing sanity, permitted defendant's counsel to introduce testimony which tended to show defendant's inability to participate rationally in the preparation of his defense, and permitted the People to introduce testimony of two of the alienists whom the court (as required by section 1027 of the Penal Code) had appointed to investigate defendant's sanity upon his plea of not guilty by reason of insanity. The opinions of defendant's witnesses and those of the People's witnesses as to insanity affecting defendant's ability to participate in his own defense were in direct conflict.

During the cross-examination of one of the court-appointed alienists the trial judge said, "If there is a doubt in your mind as to his ability to consult with his counsel in preparing a defense, if there is a defense, if there is any doubt in your mind at all I am going to give him a further hearing before a jury." The witness replied, "I have no doubts in my mind." Similarly, during the cross-examination of the other alienist the judge asked whether the witness had "any doubt at all" as to defendant's sanity and received a negative reply. At the conclusion of the testimony defendant's counsel argued the facts and the law as to defendant's then sanity. The judge then said, "I will read all those cases [cited in argument] again. * * * I want to give you every chance to be heard. * * In the event the Court should express a doubt, which I am not indicating that I have, I feel that the case should not have to go * * * to trial tomorrow morning. * * * Do not get any idea that I have any doubt in my mind, but I am going to read all these cases and I am going to go over the preliminary examination again. * * * I am deliberating very carefully on this matter, if I should determine that * * * there is a doubt and that should be tried, I will have that trial Friday, and if I should determine that I have no doubt, that there is not a doubt, the trial of the case in chief will have to go Friday." The judge took the matter under submission and stated that he would rule on it the next day (Wednesday). On Wednesday the judge ruled that "The doubt referred

stated that he would not proceed in a capital case with defendant unrepresented, appointed Mr. Kline, and again advised defendant that he might, if able, make arrangements to employ other counsel.

On February 27, 1952, defendant, through Mr. Kline, moved for a change of venue. After hearing, the motion was denied. Defendant then pleaded not guilty and not guilty by reason of insanity, trial was set for March 25, and the court appointed three psychiatrists to examine defendant.

On March 11, 1952, defendant, represented by Mr. Kline, who, as above mentioned, was assistant public defender, appeared in court. The district attorney pointed out that there had been a change in office the day before; that the public defender's office was now filled by a former deputy district attorney; and that the district attorney did not believe that it would be fair to defendant to require him to be represented by a former member of the prosecution, or a deputy working under him. The trial judge agreed that "it would not be fair" and stated that he had procured counsel, Mr. Peter Mannino, who had never been connected with the district attorney's office and who would be willing to represent defendant. After a private conference among defendant, Mr. Kline, and Mr. Mannino, defendant agreed to accept Mr. Mannino's representation and Mr. Kline was relieved. Trial was continued to April 29 to give Mr. Mannino opportunity to prepare the defense.

On May 13, 1952, Mr. C. K. Curtright, a private attorney, was associated with Mr. Mannino as counsel for defendant.

to in section 1368 of the Penal Code does not exist in the mind of the Court."

Defendant contends that "The action of the trial court, in ordering an inquiry into the mental condition of the accused, based upon the affidavits of defendant's counsel and a psychiatric expert, is in and of itself evidence that a doubt as to the sanity of the defendant existed in the mind of the court within the meaning of Section 1368 of the Penal Code. It is true that the court stated after hearing the evidence * * * that the doubt contemplated did not exist in the court's mind but this does not obviate the necessary implication of the ordering of the inquiry in the first place."

Defendant relies upon People v. West (1914), 25 Cal.App. 369, 372, 143 P. 793; People v. Vester (1933), 135 Cal.App. 223, 228, 237, 26 P.2d 685; and People v. Jackson (1951), 105 Cal.App.2d 811, 815, 234 P.2d 261. In each of those cases it was held that the circumstances showed, as a matter of law, that the trial judge had or should have had a doubt as to defendant's sanity, and the cause was sent back for trial of the question as provided in sections 1368 and 1369 of the Penal Code.

[1–4] The "doubt" referred to in section 1368 is a doubt in the mind of the trial judge, and "The sanity contemplated by the code section is tested by appraising the present ability of the defendant to so understand the nature and purpose of the proceedings taken against him as to be able to conduct his own defense in a rational manner. [Citations.] A strong showing is required before an abuse of discretion is deemed to result from the failure of the trial court to order a determination of present sanity. * * * However, when a doubt of the defendant's sanity at the time of the trial as contemplated by the statute appears on the face of the record as a matter of law, an abuse of discretion is shown and the failure to order a determination of the question of sanity results in a miscarriage of justice and a reversal is required. [Citations.]" (People v. Aparicio (1952), 38 Cal.2d 565, 567–568, 241 P.2d 221.)

[5–10] The circumstances of the hearing on the motion to suspend the criminal prosecution for the purpose of trying the issue of this defendant's then sanity do not establish that the trial judge had a doubt of defendant's sanity, nor does the record of the proceedings on that motion and the subsequent developments during the trial conclusively show that he should have had such a doubt. The determination of the motion "rests within the sound discretion of the [trial] court. Necessarily, an appellate court cannot measure to a nicety the basis for the ruling, and the trial judge must always be allowed a wide latitude." (People v. Lindley (1945), 26 Cal.2d 780, 789, 161 P.2d 227.) This is a latitude, however, within which the trial judge himself should never speculate on a nicety of balance; he necessarily is either certain or in doubt. And if he is not certain he must remember that in that circumstance the law is certain; it accords the defendant the right to a trial by jury. But, as previously indicated, the record does not show that the trial judge here indulged in speculation; rather, it shows that having no doubt of defendant's sanity he, nevertheless, conscientiously permitted the defendant to try to arouse such a doubt, considered whether in the light of the evidence he should have such a doubt, and determined in the exercise of his sound discretion that he should not. Nor does the fact that the trial judge asked the alienists whether *they* had a doubt of defendant's sanity indicate that he was applying an improper test of whose the doubt must be, for the judge repeatedly stated that *he* had no such doubt; rather, his questions and comments seem to indicate a willingness to acquire a doubt if a basis therefor, which appeared substantial to him, were established.

Prior to entry of his pleas, defendant moved for a change of venue on the ground that extensive, adverse newspaper publicity concerning defendant, particularly concerning his confession to a large number of homicides, would make it impossible to select an impartial jury. The motion was denied without prejudice. Voir dire examination of the jury panel disclosed that

many of the prospective jurors had read of the case. Those who were accepted as jurors, and many of those who were not, said that their reading had left no impression on them which would require evidence to overcome. After a jury of twelve and one alternate had been selected, defendant through his diligent counsel renewed his motion for change of venue. He put in the record articles from Sacramento newspapers published during the period of time from January 25, 1952 (the day after defendant made his initial confession in the county jail), through May 20, 1952 (the day before the making of the renewed motion). The articles described nine killings to which defendant had confessed, stated that defendant "has admittedly slain '12 or 15 guys,'" detailed his police record, and covered completely the proceedings against him. These articles were factual and disclosed no bias against defendant on the part of the newspapers, the community in general, or the prosecution. One article characterized the jury panel as "prosecution-minded" because several prospective jurors were excused after they said they had formed an opinion as to defendant's guilt. However, as previously indicated, a jury was found which was composed of persons who had not read or did not remember reading the articles or who were not particularly impressed by them. It may also be noted that defendant's victims were persons not known to the community. (Cf. People v. McKay (1951), 37 Cal.2d 792, 236 P.2d 145.)

On May 25, 1952, during the course of the trial, there was published another newspaper statement which defendant claims prejudiced him and which was promptly called to the trial court's attention as a ground for mistrial. The newspaper attributed to a deputy district attorney (not connected with the prosecution of this case) the statement that an attempt of defendant to escape from the courtroom "was the best advice Counsel could have given him," and characterized this remark as "the most amusing comment of the week." There is no evidence whatsoever that defendant's counsel gave him any such advice. On May 29, 1952, there appeared another newspaper publication which caused defendant to renew his motion for mistrial. It purported to be an account of the previous day's hearing, was entitled "Gomez Grins as he Tells of Jungle Death," and accompanied photographs of defendant captioned "Courtroom Pictures." The article referred to medical testimony that defendant had apparently enjoyed killing, said that he smiled as he testified to shooting Cunningham, and stated that the district attorney had said, "Even in memory it brings a smile to his lips." Actually the pictures had not been taken in the courtroom and no such remark had been made in the courtroom. (There is no evidence as to whether any such remark was or was not made elsewhere.) Whether the inaccuracies of such representations were products of deliberate dishonesty or of the negligence of some person or persons connected with their publication, does not specifically appear and on this appeal is not material. Neither does it appear nor is it controlling here whether contempt proceedings were instituted or whether there was prompt retraction of the untrue statement and implications. The publication of such inaccurate representations during a trial, whether from motive or carelessness, is indefensible; obviously it does not serve the cause of justice or of civilization. And it is conceivable that even accurate publications during or preceding a trial may effect a breach of due process. (See concurring opinion of Mr. Justice Jackson, joined by Mr. Justice Frankfurter, in Shepherd v. Florida (1951), 341 U.S. 50, 51, et seq., 71 S.Ct. 549, 95 L.Ed. 740; see also dissenting opinion of Mr. Justice Frankfurter in Stroble v. California (1952), 343 U.S. 181, 198, et seq., 72 S.Ct. 599, 96 L. Ed. 872.) The fact that the publications here concerned a penniless psychotic moron who was a killer and on trial for his life tends not at all to ameliorate their vice. This man had as much right to a fair and honest trial—to be adjudged on the facts and law as adduced and stated in the courtroom, free from the emotional sway of published vilification—as any citizen of the land. But whether such inaccurate (or other) publications warrant a reversal of the judgment of conviction depends on

whether the defendant's rights have been prejudiced.

[11] It is defendant's position that the jurors could not have avoided being influenced by these publications (both the accurate and the inaccurate) even though the trial judge had admonished them that they were not to read of, discuss, or listen to discussion of the case. But to sustain such contention we should have to draw inferences contrary to those drawn by the trial court, and on the showing here no such contrary inferences by us appear justified. As already indicated this is not a case in which a prosecutor stooped to misconduct or in which a trial judge or defense counsel showed any laxity in discharge of duty. On the contrary, trial judge, district attorney and defense counsel united in conducting the trial on a standard so high and clean as to merit express commendation. All counsel were consistently alert. The trial judge's admonitions were repeated, vigorous, and in varied and appropriate terms, rather than the mere recital of a formula. Presumably the jurors heeded these admonitions and, upon the entire record, we cannot hold that because of the publications mentioned the defendant was deprived of a fair trial.

[12] During voir dire examination of prospective jurors, after some of the jurors had been chosen, defendant attempted to escape. This attempt created considerable confusion in the courtroom. An unidentified woman loudly said, "I knew he was going to do it all the time." The bailiff who had charge of defendant drew his revolver as he left the courtroom to recapture defendant. Defendant's counsel made timely motions to discharge the jury panel because of this incident. He contends that the jurors may well have been unconsciously prejudiced by it, even though on subsequent voir dire examination they declared that they were not. Defendant relies upon cases where the conduct of spectators in the courtroom was so likely to have prejudiced the jurors or made them aware of community feeling against the defendant that a reversal was necessary. Those cases are not in point. Here it was defendant himself who precipitated the courtroom disturbance and the doctrine of invited error applies.

[13] As stated in People v. Stroble (1951), 36 Cal.2d 615, 621, 226 P.2d 330, "where, as here, the defendant has been represented by able and experienced counsel, the evidence of guilt is ample, and the presentation of the case in court * * * is fair, we should not reverse because of mere speculation that the jury might unconsciously have been improperly influenced adversely to defendant in the performance of their duties."

[14] Defendant contends that the trial court erred by admitting evidence of his confessions and extra-judicial statements without a showing that they were voluntary. In this defendant is mistaken. As previously indicated, the officials to whom the statements were made testified before the trial judge and jury that no threats, abuse, or promises of reward were used. The trial court ruled that it was satisfied that a showing that the statements were voluntary had been made. A psychiatrist then testified for defendant as to defendant's mental inadequacy, which affected the weight to be given his statements (People v. Boyington (1935), 3 Cal.App.2d 655, 657, 39 P.2d 867), and Mr. Kline testified that when he went to jail to interview defendant in connection with the escape charge he was informed that the district attorney was questioning defendant. (As previously stated, Mr. Kline was not then taken to see defendant, and there is no showing that he then asked to see defendant.) The trial court properly admitted evidence of the content or substance of the statements and submitted the question of their voluntariness to the jury under correct instructions. (People v. Sourisseau (1944), 62 Cal.App.2d 917, 145 P.2d 916.)

[15] Defendant calls attention to evidence that at the time defendant wrote the note he was confined in a room with a number of other prisoners, that defendant does not like the company of other persons, and that his motive in writing the note was a desire to be taken from the room. The effect of this circumstance on the weight to be given the note was for the jury.

Defendant asserts that he was prejudiced by testimony relating to other offenses. The trial court, counsel for both sides, and the officers and physicians who testified all apparently made careful efforts not to mention defendant's other homicides before the jury. Nevertheless, the following references to the other crimes were made:

The undersheriff who questioned defendant immediately after defendant wrote the note which constituted his original confession was asked what was said concerning the note. In relating his conversation with defendant he said in part, "I then directed his attention to one place there where one looked like a six, and I said, 'Do you mean to tell me you killed six men in Merced?' and he said, 'No, that is a mistake, that means one.' Now, I think you will note there on the—" The district attorney interrupted the witness by saying "I just want what was said." There was no objection and no further reference to any killing in Merced was made.

On the People's redirect examination of one of the deputies who questioned defendant immediately after he had first confessed, the following took place:

"Q. Mr. Louderback, in this four or five hours of questioning, was that all in regard to this one particular case? A. No, it was regarding twelve or fifteen cases.

"Q. And that is what took all this —

"Mr. Curtright [defendant's counsel]: Move that be stricken.

"The Court: It may go out. It was not responsive. You asked him if it was all in regard to this case and all he would have to say is 'No.'

"Mr. O'Shea [district attorney]: Q. The answer is No? Was it in regard to more cases than this—I withdraw that.

"Mr. Mannino [defendant's counsel]: Again.

"Mr. Curtright: We object.

"Mr. O'Shea: Q. Was it in regard to other matters?

"Mr. Curtright: We assign that as prejudicial—

"The Court: (Interposing) The Jury is instructed to disregard it.

"Mr. O'Shea: Q. Did you have a conversation with him in regard to other matters in addition to this particular killing out here in the jungle?

"The Court: Answer is yes or no. A. Yes.

"Q. And was there more than one of those other matters? A. Yes.

"Mr. O'Shea: That is all."

While the district attorney was cross-examining one of defendant's experts on the issue whether defendant was capable of having "an abandoned and malignant heart," he asked, "Suppose this isn't the only killing he has done—" Defendant's counsel interposed a prompt objection and the court instructed the jury to disregard the question.

[16] The above incidents appear to have been inadvertent on the part of counsel for the People and relatively so trifling in relation to any close issue of fact that defendant could not have been prejudiced by them.

[17] Finally, defendant complains of the trial court's giving of certain instructions, and its refusal to give other instructions, "regarding the consideration to be given evidence of defendant's mental condition, as the same related to the factual questions of malice and deliberation as elements of the crime charged." Defendant does not direct attention to the instructions which he claims were erroneously given and refused. The entire charge to the jury, including the portion of it which dealt with defendant's mental state, was eminently fair. The degrees of murder and the meaning of malice aforethought and of deliberation and premeditation were explained to the jury. They were also told that because of an abnormal mental condition a person "might be less likely or unable to have or to hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime"; and more

specific instructions[3] directed their attention to the relation between the evidence as to defendant's mental condition and the qualities of malice aforethought, deliberation, and premeditation. There was no error against defendant in such instructions. There is no refused instruction which presents adequately and correctly to the jury the problems of the relation of defendant's mental condition to the mental state requisite to the crime of murder of the first degree.

For the reasons above stated, the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.



41 Cal.2d 180

GRAY et al. v. BRINKERHOFF et al.

L. A. 22315.

Supreme Court of California, in Bank.

June 30, 1953.

Action for injuries sustained by pedestrian when struck by truck which was slowly making left turn into street which pedestrian was crossing on green light in marked crosswalk at intersection. The Superior Court, Los Angeles County, entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Schauer, J., held that the evidence established that driver of truck was negligent as a matter of law in failing to yield right of way to pedestrian and was insufficient to support a finding of contributory negligence of pedestrian.

Judgment reversed.

Carter, J., dissented.

Prior opinion 249 P.2d 571.

1. Negligence ⇐136(9)

Negligence of defendant and contributory negligence of plaintiff are ordinarily mixed questions of fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented.

2. Automobiles ⇐160(4)

Failure of truck driver, making left turn at street intersection, to yield right of way to pedestrian crossing intersecting street in marked crosswalk constituted a violation of statute and negligence as a matter of law in absence of reasonable explanation for driver's conduct. Vehicle Code, § 560(a).

3. Automobiles ⇐160(4)

For a driver to cause or allow vehicle to continue into and across pedestrian crosswalk while his attention is diverted by another vehicle constitutes violation of statute requiring driver to yield right of way to pedestrian in marked crosswalk. Vehicle Code, § 560(a).

4. Automobiles ⇐160(4)

Truck driver, making left turn at street intersection, had no right to assume that crosswalk across intersecting street was clear. Vehicle Code, § 560(a).

3. "We have received evidence bearing on the mental and nervous condition of the defendant at the time of the alleged commission of the crime charged. Such evidence may be considered by you in determining whether or not defendant did the overt act charged against him and, if so, whether or not, at that time, there existed in him the specific mental factor which, as you have been instructed, must accompany that act to constitute a certain crime or degree of crime.

* * *

"If, upon your consideration of all of the evidence in the case, you cannot say that you are convinced to a moral certainty and beyond a reasonable doubt that the defendant had and held malice aforethought, whether that reasonable doubt arises by reason of defendant's mental abnormality or incapacity, or otherwise, you may not find the defendant guilty of murder.

"And if, upon your consideration of all of the evidence in the case, you cannot say that you are convinced to a moral certainty and beyond a reasonable doubt that the killing was deliberate and premeditated, whether that reasonable doubt arises by reason of defendant's mental abnormality or incapacity, or otherwise, you may not find the defendant guilty of murder in the first degree."

5. Automobiles ⇐244(6, 36)

Evidence established as matter of law that driver of truck making left turn at street intersection was guilty of negligence proximately causing injury to pedestrian, crossing intersecting street in marked crosswalk, when struck by truck, regardless of whether driver's attention was diverted by another automobile or his view of pedestrian obstructed by left front corner post of truck. Vehicle Code, § 560(a).

6. Automobiles ⇐244(50, 58)

In action for injuries sustained by pedestrian when struck by oncoming truck which pedestrian had observed slowly making left turn into intersecting street which pedestrian was crossing on green light in marked crosswalk with no reason to believe until a second before impact that truck driver intended to violate her right of way and proceed into crosswalk, evidence was insufficient to support a finding that pedestrian was guilty of negligence proximately contributing to her injuries. Vehicle Code, § 560(a).

7. Automobiles ⇐206

Pedestrian, crossing street on green light in marked crosswalk at intersection, was entitled to assume that driver of oncoming truck slowly making left turn into street which pedestrian was crossing would obey the law, drive in a reasonable manner and yield right of way to pedestrian pursuant to statute. Vehicle Code, § 560(a).

Hirson & Horn and Theodore A. Horn, Los Angeles, for appellants.

Joseph A. Zahradka and Robert Glines, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiffs, who are husband and wife, appeal from an adverse judgment entered upon a jury verdict in their action for damages for personal injuries suffered by the wife when she was struck by a pickup truck driven by defendant Brinkerhoff in the course of his employment by defendant Nitzen. We have concluded that the evidence establishes negligence as a matter of law on the part of Brinkerhoff and is insufficient to support a finding of contributory negligence on the part of the wife, and that the judgment must therefore be reversed. Hereinafter in this opinion plaintiff-wife will be referred to as plaintiff, and Brinkerhoff will be referred to as defendant.

The evidence is without substantial conflict. At the time of the accident, plaintiff, carrying a bag of groceries, was attempting to walk across Manchester Boulevard, which runs in an east-west direction, at its intersection with Airport Boulevard, which runs north-south, in Los Angeles. Plaintiff waited on the curb at the southeast corner of the intersection until the traffic light changed from red to green for north-south traffic on Airport, so that she could lawfully proceed north across Manchester in the marked pedestrian crosswalk. The crosswalk was some 15 feet wide, and the distance from the curb, where plaintiff was standing, to an island located down the center of Manchester was about 30 feet. Defendant, who was driving south on Airport in a pickup truck, had stopped at the northwest corner of the intersection, also waiting for the green light; he was in the lane next to the center of Airport, as he intended to make a left turn onto Manchester. When the light changed to green, plaintiff started walking across Manchester in the crosswalk, and defendant started his truck, signaled his intention to make a left turn, and proceeded into the intersection. When he was about halfway across Manchester and before making his left turn, defendant again stopped his truck to permit another car, which was going north on Airport, to continue through the intersection. The other car, however, made a right turn into Manchester, and defendant then started his truck again, made his left turn, and drove into the crosswalk, striking plaintiff's shoulder with a "rack" attached over the left front fender of the truck, "pushing" her out of the crosswalk, and injuring her.

Plaintiff, while still waiting on the curb for the light to turn green, observed defendant's truck stopped at the intersection in the lane next to the center line of Airport, saw the truck start to move toward

the south when the signal changed and plaintiff started north across Manchester, and watched its progress into the intersection. When plaintiff had gone about 10 feet from the curb, the truck was approaching the center of the intersection. When it reached the center of the intersection it was going about 5 miles an hour, and plaintiff realized at that time that it was going to make a left turn. When the truck, after stopping for the approaching car, had started again and was about 15 feet from the crosswalk plaintiff was some 10 feet from the island, walking "Approximately in the middle" of the crosswalk. When plaintiff was a step or two from the island the truck, which both plaintiff and defendant testified was then going at a speed of 8 or 10 miles an hour, struck her. The truck moved 7 or 8 feet further ahead and then stopped. Plaintiff when first struck dropped her bag of groceries, seized hold of the rack above the fender in order not to be thrown under the truck, and received repeated blows to her knees and shoulder as she "was being pushed back" out of the crosswalk. The weather and the street were dry, and it was clear daylight at the time.

Plaintiff testified that she had been watching the truck almost continuously during her progress across the intersection; through the truck's windshield she saw both defendant driver and a co-employe who was riding with him and they seemed "to be looking in" her direction; when she "first realized that the truck was coming on the crosswalk * * * I tried to hurry to the island in the middle," although she did not run; she then had "perhaps a second" to "get out of the way"; she was then "about five feet" from the island; "I was in plain sight and * * * he looked like he would pass right behind me * * * [T]here wasn't room for him to go in front of me by that time."

Defendant testified that his windshield was clear; he did not see plaintiff at any time until after his "truck had actually impacted her," and he saw no other people in the crosswalk; after he stopped in the center of the intersection for the oncoming car, he was "looking east on Manchester" as he approached the crosswalk; there was nothing that would obstruct his view except the corner post on the truck as he was in the swing of the left turn; his brakes were in good condition.

[1] Whether or not defendant was guilty of negligence (see Toschi v. Christian (1944), 24 Cal.2d 354, 360, 149 P.2d 848; Mosley v. Arden Farms Co. (1945), 26 Cal.2d 213, 217, 157 P.2d 372, 158 A.L.R. 872; Polk v. City of Los Angeles (1945), 26 Cal.2d 519, 530, 159 P.2d 931; 19 Cal. Jur. 731, and cases there cited) or plaintiff was guilty of contributory negligence (Pewitt v. Riley (1945), 27 Cal.2d 310, 316, 163 P.2d 873; Anthony v. Hobbie (1945), 25 Cal.2d 814, 818, 155 P.2d 826, and cases there cited; see also 19 Cal.Jur. 735–738) is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented. (See also Zibbell v. Southern Pacific Co. (1911), 160 Cal. 237, 241, 116 P. 513; Reaugh v. Cudahy Packing Co., (1922), 189 Cal. 335, 343, 208 P. 125; Young v. Southern Pacific Co. (1920), 182 Cal. 369, 375, 190 P. 36; Dennis v. Gonzales (1949), 91 Cal.App.2d 203, 209, 205 P.2d 55.)

[2] It is our view that defendant's own testimony shows indubitably that he was guilty of negligence proximately causing plaintiff's injuries. By the provisions of section 560, subdivision (a), of the Vehicle Code, "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk * * *." It is undisputed that defendant did not yield the right of way to plaintiff. Such failure constitutes a violation of the statute and negligence as a matter of law in the absence of reasonable explanation for defendant's conduct. (See Satterlee v. Orange Glen School Dist. (1947), 29 Cal. 2d 581, 589, 177 P.2d 279; Ornales v. Wigger (1950), 35 Cal.2d 474, 477–480, 218 P.2d 531; Finney v. Wierman (1942), 52 Cal. App.2d 282, 284, 126 P.2d 143; Lafrenz v. Stoddard (1942), 50 Cal.App.2d 1, 4, 122 P.2d 374.)

[3] Defendant in attempted excuse of his conduct suggests that his "attention was

diverted" by the "fast approaching car" which made a right turn into Manchester instead of continuing north on Airport as defendant had expected it to do. However, that vehicle after turning to the right obviously constituted no hazard to defendant, who had stopped in the center of the intersection to allow it to pass, and provides no excuse whatsoever for his thereafter starting his truck again, driving into the crosswalk without seeing pedestrians who might be there, and striking plaintiff. For a driver to cause or allow his vehicle to continue into and across such a crosswalk while his attention is so "diverted" constitutes in itself a violation of the statute for which he must be held responsible.

[4, 5] Defendant suggests further that although his attention was "diverted," nevertheless "while in his turn, the left front corner post on the truck probably obscured his seeing" plaintiff. Again, we are not impressed with this tentative offering of an excuse. Under the circumstances shown it appears to us that the evidence does not reasonably admit of any conclusion other than that defendant could have fulfilled his duty to look for pedestrians and could have seen plaintiff if he had exercised ordinary care. He had no right to assume that the crosswalk was clear (People v. Lett (1947), 77 Cal.App.2d 917, 919, 177 P.2d 47); it was his duty in starting up and driving his vehicle into and through the crosswalk to ascertain whether plainly visible pedestrians were using such crosswalk and it was his obligation to yield the right of way to them (Fischer v. Keen (1941), 43 Cal.App.2d 244, 249, 110 P.2d 693). We hold that the evidence establishes that defendant was negligent as a matter of law.

[6] It is equally apparent that plaintiff was free from negligence proximately contributing to her injuries. She was lawfully where pedestrians are expected to be found at intersections and until "perhaps a second" before the impact she had no reason to believe that defendant intended to violate her right of way and proceed into the crosswalk and against her body. Under such circumstances, she was not allowed sufficient time, and it does not appear that she was required, to "run" [1] from his vehicle, as defendant (apparently seeking to invoke a sort of reverse last clear chance doctrine) suggests she should have done, although she did make an effort "to hurry to the island in the middle."

[7] Defendant relies on the rule that "Whether a mistake in judgment by a pedestrian when crossing a street, as to the speed and danger of an approaching vehicle constitutes contributory negligence is a question for the jury." (Kirk v. Los Angeles Ry. Corp. (1945), 26 Cal.2d 833, 839, 161 P.2d 673, 164 A.L.R. 1.) In the cited case the traffic signal changed after plaintiff pedestrian had started across the intersection; plaintiff's companions reached the far curb safely but plaintiff while hurrying to do the same dropped her purse and was struck by a streetcar when she stopped to pick it up. The judgment of nonsuit was reversed by this court with the statement that the matter of contributory negligence should have gone to the jury. In the case now presented, however, the only relevant mistake which plaintiff could have made as to the speed and danger of the approaching vehicle would be the belief that defendant driver intended to obey the law and not turn into and across the pedestrian crosswalk and strike her in complete disregard of her right of way. Defendant's vehicle, which had come to a complete stop in the center of the intersection and after starting again had at no time exceeded a speed of 8 to 10 miles an hour, obviously would give a reasonable pedestrian lawfully in the crosswalk no cause for apprehension that the speed of the vehicle constituted such an imminent danger that she should run from it. Under such circumstances we find no merit in defendant's argument that inasmuch as plaintiff had observed the truck from the time it left the center of the intersection until it struck her, her failure to increase her speed until "perhaps a second" before he pushed her out of the crosswalk could be considered to be contributory negligence. (See LeBlanc v.

1. It may be noted that there are traffic signs in some localities which expressly direct pedestrians to "Walk" and do not suggest "Run."

Browne (1947), 78 Cal.App.2d 63, 71–75, 177 P.2d 347.) Under the circumstances shown here, plaintiff had the right to assume that defendant driver would obey the law, drive in a reasonable manner, observe her right of way, and yield it. (See Schulman v. Los Angeles Ry. Corp. (1941), 44 Cal.App.2d 122, 126, 111 P.2d 924; Foerster v. Direito (1946), 75 Cal.App.2d 323, 330–331, 170 P.2d 986; Ladas v. Johnson's B. & W. Taxicab Co. (1941), 43 Cal.App.2d 223, 228, 110 P.2d 449.)

By reason of our conclusion that the evidence is insufficient to support the verdict, it becomes unnecessary to consider plaintiff's further contention that certain of the instructions given to the jury prejudicially over-emphasized her duty and minimized that of defendant.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Contrary to the majority opinion the issues of negligence and contributory negligence were for the jury, and its determination thereof against plaintiff is binding on this court. The evidence is such that reasonable minds could find either the presence or absence of the factors necessary to establish those issues.

The basis of the majority opinion is, on the issue of negligence, that defendant was required to yield the right of way to plaintiff and his failure to do so was negligence as a matter of law; on the issue of contributory negligence, that plaintiff was not required to run when she saw defendant's truck approaching and thus was free from contributory negligence as a matter of law. Those bases fail to take into consideration other factors which the jury could and did use as a basis for its verdict.

On the issue of negligence there are several significant facts upon which a finding of no negligence could be based. The intersection where the accident occurred was a busy one and there was considerable traffic there at the time. This presented a situation where plaintiff was not the only person to be watched—toward whom care was to be exercised. Other hazards required constant attention by defendant with the accompanying necessity of making decisions governing his conduct. Whether his decisions were those of a person of ordinary prudence was a question for the jury. Defendant proceeded into the intersection with the "Go" signal as he was lawfully entitled to do. He gave proper signals for making a left turn which was legally authorized. He was travelling at a low rate of speed. As he was making a left turn and approaching the crosswalk which plaintiff was using, a car approaching at a high speed from his right swung right around the corner across his prospective route. That car crossed the crosswalk to the rear of plaintiff. It is reasonable to assume that defendant's attention would be focussed on that vehicle which would have a bearing on whether he was careless in failing to observe plaintiff in the crosswalk. Moreover, he may reasonably have assumed that, as that car proceeded across the crosswalk apparently without mishap, there was no one on the crosswalk. Defendant testified that he did not see plaintiff on the crosswalk. The jury could have believed that testimony. True, it could have disbelieved it, because plaintiff was there and there was evidence that plaintiff was looking in the direction of defendant's car, but that was the jury's function, not ours. There were reasons why the jury may have chosen to believe defendant. He testified that the upright support for the top, door and windshield of his car obscured his vision. His attention was diverted by the car which turned right into his path and lead him into a sense of security by its crossing the crosswalk without mishap. There was a large amount of traffic at the intersection. Indeed the majority opinion is based on the theory that defendant was negligent in failing to see plaintiff because she was on the crosswalk, but that assumes that she was there. That assumption cannot be made because the jury could have disbelieved her testimony as to her presence in the crosswalk—at a point in the path of defendant's oncoming car. From testimony that defendant did not see her in the crosswalk when, if she was where she said she

was, the jury could infer that she was not there; that she had reached the island in the center of the street, had become confused and stepped back into the path of defendant's car, or that she darted ahead across the path of defendant's car just as the right turning car passed behind her. Of course, if defendant did not see plaintiff before the impact, and his failure to see her was not negligence, there is no basis for a finding of negligence in his failure to yield the right of way and the entire foundation of the majority opinion crumbles.

With reference to contributory negligence, there was sufficient from which the jury could find its existence. Plaintiff testified that she was watching defendant's car approaching all of the time. It could be inferred, therefore, that she walked directly into the path of an oncoming car and, after taking that chance, made no effort to hurry or avoid being struck by the car. Moreover, as before discussed, the jury could have believed that defendant did not see her, that she darted in front of his car when the other car made a right turn behind her, or could have disbelieved her testimony that she was watching defendant's car and concluded that she walked across the crosswalk blindly and with total disregard of her safety. Based upon any of those premises or other possibilities, reasonable men could have concluded that she was guilty of contributory negligence.

Furthermore, the facts may have appeared to the jury in such a light as to justify the conclusion that neither plaintiff nor defendant was negligent—that the occurrence was what is sometimes called an "unavoidable accident" where no one is at fault and hence no recovery may be had.

In regard to yielding the right of way where a pedestrian was struck while crossing the street and defendant testified he did not see him, the court said in Edwards v. McCormick, 79 Cal.App.2d 800, 804, 181 P.2d 58, 60: "In the instant case, as commented upon in respondents' brief, 'It was for the jury to decide whether respondent's failure to see the deceased was a negligent failure. His failure to yield the right of way arose from his failure to see the pedestrian before he did; the two are inextricably intertwined. Hence it would have been an invasion of the province of the jury for the court to have laid down an inflexible rule that if respondent did not yield the right of way he was negligent as a matter of law.' Under the evidence disclosed by the record, negligence and contributory negligence were questions of fact and not of law. * * *

"The appellants insist that 'The verdict and judgment are against the law, in that deceased had a right to assume defendant would obey the law (and yield the right of way), and in that deceased being confronted by a sudden peril he was not guilty of contributory negligence in attempting to pass in front of defendant's automobile.' It is also argued that 'plaintiffs are entitled to the benefit of the presumption that the deceased obeyed the law in that he exercised ordinary care for his own safety and therefore the verdict was against the evidence if the defendant was guilty of negligence.' These contentions, however, proceed on the assumption that the defendant was, and the deceased was not, guilty of negligence in the situation presented. And, as already indicated, such matters involve questions of fact, not of law. Neither a presumption of due care on the part of the deceased, nor any right to assume that respondent driver would yield the right of way, can alter this situation—or, in fact, do more than merely raise a conflict in the evidence. As pointed out in respondents' brief, 'It is clear that a pedestrian has no privilege of relying on right of way blindly or in the face of obvious danger.' Fischer v. Keen, 43 Cal.App.2d 244, 110 P.2d 693; Reed v. Stroh, 54 Cal.App.2d 183, 128 P.2d 829." See Bedell v. Duniven, 77 Cal.App.2d 145, 174 P.2d 666; O'Brien v. Schellberg, 59 Cal.App.2d 764, 140 P.2d 159.

The conclusion reached by the majority here must be based upon the unqualified assumption that all of the testimony of plaintiff is true and that at least some of defendant's testimony is false. Thus the majority is weighing the evidence, without seeing the witnesses or hearing them testify, thereby invading the exclusive prov-

ince of the triers of fact—the jury and trial judge. The position of the majority here is not only out of harmony with the settled law of this state, see In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183, but it places an undue burden upon this court—that of deciding issues of fact. I have heretofore adverted to the evils of this practice, see concurring and dissenting opinions in Daniels v. City & County of San Francisco, 40 Cal.2d 614, 255 P.2d 785; Saporito v. Purex Corp., Ltd., 40 Cal.2d 608, 255 P.2d 7; Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977. So far as this court is concerned, it is of recent development—just the last year or two, see Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Hawaiian Pineapple Co. v. Industrial Accident Commission, 40 Cal. 2d 656, 255 P.2d 431; Better Food Markets, Inc., v. American Dist. Teleg. Co., 40 Cal. 2d 179, 253 P.2d 10; Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18; Sutter Butte Canal Co. v. Industrial Accident Commission, 40 Cal.2d 139, 251 P.2d 975; Mercer-Fraser Co. v. Industrial Accident Commission, 40 Cal.2d 102, 251 P.2d 955; Gill v. Hearst Publishing Co., Inc., 40 Cal.2d 224, 253 P.2d 441; Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447; Pirkle v. Oakdale Union, etc., School Dist., 40 Cal.2d 207, 253 P.2d 1; Burtis v. Universal Pictures Co., Inc., 40 Cal.2d 823, 256 P.2d 933; Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962; Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947; Turner v. Mellon, 41 Cal.2d 45, 257 P.2d 15; Barrett v. City of Claremont, 41 Cal.2d 799, 256 P.2d 977; In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990. I cannot refrain from again reiterating that this practice is not only in direct violation of the constitutional right of litigants to trial by jury, but is an insidious abuse of the judicial process.

About ten years ago (December 1, 1943), Mr. Justice Schauer in speaking for the majority of this court took a position diametrically opposed to the position now taken by him in the case at bar. As author of the majority opinion in Re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689, he clearly and forcefully restated the traditional rule with respect to the function of this court and the District Courts of Appeal in reviewing findings of a trial court or jury. I concurred with Mr. Justice Schauer in the views expressed in that opinion and still believe that it should be the law of this state. I quote his pertinent language in that case and commend it to his consideration in reaching a conclusion in the case at bar. In Re Estate of Bristol Mr. Justice Schauer stated, 23 Cal.2d at pages 223 and 224, 143 P.2d at page 690, as follows: "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. (In re Estate of Snowball (1910), 157 Cal. 301, 305, 107 P. 598; In re Estate of Barr (1924), 69 Cal.App. 16, 33, 230 P. 181.) The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pac. Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is '*substantial*'; it is a door which can lead as readily to abuse as to practical or enlightened justice. *It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial —if it can be reflected at all—in a phonographic record. Appellate courts, there-*

fore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical. Upon such view of the law we cannot hold that any essential finding in this case is unsupported." (Emphasis added.)

In some of my dissenting opinions I have called attention to the long-established rule that it is only in cases where the uncontradicted evidence is such that reasonable minds cannot differ, that the issues of negligence and contributory negligence may be decided as issues of law. Heretofore the majority have not seen fit to discuss this rule, but have ignored it by the simple process of arbitrarily disregarding the determination of the trier of fact and holding as a matter of law that the evidence supporting such determination was insufficient, see Rodabaugh v. Tekus, supra; Better Food Markets, Inc., v. American Dist. Teleg. Co., supra; Atkinson v. Pacific Fire Extinguisher Co., supra; Goodman v. Harris, supra; Pirkle v. Oakdale Union etc. School Dist., supra; Burtis v. Universal Pictures Co., Inc., supra; Turner v. Mellon, supra; Barrett v. City of Claremont, supra. Here, however, the majority cites the cases which have established the rule, and then misstates it and refuses to apply it to this case. In this connection the majority opinion states: "Whether or not defendant was guilty of negligence [citing cases] or plaintiff was guilty of contributory negligence [citing cases] is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented." The foregoing is not a correct statement of the rule. While the statement of the rule has been couched in different language in some of the cases, it has been repeatedly declared as follows: " 'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Seller v. Market St. Ry. Co., 139 Cal. 268, 72 P. 1006; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651." Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 P. 513, 515. What the majority here mean by the phrase, *"reasonable men following the law"*, is not clear. However, by its attempted application of the rule to this case, I assume that the majority mean that those Justices who constitute the present majority of this court are the *only "reasonable men following the law"* who have passed on the issues in this case. If that is what the majority intend to imply, and I can conceive of no other meaning, then I resent the implication both on behalf of the members of the jury, the learned trial judge and the three able and honorable members of the District Court of Appeal, see Gray v. Brinkerhoff, Cal. App., 249 P.2d 571, as well as for myself, all of whom disagree with the conclusion reached by the majority of this court in this case. According to the majority none of the above persons is a reasonable person following the law.

I have no hesitancy in stating that I am not at all chagrined to be so classified by the majority of this court, as I am confident that neither unbiased contemporary observers nor posterity will sanction the distortions to which the majority of this court has resorted in its attempt to justify its invasion of the fact-finding functions of the jury and trial judge. I feel rather that those who believe in the democratic process may properly but regretfully refer to this period in our judicial history as the era when the Supreme Court of California assumed the role of the fact-finder in negligence cases.

I have examined the record in this case and find no error prejudicial to plaintiff.

I would, therefore, affirm the judgment.

118 Cal.App.2d 726

ANDERSON v. CITY OF SAN DIEGO et al.

Civ. 4516.

District Court of Appeal, Fourth District, California.

June 26, 1953.

Action was brought to terminate a trust and to quiet title to certain lots. The Superior Court of San Diego County, Dean Sherry, J., entered judgment dismissing the action under statute requiring dismissal if an action is not brought to trial within five years after filing of complaint, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that action was properly dismissed.

Judgment affirmed.

1. Dismissal and Nonsuit ⇐60(3)

Statute requiring dismissal if action is not brought to trial within five years after filing of complaint is mandatory, but is subject to implied exception where plaintiff is prevented by causes beyond his control from bringing case to trial, and, in computing five-year period, time, during which plaintiff was thus prevented, is to be excluded, whether handicap results from lack of jurisdiction in strict sense or because proceeding to trial would be both impracticable and futile. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇐60(6)

Where complaint was filed on May 9, 1946, motion filed by defendant on November 28, 1951, to dismiss the action, on ground that it had not been brought to trial within five years as required by statute, was properly granted over objection of plaintiff that plaintiff could have done nothing from May 9, 1946, until November, 1947, when first demurrer was sustained, and that 19 month period was required to be excluded in computing five-year period, and that plaintiff could not have set case for trial because no answer to amended complaint was ever filed by defendant, and that defendant did not file amended demurrer as allegedly promised. Code Civ. Proc. § 583.

3. Dismissal and Nonsuit ⇐50

Alleged fact that plaintiff relied on alleged statement of defendant that defendant would file an amended demurrer and on alleged promise that defendant would expedite the matter but did not do so did not estop defendant from moving for dismissal under statute requiring dismissal if an action is not brought to trial within five years after filing of complaint. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(2)

Hearing of demurrer to complaint did not constitute a "trial" within meaning of statute requiring dismissal if an action is not brought to "trial" within five years after filing of complaint. Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

5. Dismissal and Nonsuit ⇐60(1)

Court did not err in dismissing suit under statute requiring dismissal if an action is not brought to trial within five years after filing of complaint, on ground that it would be futile to dismiss the action because another action could allegedly be brought for the same purpose. Code Civ. Proc. § 583.

Manasse & Crowley, Hollywood, Betty Aronow, Los Angeles, for appellant.

J. F. DuPaul, City Atty., and Alan M. Firestone, Deputy City Attorney, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment dismissing the action by reason of its not having been brought to trial within five years.

The action was one to terminate a trust, and to quiet the plaintiff's title to five lots in San Diego. It was alleged that by a deed recorded in 1893 the deceased conveyed two of these lots in trust to the defendant city on the condition that it should forever hold and use said property, and the income thereof, for the purpose of founding and maintaining a home for foundling children; that by a deed recorded in 1894 the deceased conveyed the other three lots in trust to the defendant city to be used for a foundling home, or rented

and the income used for that purpose, with a provision that the property should revert to his heirs if the city should at any time use the property or the proceeds thereof for any other purpose; and that the city had violated the conditions in these deeds by failing to use the property or its income for the support and maintenance of a foundlings' home, and by using the property for other purposes.

The complaint in this action was filed on May 9, 1946. An answer was filed on October 11, 1946, the time to answer having been extended by two stipulations and an order. On October 18, 1946, the city gave notice of a motion for permission to withdraw its answer and to file a demurrer. On November 20, 1946, such permission was granted, the answer was withdrawn and a demurrer was filed. At the request of the plaintiff, filed October 22, 1947, the demurrer was set for hearing on November 3, 1947, and on that date it was sustained, the plaintiff being given 20 days in which to amend. An amended complaint was filed on December 31, 1947, joining the Attorney General as a defendant, and alleging among other things that Joseph Cook, Sr., died in 1907, that the plaintiff was appointed administratrix of his estate in September, 1945, and that there had been no prior probate proceedings in connection with Cook's estate. The city filed a demurrer to the amended complaint on January 9, 1948. On March 7, 1949, the attorney general filed an answer, together with a cross-complaint against the city of San Diego. On March 8, 1949, plaintiff's attorney telephoned to the city attorney asking that the matter be set for trial. On March 30, 1949, he wrote to the city attorney asking about the status of the litigation. On July 1, 1949, he again wrote the city attorney asking what progress had been made on setting the demurrer for a hearing, and asking that the matter be expedited. On July 18, 1949, he received a letter from the city attorney's office saying they would file an amended demurrer in the next several weeks. In May, 1950, plaintiff's attorney called at the office of the city attorney in San Diego and was told that they would file the amended demurrer. On October 29, 1951, the attorney for plaintiff wrote to the city attorney stating that the administratrix had died and asking for a stipulation for substitution of parties plaintiff. On October 31, 1951, he was advised that the city attorney's office would not stipulate to such a substitution but that it would not be opposed. On November 19, 1951, notice was filed that on December 17, 1951, the plaintiff would move the court to hear and try the city's demurrer. This motion was filed by different attorneys for the plaintiff, and we find no substitution of attorneys or of the party plaintiff in the record. On November 28, 1951, notice was filed of the defendant city's motion to dismiss the action on the ground that it had not been brought to trial within five years, this motion being also noticed for December 17, 1951. The motion to dismiss was argued on that day, and an order and judgment of dismissal was entered on February 4, 1952.

[1] It is well settled that the five-year provision of Code Civ.Proc. Section 583 is mandatory when it is applicable, Andersen v. Superior Court, 187 Cal. 95, 200 P. 963. It seems to be equally well settled that an implied exception exists when the plaintiff is prevented by causes beyond his control from bringing the case to trial, and that in computing the five-year period the time during which he was thus prevented is to be excluded, whether the handicap results from a lack of jurisdiction in the strict sense or "because proceeding to trial would be both impracticable and futile." Christin v. Superior Court, 9 Cal. 2d 526, 71 P.2d 205, 208, 112 A.L.R. 1153; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; Rose v. Knapp, 38 Cal.2d 114, 237 P.2d 981. In the Christin case, the inability arose from the fact that an appeal was pending from an order changing the venue and the records had been sent to the appellate court. In the Rose case, a judgment had existed for more than two years, which destroyed the basis for the plaintiff's action and made it futile to proceed until that judgment was reversed or set aside. In the Pacific Greyhound case, one of the defendants was in the military service and had been for some

years. It had been orally stipulated that the case remain off calendar until he returned to civilian status, and the record disclosed that both parties considered his presence necessary. In that case, it was held that the question of whether it was impracticable and futile to bring the action to trial within the period was one of fact for the trial court, and its refusal to dismiss the action was sustained.

[2] The appellant's first contention is that the instant case falls within the exception established by the cases just cited, and that it was impossible, impracticable and futile to bring this case to trial. It is argued that the plaintiff could have done nothing from May, 1946, when the original complaint was filed, to November, 1947, when the first demurrer was sustained; that this period of 19 months must be excluded in the computation of the five-year period; that the appellant could not have set the case for trial since no answer to the amended complaint was ever filed by the city; and that the city's attorney made many promises to file an amended demurrer and to expedite the matter, which were not kept. The matters thus relied on are not sufficient to bring this case within any of the established exceptions, and the record sustains the trial court's finding to that effect. Pacific States Corporation v. Grant, 87 Cal.App. 108, 261 P. 1100; Rosenfelt v. Scholtz, 17 Cal.App.2d 443, 62 P.2d 381; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006; Smith v. Bear Valley etc. Co., 26 Cal.2d 590, 160 P.2d 1.

[3] It is next contended that the defendant city was estopped from moving for a dismissal by its own conduct. It is argued that the plaintiff's attorney was located in Los Angeles, and relied on the fact that the city's attorneys had stated that they intended to file an amended demurrer and upon various promises of the city's attorneys that they would expedite the matter, which promises were not kept. There was nothing to prevent plaintiff's attorneys from setting the demurrer for hearing, they found very early in the proceeding that such promises, if made, were not being kept, and nothing was done by either party between July, 1949 and October, 1951, except that the former attorney for the plaintiff stated in his affidavit that in May, 1950, he called at the office of the city attorney in San Diego and "was promised that they would file the amended demurrer," and that he wanted to get along with the attorneys and did not wish to rush them. It is well settled that no estoppel, sufficient to avoid the effect of this statute, would result from such conduct. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Elmhurst Packers v. Superior Court, 46 Cal.App.2d 648, 116 P.2d 487; Breakstone v. Giannini, 70 Cal. App.2d 224, 160 P.2d 887.

[4] Some contention is made that the hearing of the demurrer to the original complaint constituted a trial, with the result that Section 583 is not applicable. It is argued that this is established by the case of Smith v. City of Los Angeles, 84 Cal. App.2d 297, 190 P.2d 943, which "overruled" Perrin v. Miller, 35 Cal.App. 129, 169 P. 426, and in effect overruled Meier v. Superior Court, 55 Cal.App.2d 675, 131 P.2d 554. The last two cases, and others, establish the rule that the hearing of a demurrer is not a trial, within the meaning of Section 583, unless the ruling on the demurrer is a final determination of the rights of the parties. There is nothing inconsistent with this rule in Smith v. City of Los Angeles. It has also been held that the filing of an amended complaint does not prolong the time within which the action may be brought to trial. Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716.

[5] It is further contended that the defendant city holds this property under a trust which has not been repudiated; that the statute of limitations would not begin to run until the trust is repudiated; that the plaintiff would not be precluded from filing another action; and that it follows that the dismissal of the present action would be futile and not in the interest of justice.

Whether or not another action would be barred by the statutes of limitation is in no way controlling. The question presented

on such a motion to dismiss is not as to the merits of the cause of action alleged in the complaint, or whether any new action might be brought, but is as to whether the existing action was brought to trial within the statutory time or comes under one of the implied exceptions.

While the appellant produced nothing to show that it would have been futile to take the usual steps which would have led to a trial within the time allowed, it is now argued that it would be futile to dismiss this action since another could be brought for the same purpose. If that were material here, an interesting situation apparently exists. The respondent, in its brief, states that four prior proceedings affecting this matter were brought; that in 1913, the city in a proceeding in the superior court secured an order permitting it to lease two of these lots and directing that the rental be placed in a separate "Foundlings' Home Fund"; that in 1918 this administratrix, personally and with other plaintiffs, filed an action in the superior court alleging that the plaintiffs were the heirs of Joseph Cook, Sr., and that the city had breached this trust, and seeking to quiet their title to the property and to cancel these deeds; that an answer was filed by the city in 1918 and the action was dismissed by the plaintiffs twenty years later, in 1938; that a similar action was filed in 1939; that an answer and a demurrer were filed in 1939, and the action was dismissed by the plaintiffs in 1945; and that a petition to establish heirship was filed in the estate of Joseph Cook, Sr., in 1942 by this administratrix and others, which was dismissed by them in 1945. The appellant calls attention to the fact that the matters thus stated in respondent's brief do not appear in the record, which is true.

It does appear that this action was filed more than 50 years after these deeds were recorded, and nearly 40 years after the grantor died. The cross-complaint filed by the attorney general alleges that the city has paid $600 a year since 1913 into a "Foundlings' Home Fund" as rental for two of the lots; that the other lots have never been rented, and because of changed conditions, are now unsuitable as the site of a foundling home; that sufficient funds are not available to build and maintain a foundling home and the city has been unable to administer the trust except to the extent of accumulating said Foundlings' Home Fund; that the city should be made to account for its use of the property; that a new trustee should be appointed, and some or all of the property should be sold; and that plans should be worked out, through a consolidation with other charities or otherwise, to the end that a foundling home may be established in accordance with the purpose of the trust.

While part of the matters referred to by the respondent are not in the record they may have been known to the trial judge, and there is enough in the record to indicate that if the merits of the action were to be considered, it should be done in a new action presenting the issues in a manner which would better enable them to be decided in accordance with justice and the real rights of all parties. This furnishes an additional reason why it cannot be held that any abuse of discretion appears.

The judgment of dismissal is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 704

WILCOX v. SALOMONE et al.

Civ. 8159.

Sac. 6258.

District Court of Appeal,
Third District, California.

June 26, 1953.

Rehearing Denied July 20, 1953.

Hearing Denied Aug. 20, 1953.

In plaintiff's action against his father-in-law and mother-in-law to have third party's deed to defendants declared to be a mortgage, the Superior Court, Tehama County, Albert F. Ross, J., rendered judgment for plaintiff, and defendants appealed. The Dis-

trict Court of Appeal, Schottky, J., held that evidence sustained finding that plaintiff had permitted conveyance of land by third party to defendants only as security for purchase money advanced by defendants for plaintiff, and that there was thus created a resulting trust by way of a mortgage.

Affirmed.

1. Mortgages ⇐36

It is presumed that a deed absolute on its face is what it purports to be; but a deed absolute in form may be shown to have been intended as a mortgage.

2. Mortgages ⇐32(3)

A deed absolute in form is a mortgage if intended as security for performance of an obligation. Civ.Code, § 2924.

3. Mortgages ⇐36, 38(3)

Burden of proving that a deed absolute is a mortgage rests upon party who alleges it, and evidence must be clear, satisfactory and convincing, unequivocal and indisputable. Civ.Code, § 2924.

4. Appeal and Error ⇐1011(1)

Whether evidence to show that deed was intended as a mortgage is clear and convincing is question for trial court, whose determination on conflicting evidence is not reviewable on appeal.

5. Evidence ⇐271(1, 16)

As a general rule, declarations of persons, deceased or party to action, made in absence of opposite party sought to be bound by them, which declarations are in support of party's or declarant's own interests, are not admissible in favor of those who claim rights which declaration would maintain.

6. Evidence ⇐271(17)

In plaintiff's action against his father-in-law and mother-in-law to have third party's deed to defendants declared to be a mortgage, there was no error in admitting evidence as to declarations made by plaintiff's deceased wife tending to support plaintiff's contention that a loan and mortgage had been intended in the transaction in question, notwithstanding fact that such declarations were made out of presence of defendants.

7. Appeal and Error ⇐1051(3), 1054(1)

Error, if any, in admission of self-serving declarations would not require reversal where appellants had, in their own testimony, admitted greater part of what was contained in such declarations, and especially in view of fact that case was tried to court without a jury.

8. Trusts ⇐89(4)

Evidence sustained finding that plaintiff had permitted conveyance of land by third party to defendants only as security for purchase money advanced by defendants for plaintiff, and that there was thus created a resulting trust by way of a mortgage.

Ira M. Shadwell, Redding, Philip H. Angell, San Francisco, for appellants.

Rawlins Coffman, Red Bluff, for respondent.

SCHOTTKY, Justice.

Respondent commenced an action against appellants to have a deed to certain real property declared to be a mortgage and that appellants be barred of all right in said real property except as to a lien for the unpaid balance of the loan. Appellants filed an answer denying the material allegations of the complaint and also filed a cross-complaint seeking to quiet their title to said real property as against the claims of respondent. Following a trial before the court, sitting without a jury, the court found substantially in accordance with the allegations of the complaint and judgment was entered decreeing that the deed in question was a mortgage and respondent was the owner of the real property in controversy, subject to lien in favor of appellants, for $3,620.80, the unpaid balance of the loan, with interest at the rate of one per cent per annum from June 30, 1951, and taxes in the sum of $191.80. This appeal is from said judgment.

Appellants attack the judgment as being unsupported by and contrary to the evidence.

In arguing for a reversal of the judgment appellants urge three major contentions:

1. There is insufficient evidence to support the finding that the deed absolute was a mortgage.

2. That the trial court erred in admitting over objection statements made by respondent and his deceased wife to third persons, out of appellants' presence, that respondent and his wife were owners of the property in question.

3. That the trial court erred in admitting, over appellants' objection, documentary evidence which was self-serving and hearsay, and never seen by or its contents known to appellants.

Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

On or about September 26, 1945, the respondent and his wife leased certain real property located in Corning, Tehama County, improved with a garage building and dwelling quarters, from one White and his wife for a period of three years ending the 30th day of September, 1948. There was also an option to release given at this time. The rental was $60 per month. This lease was recorded. During the period of this leasing the respondent, assisted by his wife, made certain temporary improvements on the property.

During the month of March, 1946, the Whites indicated to respondent and his wife a desire to sell said real property, whereupon negotiations for a sale were entered into between these parties. After some preliminary negotiations respondent's wife applied to her parents, the appellants, for a loan of approximately $5,687 to handle the purchase of this real property. Some time subsequent to this application the appellants wrote the following letter to respondent and his wife:

"San Francisco
"March 14–46

"Dear Val an Al.

"There's no doubt that you've been waiting for this letter before now, but we were doing some waiting ourselves also. Ted White was here las Saturday has we already stated, and he promised that, he, would mail us a photostatic copy of the note that Mr. Morgan has against the property but so far we haven't received anything and I (Dad) also contacted the bank of three different occasions for information and advice, how to go about it—and how to transfer the money an so on. First I went to the bank where Mr. Demartini was supposed to be (18 & Castro & Market) well when I got there, was told that he had passed away about six months or so ago, but the Maneger in charge was very nice and told me how the transaction sould be made, and again today I went to the Bank of America No. 1 Powell and was advised about on the same manner of procedure, which I will explain to you on the following page.

"In as much as we would like to have our financing secured on the same lines as the Morgan note reads, 'except the interest which would be, say, one per cent just to make it legal', you should and must draw the papers by a Title Insurance Company and not otherwise. They told me the B. of America of Corning probably could arrange to have it done by a Title Insurance Co., therefore said insurance would get you a clear title, would have it recorded, would upon signature of transfer pay the sum which the Morgan note ammount and also pay the sum stipulated to Ted White. I was told the money had to be put in escrow with the Title Ins. Co. therefore you will tell them to call on Bank of America No. 1 Powell, Day and Nite Bank, and its agreed the bank will then call me to go there and make the transfer of said money's. Now then, I dont know if you will agree with said advise but they all told me that, it was the proper and surest way to transact business of this kind Ted White gave me his word 'if it ammount to anything' that he would not claim any rent after March 1*th*, but the time it will take to consumate the deal would be considered paid by that last month of the lease and rent set to him after that—date would be deducted from the price stated, and said for you to have the papers

made and he and his wife will go there to sign them. Thats about all the advise I have gathered and can give you but you should also investigate on your own, dont be afraid go to the bank and ask if the procedure I have recomended is the proper one or not, and please let me know about it. But dont confide this to Mr. Morg. I was told not to, but would like to know, how his note is worded, if he is kind enough to tell you. Then go ahead as long as you want the place get it over with.

"Here in enclosed is Ted White Grant Deed. 'deed of purchase' and you will notice it was andled by Title Ins. & Guaranty Co. of S. F. tru the Bank of Corning. Your lease is enclosed also. take care of both documents. Before closing will say thing are about the same here, so with best regards to both of you

"Love,

"Mother & Dad

"P.S. Dont get it wrong about the wording of the note similar to Morg. that is only protection on both sides and the interest will be just to make it legal.

"P.S. Please state the amount required."

In April, 1946, a deed of the property in question was made from the Whites to the appellants as joint tenants. It is contended by the respondent, and alleged in the complaint that this deed absolute was taken by the appellants to secure the loan of the purchase money by appellants to plaintiff. Respondent testified that a note for $5,687 was executed by himself and his wife and delivered to appellants, but this was denied by appellants; and the note was not produced at the trial.

Appellants testified that they purchased the property for themselves and denied that they received a note for the purchase price. They admitted that they originally intended to lend the purchase price money to respondent and his wife, but stated that they had later changed their minds before the execution of the deed itself. The letter from appellants to respondent and his wife, dated March 14, 1946, and hereinbefore set forth, showed clearly that they intended to lend the purchase money to respondent and his wife on that date, which was about two weeks prior to the transfer.

Mr. White, from whom the property was purchased, testified that appellants had both stated to him at the time of negotiating for the sale of the property that they would pay the purchase price, that they would lend it to respondent and his wife and let them pay them back at so much a month, and White testified further that that was his understanding throughout the entire transaction.

In the deposition of appellant John C. Salomone, taken on September 21, 1950, more than seven months before the trial, said appellant appeared to have no recollection that it was first understood and agreed that appellants were to advance the money for respondent and his wife, and it was apparently not until the letter of March 14, 1946, was produced at the trial that appellants admitted the prior conversations and discussions, but testified that after such discussions they had changed their minds and decided to buy the property themselves.

After the transfer the respondent and his wife paid the taxes and insurance on the property, and made repairs and improvements costing $3,000 or more. Appellants introduced evidence that at respondent's request an endorsement was placed on the insurance policy to the effect that appellants were the owners of the property. The respondent and his wife also continued to pay $60 per month to the appellants, the sum which had previously been paid as rent to the prior owner, Mr. White. Appellants testified that the $60 payments were rent and not payments on any loan, and introduced evidence tending to show that the $60 monthly payment was treated as rent by respondent and his wife on their check stubs, in their records, and so reported on their income tax return. Appellants testified that the taxes and insurance paid by respondent and his wife were also a part of the rent, and testified further that the so-called repairs and improvements made by respondents were only such repairs and

improvements as any lessee might make in order to adapt the premises to his business needs. However, respondent denied all of this and testified that the monthly payments were not rent but were payments on the loan; that the taxes and insurance were paid by himself and his wife as owners of the property and were not part of any rent; and that the improvements were made by himself and his wife as owners of the property.

Some time before the death of respondent's wife, dissension apparently arose between respondent and his wife and defendants. But following her death in December, 1949, until May, 1950, respondent remained in possession of the property and made further improvements and monthly payments to appellants. In May, 1950, respondent made a demand upon appellants for the deed to the property, he offering to pay off the alleged balance due on the alleged obligation. Appellants refused to answer this demand, claiming the property was theirs and that they would keep title themselves. Subsequent to this, respondent instituted suit against the appellants, alleging five various causes of action based on the foregoing. Appellants cross-complained for a quiet title judgment.

Appellants' first contention is that the evidence is insufficient to support the court's "findings, conclusions or judgment that the deed was a mortgage." Appellants argue that the deed absolute to them created a presumption of law that they were the owners of the property described in the deed and that this presumption could only be overcome by clear and convincing evidence to the contrary.

[1–4] It is presumed that a deed absolute on its face is what it purports to be. 17 Cal.Jur., Mortgages, secs. 56 and 57, and cases cited therein. However, it is a well settled rule that a deed absolute in form may be shown to have been intended as a mortgage, and that such a deed is a mortgage if intended as security for the performance of an obligation. 17 Cal.Jur., Mortgages, sec. 41; Civ.Code, § 2924. The burden of proving that a deed absolute is a mortgage rests upon the party who alleges it, and the evidence must be clear, satisfactory and convincing; unequivocal and indisputable. 17 Cal.Jur., Mortgages, secs. 58, 59. Whether the evidence to show that a deed was intended as a mortgage is clear and convincing is a question for the trial court, whose determination on conflicting evidence is not reviewable on appeal. Rogers v. Mulkey, 63 Cal.App.2d 567, 147 P.2d 62; Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. Although this is a three-party rather than a two-party transaction, wherein the one who takes title to the property holds it as trustee for the party to whom he loaned the purchase money, and also holds a lien as mortgagee for repayment of the loan, the usual rules applying to a deed absolute-mortgage case apply here. 2 Bogert, Trusts and Trustees, sec. 455; 17 Cal.Jur., Mortgages, secs. 53, 54. The present case is what is termed "a resulting trust by way of a mortgage." 2 Bogert, Trusts and Trustees, sec. 455.

It is apparent from the summary of the evidence hereinbefore set forth that the evidence is highly conflicting. It was for the trial court to resolve the conflict. Appellants argue correctly that the rule is that a deed purporting on its face to convey the title absolutely cannot be held to be a mortgage except upon clear and convincing evidence. But whether the evidence is clear and convincing is generally held to be a question for the trial court to determine. As we said in Rogers v. Mulkey, supra, 63 Cal.App.2d at page 573, 147 P.2d at page 65:

> "It has been declared repeatedly by our decisions that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage. See Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020, 31 Am.St.Rep. 175; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93; Couts v. Winston, 153 Cal. 686, 96 P. 357; Todd v. Todd, 164 Cal. 255, 128 P. 413; Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; Carlson v. Robinson, 7 Cal.

2d 235, 60 P.2d 426. But whether or not the evidence offered to change what appears to be the character of the instrument is clear and convincing is a question for the trial court to decide. Mahoney v. Bostwick, supra; Lockhart v. J. H. McDougall Co., supra; 17 Cal.Jur. 757, sec. 59. In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review upon appeal. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Locke v. Moulton, 132 Cal. 145, 64 P. 87; Beckman v. Waters, 161 Cal. 581, 119 P. 922; 17 Cal.Jur., 758, sec. 60. As was said in this regard in Wadleigh v. Phelps, supra, 149 Cal. at page 637, 87 P. at page 98, 'the appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.' "

[5–8] Appellants next contend that the court erred in admitting in evidence over their objection certain oral and written declarations made by respondent's deceased wife relating to the nature of the transaction, and made out of the presence of appellants. These declarations were either testified to by witnesses to whom they were made, or introduced into evidence in their written form. They were of the same nature and all supported the contention that a loan and a mortgage were intended by the appellants in the transaction in question. Thus, they would be "self-serving declarations," and hearsay. They would be self-serving since they were in support of the interest of respondent and the deceased declarant. 10 Cal.Jur., Evidence, sec. 311. They would be hearsay since they rest upon the veracity and competency of some person other than the witness offering them. 10 Cal.Jur., Evidence, sec. 288; Code Civ.Proc. § 1845. Declarations of a person, deceased or a party to the action, made in the absence of the opposite party sought to be bound by them, which declarations are in support of the party's or declarant's own interest, are not admissible in favor of those who claim rights which the declaration would maintain. 10 Cal. Jur., Evidence, secs. 311, 331. However, there are exceptions to the hearsay rule.

In Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530, 531, our Supreme Court said at page 524:

"When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Donohue [Donahue] v. Sweeney, 171 Cal. 388, 153 P. 708; De Cou v. Howell, 190 Cal. 741, 214 P. 444; see [McBaine, Admissibility in California of Declarations of Physical or Mental Condition] 19 Cal.L.Rev. 231, 251. Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gift are admissible though the statements be self-serving. Sprague v. Walton, 145 Cal. 228, 78 P. 645. In alienation of affections cases declarations of an alienated spouse subsequent to the defendant's alleged tortious acts are admissible as evidence of the spouse's state of mind. Adkins v. Brett, 184 Cal. 252, 193 P. 251; Cripe v. Cripe, 170 Cal. 91, 148 P. 520."

And in Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, at pages 173–174, 168 P.2d 946, at page 958, the court quoted the foregoing language from Whitlow v. Durst, with approval, and said further;

"Appellants contend that the trial court erred in admitting in evidence oral and written declarations of own-

ership of the stock and of the company made by Oscar, not within the presence or to the proved knowledge of Josephine, but subsequent to the transfers to her and in derogation of them. Chard v. O'Connell, 1936, 7 Cal.2d 663, 667, 62 P.2d 369; Francoeur v. Beatty, 1915, 170 Cal. 740, 747, 151 P. 123; Bollinger v. Bollinger, 1908, 154 Cal. 695, 705, 99 P. 196; Miller v. Miller, 1942, 55 Cal.App.2d 199, 207, 208, 130 P.2d 438; Taylor v. Bunnell, 1926, 77 Cal.App. 525, 534, 247 P. 240. However, under well recognized exceptions to the hearsay rule, such declarations, made before, at the time of, or subsequent to the transfers, were properly admissible on the issue of delivery to Josephine (and it was found that the instruments were delivered to her), on the issue of a claimed gift, and also to show the intent or state of mind of Oscar."

In view of the foregoing authorities we are unable to agree with appellants' contention that the court erred in admitting evidence as to said declarations, but even if the court erred in admitting them we do not believe that it committed reversible error in so doing. For appellants in their testimony admitted the greater part of what was contained in the statements that respondent testified were made to him by his wife. As to the remainder of said declarations, such as statements made to others by the deceased wife of respondent that she and respondent were buying the property or that it was theirs, such statements, in our opinion, added little to the evidence. The instant case was tried by the court without a jury and was submitted on briefs. The trial judge stated that in weighing the evidence he would determine the weight to which it was entitled. The letter of March 14, 1946, the testimony of appellants themselves and the testimony of White amply supported the following statement in his memorandum of decision:

"The proof is 'clear and convincing' to me that the deal involved herein was originally that the wife's parents, defendants herein, were to buy the property for their daughter and son-in-law and I am satisfied this continued to be the deal. There was no good reason why Wilcox and wife should substitute one landlord for another; they already had a lease for some time to run on better terms than the alleged terms here. No, the parents bought the place to resell to the children and put title in their name just for security. Then when the daughter's feelings took some change and she became angry with her husband over something, perhaps justifiably, perhaps not, the parents' feelings also changed and the claim that they were only renting the place came to the fore. The use of the word 'rent' may support them somewhat, but it is common for persons buying either real or personal property on monthly payments to refer to those payments as rent. This certainly does not outweigh all the other evidence including the logical inferences which can be made."

It is clear that the trial court did not believe the testimony of appellants that they changed their minds after agreeing to lend respondent and his wife the purchase money, but did believe the testimony of respondent as to the giving of the note and the testimony of White that appellants told him that they were lending respondent and wife the money to buy the property. We are satisfied that appellants were not prejudiced by the testimony which they contend was erroneously admitted.

In view of the foregoing we conclude that the evidence amply supports the judgment and that no prejudicial error was committed.

The judgment is affirmed.

VAN DYKE, P. J., concurs.

Hearing denied; TRAYNOR, J., dissenting.

118 Cal.App.2d 748

FRUIT MACHINERY CO. v. F. M. BALL & CO.

No. 15461.

District Court of Appeal, First District, Division 1, California.

June 29, 1953.

Action in contract for royalties payable by defendant to plaintiff according to terms of an agreement by which plaintiff granted defendant a nonexclusive sublicense to construct, manufacture, own, use and maintain patented peach pitting machine. The Superior Court, in and for the County of Alameda, James R. Agee, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Wood, J., held that examination of the written agreements, and consideration of the oral agreements, warranted finding that it was not the intent of the parties that defendant was to be vested with an absolute title in the patented article without condition or restriction, but that title which defendant acquired was severely limited in nature, both as to use of machines and power to dispose of them, and was coupled with the obligation to pay the indicated royalties, and that the machines did not pass from within scope of the patent, and did not become subject to unrestricted use by defendant as sublicensee.

Judgment affirmed.

1. Appeal and Error ⇐846(5), 989

On appeal from judgment after waiver of findings of fact and conclusions of law, reviewing court would assume that trial court found every fact essential to support the judgment, and when transcript of evidence was before reviewing court it would not weigh evidence to determine what was true and what was not, but would search the record only for purpose of determining whether there was substantial evidence supporting the judgment, resolving doubts in favor of the judgment.

2. Patents ⇐219(5)

In action by which plaintiff, a corporate licensee of patent for peach-pitting machine, sought to recover royalty payments allegedly due from defendant under terms of sublicense agreement, wherein it appeared that defendant was one of six canner stockholders in plaintiff, examination of written agreements and consideration of oral agreements between parties warranted finding that intent of parties was that defendant should not acquire an unrestricted title in any of its allotments of machines, such as would remove machines from protection of patent.

3. Patents ⇐213

Agreement by which plaintiff, a corporate licensee of patent for peach-pitting machine, gave defendant, as sublicensee, the right, upon payment of royalties, to manufacture, own and use the machines, but precluding use or sale of such machine to other than subsidiaries or the parent of defendant, or stated other parties, did not vest absolute title in the machines in defendant without condition or restrictions, within contemplation of rule that in such circumstances the article passes from within scope of the patent.

4. Patents ⇐193, 206, 211(1), 269

The owner of a patent may assign it to another and convey the exclusive right to make, use, and vend the invention throughout the United States, or he may assign an undivided part or share of that exclusive right, or the exclusive right under the patent within and through a specific part of the United States, but any assignment or transfer short thereof is a license, giving licensee no title and no right to sue at law in his own name for patent infringement.

5. Patents ⇐209(1)

A patentee may make and grant a license to another to make and use the patented articles but withholding his right to sell them, and if patentee licenses the selling of the articles he may limit the selling by limiting the method of sale and the price, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.

6. Patents ⇐213

Defendant's obligation to pay royalties under agreement by which plaintiff gave defendant sublicense to manufacture, own and use patented peach-pitting machines on payment of royalty, but reserving, among other things, prior option in plaintiff to buy if defendant desired to sell such machines

to other than specified parties and fixing purchase price, was not without consideration because of possibility that plaintiff might not exercise its option to purchase, in which event machines would pass beyond the scope of patent monopoly, but in any event, even if such possibility should occur, it would not operate retroactively to avoid consideration for promise to pay royalties previously accrued.

7. Patents ⇐213

A party attacking a patent sublicense agreement because of want of consideration for obligation to pay royalties had burden of showing such want of consideration. Civ.Code, §§ 1614, 1615.

8. Monopolies ⇐21

In action by which plaintiff, the corporate license of patent for peach-pitting machine, sought to recover royalty payments allegedly due from defendant canner under terms of sublicense agreement wherein it appeared that defendant was one of six canner stockholders in plaintiff, and defendant contended that plaintiff and its stockholders had created a monopoly in violation of state or federal law, evidence warranted finding that purpose of allowing canner ownership of a limited number of machines, without privilege of resale was to enable the financing of the mechanical and commercial development of the invention, and not to give anyone an advantage.

9. Monopolies ⇐21

Where sublicensee of patent for peach-pitting machine sought to avoid payment of royalties on theory that a monopoly existed by virtue of agreement under which sublicense and other canners, as stockholders in corporate licensee, were given right to obtain and use certain number of such machines, but evidence established that purpose of allowing canner ownership of limited number of machines was to provide financing for the development of the invention, court would not presume future violations of anti-trust laws.

10. Monopolies ⇐12(15)

The purpose of patent law is to encourage inventive effort by according the inventor and his assigns control over the invention and protection in the exercise of the rights accorded him as patentee, and an agreement giving such commercial advantage between patentee, his exclusive licensee, and sublicensee is not per se illegal.

C. P. Dorr, Otto C. Stelling, San Francisco, for appellant.

Cooley, Crowley & Gaither, San Francisco, for respondent.

FRED B. WOOD, Justice.

This is an action in contract for royalties payable by defendant to plaintiff in 1949 and 1950 according to the terms of an agreement by which plaintiff (licensee of the patentee) granted defendant a "non-exclusive sub-license to construct, manufacture, own, use and maintain 125 F. & P. Pitters" (patented peach pitting machines) under the terms and conditions expressed in the agreement.

Judgment was rendered in favor of plaintiff in the sum of $10,335.08 with interest at 7% from September 15, 1949, and in the sum of $23,906.25 with interest at 7%. Defendant has appealed.

The Issues.

Defendant claims it is absolved from the duty of paying any of the agreed royalties because (1) defendant acquired and had title to the machines, (2) there was no consideration for payment of the royalties, and (3) plaintiff is a monopoly and in restraint of trade under state and federal statutes.

[1] Findings of fact and conclusions of law were waived. Accordingly, a reviewing court "will assume that the trial court found every fact essential to support the judgment, and when a transcript of the evidence is before the reviewing court it will not weigh the evidence to determine what is true and what is not, but it will search the record for the purpose only of determining whether there is substantial evidence supporting the judgment and will resolve all doubts in favor of the judgment. [Citations.]" Baker v. Baker, 98 Cal.App.2d 424, 426, 220 P.2d 576, 578.

Our examination of the record in this case convinces us that defendant's points are not well taken; instead, that the evidence supports implied findings which in turn support the judgment.

The Facts.

The record shows the significant facts narrated below. Some were admitted by the answer to the complaint, expressly or by failure to deny. Some were established by stipulation. The rest were supported by substantial evidence.

Filice and Perrelli Canning Company, Inc., a corporation, acquired an invention known as F. & P. Pitters (machines for removing pits from peaches) and all rights and patents to be granted thereon.

Filice and Perrelli contacted five other canning companies, including the defendant herein, to form a corporation to develop and market the pitter. That corporation, the plaintiff herein, was organized in January, 1942. Among its purposes were these: (a) dealing in patent rights and licenses relating to F. & P. Pitters, (b) improving and devoloping F. & P. Pitters, and (c) licensing F. & P. Pitters to the six canning company organizers and others. The intention of the organizers also was that the plaintiff should make a profit from the manufacture of the machines and the licensing of the machines to themselves and others, and that they would profit through dividends payable to them as stockholders; not that plaintiff should operate on a non-profit basis, as defendant now contends.

In February, 1942, Filice and Perrelli granted to plaintiff an exclusive license (during the pendency of the patent application and during the life of any patent which might issue) to manufacture F. & P. Pitters and to lease the same to others for use, and to grant sub-licenses, for such consideration or royalties as would be determined by plaintiff's board of directors. This agreement stipulated that plaintiff would pay Filice and Perrelli royalties on fruit pitted by users of these machines, beginning at ten cents per ton during the first year of the license and increasing year by year until the fifth year, during which, and thereafter, the royalty would be thirty cents per ton. Plaintiff further agreed not to assign this license or any interest therein without the written consent of Filice and Perrelli. (This agreement did not authorize plaintiff to sell any of the machines which it might manufacture.)

At all times the six organizers, including defendant, were represented upon plaintiff's board of directors.

During the development period each of the organizers contributed moneys in equal amounts to plaintiff for the cost of perfecting the machine. Commencing at least as early as November, 1943, one T. M. Harrer did the development work for plaintiff, including the making of arrangements for manufacture on a commercial scale. Early in the history of the plaintiff corporation Harrer was given representation upon its board of directors. He continued thereafter to be represented thereon.

By the fall of 1945 the pitter was sufficiently improved for plaintiff to manufacture machines for use in 1946. Accordingly, the six canner organizers indicated to plaintiff the number of machines each would want for use during the 1946 season, a total of 225 machines.

At meetings held in September, October, November, 1945, and January and March, 1946, plaintiff's board of directors considered ways and means of financing the cost of building these machines, financing plaintiff's operations, and paying the 30 cent royalty to Filice and Perrelli. In December, 1945, a written contract between plaintiff and Harrer was executed, whereby he would make the machines and plaintiff would pay him the actual cost plus a percentage. To meet that cost, various proposals were considered: To sell the machines to the six canner members on a conditional sales contract basis, and hypothecate the contracts to plaintiff's bank; to impose a royalty of $1 per ton on the use of such machines; and to sell capital stock to the six canner members, in equal amounts, and to issue an equal share to Harrer as compensation for his work of development. This culminated in the following arrangement. Harrer would bill plaintiff from time to time during the course of manufacture and plaintiff would

then bill each of the six canner members for its due share of the cost, based upon the number of machines it had requested; in addition, each canner member would annually pay plaintiff a royalty (to be determined by plaintiff's board of directors) on the machines taken by him, based upon the tonnage of fruit processed by him, and to do so during the life of the patent (until 1960). Plaintiff desired to have this arrangement or plan expressed in the form of written contracts between it and the canner members. Its board instructed plaintiff's secretary to prepare contracts to cover the sale of the machines and the royalties thereon and to submit them with stock subscription forms to the six interested canners with a letter advising them their orders would be taken for the number of machines indicated. But it was understood by all concerned that plaintiff would have to obtain from Filice and Perrelli a modification of the licensing agreement because that agreement did not authorize plaintiff to convey title to any machine. Such a modification was effected in May, 1947.

Meanwhile, the machines were manufactured and delivered, under this arrangement, to the several canner members during 1946, defendant receiving and paying the cost of 110 to 125 machines, making progressive payments as the machines were manufactured. Each of the canner members, including defendant, also paid plaintiff the 1946 royalty, seventy-five cents per ton of fruit processed on these machines. During 1946, capital stock of the plaintiff was issued in equal amounts to the several canner members, including defendant, and to Harrer.

In May, 1947, Filice and Perrelli executed with plaintiff a modification agreement supplemental to the licensing agreement of 1942. The 1947 agreement recites that the 1942 agreement made "no provision authorizing the sale of any machines constructed" thereunder and it is the desire of the parties that the 1942 agreement "be modified to authorize the licensee [plaintiff herein] * * * to sub-license the right to manufacture said machines and *to permit the ownership by such sub-licensees* of certain of said machines *upon the payment of royalties for the permission to so manufacture, own, and use,* as hereinafter detailed." (Emphasis added.)

By the terms of this supplemental agreement Filice and Perrelli granted plaintiff the right to license defendant and the other canner stockholders (naming each) "to manufacture, own, use and maintain F. & P. Pitters in the numbers set forth opposite their names" (125 being the number in each case), reciting that all of said companies "are present stockholders of" plaintiff. The agreement provided (1) that the licenses granted said companies "shall provide for the payment of royalties for the right to manufacture, own, and use said machines, in an amount to be determined by the Second Party [plaintiff herein], but in no event to be less than thirty cents (30¢) per ton for each ton of fruit processed through said machines for the remainder of the life of the" patents; (2) [a] that plaintiff "shall by appropriate agreement forbid the resale of said machines by any of the above named companies, except as hereinafter provided, and shall forbid the use thereof in canneries other than those owned or operated by said above named companies. [b] This paragraph shall not prevent the use or sale of said machines licensed to any of the above named companies by or to a wholly owned subsidiary, or by or to a parent company holding all or substantially all of the outstanding stock of one of the above named companies, or by or to an affiliated company in which all or substantially all of its capital stock is owned by a parent company which, in turn, owns all or substantially all of the capital stock of one of the above named companies"; (3) that in sub-licensing "the manufacture, ownership and use of said machines, as herein provided" plaintiff "shall at all times restrict the ownership, use and sale of said machines, as above set forth, and provision shall be made in the sub-license agreements to afford Second Party a prior option to purchase said machines from any of said purchasers or subsidiaries, affiliates or parent companies in the event any of said sub-licensees above named shall dispose of its stock in Second

Party. Second Party shall require in all such sub-license agreements that it be given a prior option to purchase said machines in the event any owner of said machines desires to sell them to a person or firm other than a parent, subsidiary or affiliate as described above"; (4) that if any of the machines manufactured by virtue of such sub-licenses be destroyed by fire or otherwise, plaintiff shall have the privilege of granting a new license to the company suffering such loss "so that such company may have a total of one hundred twenty five (125) machines under said license"; (5) that the provisions of all sub-license agreements covering machines to be manufactured as contemplated by this agreement "shall first be subject to the written approval of" Filice and Perrelli before any such sub-license agreement is finally entered into; (6) that plaintiff shall at all times be obliged to account to Filice and Perrelli for the royalties provided in the licensing agreement of 1942 "for all fruit processed through all machines sub-licensed by Second Party [plaintiff] in the manner contemplated herein" and plaintiff agrees in each sub-licensing agreement to make such provision as will at all times enable plaintiff to comply with this requirement; and (7) that the period covered by the supplemental agreement shall be co-extensive with that of the original agreement of 1942.

During the first part of 1947 it was agreed between the six canners individually and with plaintiff that six identical, written instruments be prepared embodying the terms of the oral agreement, and that all of the canner members were to sign these identical, written instruments and that all of the six canner members were to be bound thereby. Five, including defendant, signed those instruments. The sixth canner later executed a substantially similar instrument with plaintiff.

The instrument executed by defendant with plaintiff bears date July 29, 1947.[1] It is an agreement which recites that plaintiff is exclusive licensee for the manufacture of pitter machines identified by reference to patents issued in 1942 and 1943, and refers to the original and supplemental licensing agreements of 1942 and 1947 between plaintiff and Filice and Perrelli. It then provides that plaintiff grants unto defendant a non-exclusive sub-license "to construct, manufacture, own, use and maintain 125 F. & P. Pitters, embodying the principles and improvements thereon, under the following terms and conditions": (1) Defendant shall not use the machines in any cannery other than one owned or operated by defendant, except by a subsidiary or parent company (the exception being expressed in the very terms which appear in sub-clause (b) of clause (2) of our Summary of plaintiff's 1947 supplemental agreement with Filice and Perrelli); (2) defendant agrees to pay plaintiff a royalty "for the right to manufacture, own and use said machines in such amount as is determined from time to time by" plaintiff, "but in no event shall said royalty be less than 30 cents per ton for each ton of fruit processed through said machines for the life of the patent period * * *," said royalty to be paid "on the use of the machines from date hereof until * * * December 7, 1960"; (3) if defendant disposes of its shares of stock in plaintiff, plaintiff shall have the prior right and option forthwith to buy the machines then owned by defendant, the purchase price to be "the depreciated value thereof on the books of" defendant at the time the right of purchase accrues to plaintiff; (4) if defendant desires to sell the machines other than to a parent, subsidiary or affiliate, plaintiff shall be given a prior option to purchase, the price to be the original cost less 1/13th thereof for each calendar year after the year of manufacture; (5) defendant shall account to plaintiff on Tuesday of each week for all royalties that may be due or owing, covering tonnage processed during the preceding week, and to determine the tonnage processed defendant's books and records shall be open to plain-

1. When this agreement had been drafted and was ready for execution, plaintiff sent copies to the several canner-stockholders for signature. The letter of transmittal stated "you will find enclosed, in duplicate, the sub-license agreement covering the 125 machines to which you may take title."

tiff's inspection at all reasonable times; (6) if any of the machines manufactured by virtue of this sub-license are destroyed by fire or otherwise, defendant shall be privileged to construct additional machines so that defendant may at all times have 125 capable of operation under this sub-license; (7) neither this agreement nor any of the rights of defendant hereunder shall be assigned by defendant without the prior written consent of plaintiff.

After supplying the canner-stockholder demand for machines (not exceeding 125 each), pursuant to these agreements, plaintiff built machines for leasing only. The royalty on leased machines is maintained at a higher rate than on canner-stockholder owned machines.[2] The difference in rate is in consideration of the fact that each machine cost the canner-stockholder about $1,300 to build, and the canner-owner maintains the machine, replacing parts, at its own expense, and runs the risk of obsolescence due to possible improvements in this or in plaintiff's competitors' machines. In contrast, in respect to machines which it leases, plaintiff pays the manufacturing cost and the cost of upkeep, and runs the risk of loss of the investment through obsolescence. These facts would support an inference that a higher royalty rate for leased machines would be just and fair. That the higher rates actually fixed for leased machines bore a reasonable relation to these factors is indicated by the fact that one of plaintiff's stockholders contracted with plaintiff in 1948 to lease or buy, intending to lease on a royalty basis of $4.25 per ton, with a minimum of 100 tons per year. It preferred leasing, with higher royalties, to making the capital investment and paying lower royalties.

Plaintiff charged its stockholders the same royalty rate on machines leased to its stockholders as on those leased to others. Defendant leased 65 machines for a time. It desired to buy but it already had its 125 as limited by its agreement and by the 1947 agreement between plaintiff and Filice and Perrelli.

Plaintiff has endeavored to lease machines to others in the industry but has not met with great success, due to improvements in its competitors' machines, such as automatic feeding devices, which plaintiff was still seeking to develop at the time of trial.

In 1948 a dispute arose between defendant and plaintiff concerning (a) the royalties on 65 machines defendant had leased from plaintiff, and (b) the rate fixed by plaintiff in March of 1948 on canner-owned machines. This was the subject of considerable discussion at meetings of plaintiff's board of directors during the latter months of 1948 and culminated in plaintiff giving defendant a credit of $11,000 on account and defendant paying the 1948 royalties on its 125 machines. Upon this appeal, the parties differ upon the question whether or not the $11,000 credit operated as consideration for an obligation on the part of defendant to pay the royalty rates on its 125 machines in 1949 and 1950. That question does not appear especially significant in view of the obligation which defendant assumed when it executed the sub-license agreement with plaintiff in July, 1947.

Each of the canner-stockholders, including defendant, paid the royalty rates fixed by plaintiff's board of directors for the years 1946 to 1948, inclusive. All canner-stockholders except defendant paid the royalties for 1949 and 1950, defendant paying none for 1950 and only in part for 1949.

Discussion of the Issues.

(1) *Acquisition of title to the machines did not prevent defendant from effectively assuming the obligation to pay the royalties.*

2. The royalty rates fixed for plaintiff's leased and the canner-stockholder owned machines, respectively, were $1.50 and $2.50 per ton in 1947; $3.25 and $4.25 in 1948; $2.25 and $4.25 in 1949, 1950, and 1951. Uniformly for both types of machines, a minimum payment based upon 100 tons per machine per year has been required, except in 1950, when the minimum base was lowered to 85 tons because of a government order requiring the growers to drop 15% of the crop on the ground.

Defendant contends that the oral agreement of 1945 became an executed oral contract by which defendant became the owner of 125 machines; that this was confirmed in writing by the supplemental licensing agreement of May, 1947, between plaintiff and the patentee and the sub-licensing agreement of July, 1947, between plaintiff and defendant; and that there can be no dispute of the fact that in 1949 and 1950 defendant owned those machines.

Defendant then invokes a number of decisions of the Supreme Court of the United States,[3] some of which apply and others recognize the principle that when a patentee sells his patented article, vesting absolute title in the purchaser without condition or restriction, the article passes from without the scope of the patent and the purchaser may make the same unrestricted use of it as he could of an unpatented article. That is a well established principle but it does not apply here.

The fallacy of defendant's reasoning stems from its erroneous interpretation of the oral and written agreements mentioned and from its attempt to separate its acquisition of a limited title and right of dominion over these machines from the other features of those agreements.

[2] The oral and written agreements warrant a finding of intent that defendant should not acquire, and that it did not acquire a proprietary interest in any of the 125 machines until after appropriate modification of plaintiff's 1942 licensing agreement with the patentee and the execution of a sub-licensing agreement expressive of appropriate terms and conditions, including an obligation to pay royalties.

[3] Scrutiny of the July, 1947, sub-licensing agreement demonstrates that the "title" which defendant acquired was severely limited in nature, both as to the use of those machines and the power to dispose of them, and was coupled with the obligation to pay the indicated royalties, all tied in with the patent, through plaintiff as exclusive licensee and approval by the patentee, and limited to the life of the patent. The various provisions of defendant's sub-licensing agreement are interlaced, interwoven, and bound together. Defendant cannot take the privileges thereby accorded without the obligations imposed and assumed.

[4, 5] Clearly, it is a contract made by plaintiff (as assignee of the patentee) in the exercise, and within the scope, of the rights given and the protection accorded by the patent. It is within the scope and application of the principle enunciated by the Supreme Court of the United States in 1926: "The owner of a patent may assign it to another and convey (1) the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and through a specific part of the United States. But any assignment or transfer short of one of these is a license giving the licensee no title in the patent and no right to sue at law in his own name for an infringement. [Citations.] Conveying less than title to the patent or part of it, the patentee may grant a license to make, use, and vend articles under the specifications of his patent for any royalty, or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. It is well settled, as already said, that where a patentee makes the patented article, and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights. [Cita-

3. Bloomer v. McQuewan, 14 How. 539, 55 U.S. 539, 14 L.Ed. 532; Chaffee v. Boston Belting Co., 22 How. 217, 63 U. S. 217, 16 L.Ed. 240; Bloomer v. Millinger, 1 Wall. 340, 68 U.S. 340, 17 L.Ed. 581; Mitchell v. Hawley, 16 Wall. 544, 83 U.S. 544, 21 L.Ed. 322; Adams v. Burke, 17 Wall. 453, 84 U.S. 453, 21 L. Ed. 700; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U.S. 425, 14 S.Ct. 627, 38 L.Ed. 500; Keeler v. Standard Folding Bed Co., 157 U.S. 659, 15 S.Ct. 738, 39 L.Ed. 848; United States v. General Electric Co., 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362; United States v. Univis Lens Co., 316 U. S. 241, 62 S.Ct. 1088, 86 L.Ed. 1408.

tions.] But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the exercise of the right to sell. The patentee may make and grant a license to another to make and use the patented articles but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valueable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell." United States v. General Electric Co., 272 U.S. 476, 489–490, 47 S.Ct. 192, 196, 71 L.Ed. 362.

Defendant directs attention to the fact that its 1947 agreement is a sub-license "to construct, manufacture, own, use and maintain 125 F. & P. Pitters," and argues that because plaintiff built these machines (defendant reimbursing plaintiff for the actual cost), the right to "own and use" is in some way separated from the right to "construct and manufacture." This is but a part of defendant's attempt to divide its contract into separate and severable parts. True, plaintiff did build these machines. We must view that against the background of plaintiff as a corporation organized and financed by defendant and the other canners to develop and exploit the invention. Payment of the cost of manufacture of the machines presently coming into their possession (in 1945 and 1946) was a part of their method of financing. The limited right of manufacture later accorded in 1947 was in a very real sense confirmation of the 1945–46 transaction. Besides, defendant may yet have occasion to "manufacture" machines to replace any of the original 125 which may be "destroyed by fire or otherwise." These facts do not tend to render severable any of the provisions of defendant's sub-license agreement of July, 1947.

(2) *Defendant's obligation to pay the royalties is supported by adequate consideration.*

Defendant's argument that its promise to pay these royalties was without consideration is much the same as its argument that it acquired dominion over the 125 machines divorced from restrictions as to their use or disposition.

[6] Here, it directs particular attention to the provision of the sub-license agreement which (a) declares that if defendant desires to sell any of these machines other than to a subsidiary, parent or affiliate of defendant, plaintiff has a prior option to buy, and (b) fixes the price, defendant's original cost less 1/13th thereof for each calendar year since the year of manufacture. Defendant then says that in such event (plaintiff failing to exercise its option) the machines so sold by defendant will pass beyond the scope of the monopoly accorded by the patent and the purchaser will be entitled to use the machines without the payment of royalties. Therefore, the argument runs, defendant need not pay the royalties it has promised to pay.

The mere statement of this argument constitutes its own refutation. The event described has not happened yet. It is not likely to happen in view of the diminishing price defendant would receive and

the desire plaintiff would have to keep the machines within the scope of the patent. Should such an event hereafter occur, we see no reason for holding that it would operate retroactively to void the element of consideration for defendant's promise to pay royalties which had theretofore accrued. Nor would the bare possibility of such an occurrence absolve defendant from its obligation to pay the royalties while it continues to hold these machines under and pursuant to the terms and conditions of the sub-license agreement.

[7] Moreover, the burden of showing want of consideration rests upon defendant, Civ.Code, § 1615, a burden it has failed to meet. Also, this is a written instrument, which "is presumptive evidence of a consideration." Civ.Code, § 1614.

(3) *Plaintiff and its canner-stockholders, including defendant, have not "created a monopoly by the limitation of the ownership of the peach pitting machines to the six stockholders," in violation of state or federal law, and thereby rendered defendant's sub-licensing agreement void and unenforceable.*

Defendant says that (1) "in order to permit the canners who had contributed to the research work on the machines to secure 'an advantage,'" (2) "arrangements were made to allow them to purchase outright a limited number of machines," (3) by "a combination participated in by the stockholder members of" plaintiff, the exclusive licensee of the patentee, "a setup has been created whereby the stockholder members have an exclusive monopoly on the ownership of machines by canneries while all other canners can only secure machines on a royalty basis"; (4) plaintiff's sole competitor "only leases machines and does not sell them"; (5) "a complete monopoly, therefore, exists in the six canners so far as owning machines is concerned, and the whole canning world other than these six must lease machines and pay royalties therefor"; and (6) it is possible that in time plaintiff will reduce the royalty rate on canner-owned machines to thirty cents per ton and continue to maintain the $4.25 per ton rate on leased machines.

[8] This argument ignores substantial evidence that the purpose of allowing canner ownership of a limited number of machines was that of financing the mechanical and commercial development of the invention, not that of giving any one an "advantage"; that the ownership accorded was not "outright" but was severely limited and within the scope of the patent right; and that the differential in royalty rates which plaintiff has maintained between the leased and canner-owned machines bears a reasonable relationship to the differences in costs and capital risks between the two types of uses, thus not giving the canner-owners the "advantage" which defendant asserts but has not proven.

[9] As to the possibility of plaintiff spreading the differential to such an extent as would put the arrangement beyond the scope of the patent rights and within the proscription of the anti-trust laws, a sufficient answer is that such has not happened yet, and we read into the license and sub-license agreements no intendment that plaintiff, in fixing rates from time to time, should or could establish such a differential as would lose to the parties the privileges, the sanctions and the protection accorded by the patent law and subject them to the proscriptions and penalties of the anti-trust laws. Future violation of these agreements and of the anti-trust laws will not be presumed. Such a violation of the agreements and of the law, should it occur, would subject the violator to appropriate remedies at the suit of interested parties and of the government. It would not of itself abrogate the contract and render obligations under it illegal and void.

[10] We do not mean that it would be legally improper or incompetent for the patentee, his exclusive licensee, and the latter's sub-licensees, by agreements such as these parties have made, to give themselves a commercial advantage over others in industry. The very purpose of the patent law is to encourage inventive effort by according the inventor and his assigns control over the invention and protection in the exercise of the rights accorded him as patentee. Defendant has not shown that the parties, in executing and carrying out

the sub-license agreement in suit, exercised rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law.

In support of its argument on this point defendant cites a number of anti-trust law decisions. We deem them inapplicable. The greater number of them dealt with situations in which no patent rights were involved. In those in which the exercise of patent rights were involved, it appeared that the patentee or his assignee went beyond that which was necessary or incidental to the scope of his patent and brought himself within the proscription of the anti-trust laws. In the latter group are Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107; Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. 852; United States v. Univis Lens Co., 316 U.S. 241, 62 S.Ct. 1088, 86 L.Ed. 1408; Oxford Varnish Corp. v. Ault & Wiborg Corp., 6 Cir., 83 F.2d 764; Urquhart v. United States, Ct.Cl., 109 F.Supp. 409. Morey v. Paladini, 187 Cal. 727, 203 P. 760, involved illegal restraint of trade in the buying and selling of lobsters, not a patented article. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867, came up on a demurrer which, of course, admitted the allegations of the complaint concerning an asserted combination between a board of fire underwriters and insurance company members of the board to stifle competition in the insurance field by dominating the business of insurance agents. United States v. United Shoe Machinery Corp., D.C., 110 F.Supp. 295, involved much more than the mere exercise of patent rights and their protection. See the Summary on page 297, of 110 F.Supp. Indeed, the major patents had expired. 110 F.Supp. at page 339. Interestingly enough, it was held therein that the defendant's tanning machine leases did not violate the Sherman Act, 15 U.S.C.A. § 1 et seq., for the reason that there was no evidence that defendant had dominant market power or planned to monopolize in that field, the court saying "the leases themselves are not forbidden; only when they are used as an instrument for seeking market control is the lessor to be charged with using them in an attempt to monopolize. Such use of tanning machinery leases was not proved." 110 F.Supp. at page 346.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



ARMENTA et al. v. CHURCHILL et al.*

Civ. 19331.

District Court of Appeal, Second District, Division 3, California.

July 1, 1953.

Rehearing Denied July 28, 1953.

Hearing Granted Aug. 27, 1953.

Wrongful death action by heirs of decedent against truck owner and her driver, who backed truck over decedent. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., entered judgment on verdict for defendants and denied motion for new trial, and heirs appealed. The District Court of Appeal, Shinn, J., held that, where answer admitted that driver was agent and employee of owner and was acting within scope of his employment, at time of accident, evidence that driver had allegedly been found guilty of some 37 traffic violations, including manslaughter conviction, and that owner had knowledge of such violations and was negligent in permitting driver to operate truck was properly excluded.

Judgment affirmed and attempted appeal from order denying motion dismissed.

1. Automobiles ⇐243(1)

In wrongful death action by heirs of deceased against truck owner and her driver, who backed truck over deceased, where answer admitted that driver was agent and employee of owner and was acting within scope of his employment at time of accident, evidence that driver had allegedly been found guilty of some 37 traffic violations, including manslaughter conviction, and that owner had knowledge of such

* Subsequent opinion 267 P.2d 303.

violations and was negligent in permitting driver to operate truck was properly excluded.

2. Evidence ⇐99

Purpose of evidence is to enable court to determine issues, and it would be indefensible to receive evidence which could serve no other purpose than to distract jurors' minds from such issues and arouse feeling against one or more of the parties.

3. Evidence ⇐99

Evidence should be limited to issues which are for trial and decision.

4. Automobiles ⇐169

In wrongful death action by heirs of deceased against truck owner and her driver, who, on county highway, backed truck over deceased, Administrative Code Construction Safety Order providing that truck used to haul construction material should sound warning while truck is backing up was inapplicable in view of fact that such field was covered by state law.

5. Administrative Law and Procedure ⇐387

Field of law which is entirely covered by state legislation is not subject to regulations and orders of administrative agencies. Government Code, § 11374.

6. Automobiles ⇐243(1)

In wrongful death action by heirs of deceased against truck owner and her driver, who backed truck, which, unladen, weighed 13,000 pounds, over deceased, refusal to admit into evidence certified copy of chauffeur's license of driver by which driver was authorized to operate motor vehicle not over 6,000 pounds was not error. Vehicle Code, §§ 265, 272, 273.

7. Automobiles ⇐145

Automobile operator's negligence is to be determined by facts existing at time of accident, and question whether operator had license to operate an automobile under state law is immaterial unless there is some causal relationship between injury and failure to have such license.

8. Automobiles ⇐242(1), 243(3)

Fact that chauffeur's license of truck driver authorized him to operate motor vehicle of not over 6,000 pounds unladen weight would not give rise to presumption that Motor Vehicle Department had determined that driver was not competent to drive heavy truck nor would evidence of such opinion constitute evidence of negligence on part of driver. Vehicle Code, §§ 265, 272, 273.

9. Automobiles ⇐244(36)

In wrongful death action against truck owner and her driver, who backed truck over decedent, evidence was not sufficient to establish causal connection between fact that driver was operating vehicle of weight which exceeded that permitted by his chauffeur's license and the accident. Vehicle Code, §§ 265, 272, 273.

10. Automobiles ⇐244(23)

In wrongful death action against wife, who owned truck, and husband, who backed truck over decedent, evidence, which revealed that husband was in business for himself, had purchased truck which was registered in his wife's name, but did not reveal that he was driving truck for his wife for compensation, was insufficient to establish that husband was "chauffeur" as defined by Vehicle Code provision as person who is employed by another for principal purpose of driving motor vehicle on highway and who received compensation therefor. Vehicle Code, § 71.

See publication Words and Phrases, for other judicial constructions and definitions of "Chauffeur".

11. Trial ⇐260(8)

In wrongful death action by heirs of decedent against truck owner and her driver, who backed truck over decedent, refusal to instruct jury in terms of statute providing that no one shall back vehicle on highway unless and until such movement can be made with reasonable safety was not error in view of other instructions given. Vehicle Code, §§ 81, 543.

12. Evidence ⇐359(2)

In wrongful death action against truck owner and her driver, who backed truck over decedent, refusal to admit into evidence photograph of decedent taken during his life time was not error.

Victor C. Rose and Alfred M. Klein, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

SHINN, Presiding Justice.

The heirs of Amador Armenta, Sr., brought this cause to recover damages for alleged wrongful death. Defendants are Dale and Alece Churchill, husband and wife. In a jury trial verdict and judgment were for defendants and plaintiffs appeal.

The complaint was in two causes of action. In the first it was alleged that defendant Dale Churchill, in driving a truck as the agent and employee of his wife, acting within the scope of his agency and employment, negligently backed it into Mr. Armenta, Sr., causing his death. In the second cause of action it was alleged, in addition to the foregoing, that Dale was operating the truck with the permission and consent of his wife and that she was negligent in entrusting the truck to her husband, having knowledge that he was a careless and reckless driver. By their answer defendants admitted that Dale was the agent and employee of Alece, acting within the scope of his employment, and during the trial defendants stated that if judgment should go against either defendant it should go against both. This oral admission, however, was unnecessary in view of the admissions of the answer.

The fatal accident happened on Tyler Avenue, a county highway in Los Angeles County, where the street was being resurfaced and widened. Warren Southwest, Inc., a paving concern, was spreading "black top," an asphaltic pavement. The paving material was being distributed by a mobile machine known as a "Barber-Green." This machine travels while in operation at about two miles per hour and needs to be fed a constant supply of paving material. Several trucks were required to bring the necessary supply from a distance of about six miles. Dale, driving one of these trucks southward on Tyler Avenue, passed a Barber-Green which was headed south, and stopped 75 or 100 feet in front of it. There was another truck unloading at the time. As the Barber-Green advanced slowly Dale kept his truck in front of it, and when the other truck had left, commenced backing toward the Barber-Green. Armenta, Sr. was a "stringman," whose duty it was to stretch a cord in front of the Barber-Green to lay out a straight course for it to follow. He was engaged in laying out the string with his back to defendants' truck at the time he was struck and run over. He was then about 30 or 40 feet in front of the Barber-Green and four feet east of the western edge of the paving area. Dale was standing with one foot on the throttle and the other on the running board of his truck, guiding it and looking to the rear. He could not see the right rear of the truck, which was the part that struck and ran over Armenta.

It is unnecessary to follow the argument of appellants that Dale was guilty of negligence. The implied finding of the jury was that he was not negligent and the sufficiency of the evidence to support this finding is not questioned.

[1–3] Appellants' first contention is that they should have been permitted to prove, as they offered to do, that Dale had been found guilty of some 37 traffic violations, including a conviction of manslaughter, that Alece had knowledge of these facts and was negligent in permitting him to operate the truck. An objection to the offer of proof was sustained. There was no error in this ruling. In Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752, the point in question here was decided contrary to the contention of the appellants. That action was by parents for the death of minor sons. The defendant answered, admitting liability. Plaintiffs, over defendant's objection, were permitted to prove the circumstances of the accident including the fact that defendant was intoxicated, and that the children were thrown eighty feet by the force of the impact. The court said, 31 Cal.2d at page 4, 187 P.2d at page 754: "Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. [Citations.] * * * The defendant here by an unqualified statement in his answer admitted liability for the deaths of the children, and the sole re-

maining question in issue was the amount of damages suffered by the parents. In an action for wrongful death of a minor child the damages consist of the pecuniary loss to the parents in being deprived of the services, earnings, society, comfort and protection of the child. Bond v. United Railroads, 159 Cal. 270, 285, 113 P. 366, 48 L.R.A.,N.S., 687, Ann.Cas.1912C, 50. The manner in which the accident occurred, the force of the impact, or defendant's intoxication could have no bearing on these elements of damage. The evidence, therefore, was not material to any issue before the jury, and its admission was error." Here, the question of the liability of the wife for the acts of her husband was completely eliminated by a clear and unequivocal admission in the pleadings. Alece's liability depended upon proof of Dale's negligence, and if he was not negligent in operating the truck it was immaterial whether his wife was negligent in permitting him to operate it. It is not claimed that the evidence was necessary to prove the responsibility of the wife for the acts of her husband. Any such claim would be refuted by the admissions of the answer. The sole contention of plaintiffs is that since they alleged the facts sought to be proved they had a right to prove them, notwithstanding the admissions of the answer. The law is settled to the contrary. The purpose of evidence is to enable the court to determine the issues and it would be indefensible to receive evidence which could serve no purpose other than to distract the minds of the jurors from the issues and arouse feelings against one or more of the parties. Evidence of many traffic violations by Dale Churchill, including the claimed conviction of manslaughter, would have tended to prejudice the jury against him, and against his wife also, for permitting him to use the truck. Under the circumstances it also would have tended to confuse the jury in considering the evidence upon which the question of actionable negligence was to be determined, namely, the conduct of the driver at the time of the accident. We hold that the offer of proof was properly rejected under the rule that the evidence should be limited to the issues which are for trial and decision.

The second point is that the court should have instructed the jury in the language of Construction Safety Order 1753(b) of the Administrative Code.[1] Such an instruction was requested and refused. The court instructed that section 671(b) of the Vehicle Code, then in effect, provided that: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used." Defendants resist the claim of error upon several grounds, namely: (1) The regulation is unreasonably discriminative in that it applies only to trucks hauling certain materials; (2) it is fatally uncertain in that it does not define the term "construction materials" and it would be impossible for a driver to know whether it included only heavy materials, such as concrete, lumber and the like, but also all small articles of hardware and like materials which enter into construction, and (3) the regulation attempts to invade the field of legislation which is preempted by section 671(b) of the Vehicle Code. Although we find merit in the first and second objections, we pass them as not requiring decision. We do not believe the safety order could be given effect in view of the provisions of section 671(b).

The safety order is contained in Title 8 of the Administrative Code, entitled "Construction Safety Orders." Section 1506 of Article 2, Title 8, provides: "These orders shall apply to the excavation, construction, alteration, repairing, renovating, removal or wrecking of buildings or other structures." If we assume, without deciding, that the order relates to the surfacing

1. "Sec. 1753. Trucks. (b) Trucks used to haul dirt, rock, concrete or other construction material shall be equipped with a horn, bell or whistle on both the front and rear ends, or with a horn capable of emitting a sound audible under normal operating conditions from a distance of not less than two hundred feet (200') in the rear of the truck, provided, the warning will be sounded while the truck is backing up."

of highways, it is clear that if it purports to apply to highway operated trucks it would be in a field covered by state law and in conflict therewith.

Section 671(b) of the Vehicle Code covers the entire subject of giving signals by blowing a horn of a vehicle traveling on a highway. Not only does it require that a horn be blown when reasonably necessary to insure safe operation, but it prohibits its use under other circumstances. Thus the regulation, in addition to invading the field of state legislation, would be in conflict with it insofar as it would require the blowing of a horn in backing up on a highway under all conditions, even though that warning was not reasonably necessary to insure safety. A field of the law which is entirely covered by state legislation is not subject to legislation by a municipality. This subject was thoroughly explored and the cases reviewed in Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515, and Agnew v. City of Los Angeles, 110 Cal. App.2d 612, 243 P.2d 73.

[4] Plaintiffs say that safety order 1753 (b) is broader than section 671(b) in that the latter is limited by section 616, Vehicle Code, to the operation of vehicles on a highway while the former governs the equipment of vehicles and its use whether it be on or off a highway. Therefore, they contend, the safety order is valid and has application here. We cannot agree. It may be that the order was intended to apply under all conditions. Granted that it is a proper regulation of trucks when not on a highway, there was uncontradicted testimony of a county highway engineer that in September, 1950, when the accident occurred, Tyler Avenue was a county highway, and there was other evidence to the same effect. Plaintiffs have contended throughout that it was a highway and there was no evidence to the contrary.

[5] The reasons which preclude municipal legislation in a field covered by state legislation have application to regulations and orders of administrative agencies. Government Code, sec. 11374; 2 Cal. Jur.2d 154.

[6] A further assignment of error is the refusal of the court to admit into evidence a certified copy of Churchill's chauffeur's license by which he was authorized to operate a motor vehicle of not over 6,000 pounds, unladen weight. The truck he was driving weighed, unladen, 13,000 pounds. The Department of Motor Vehicles has authority to issue either a general chauffeur's license or a restricted chauffeur's license, the latter showing the type of vehicle or combination of vehicles the licensee is licensed to operate. Veh.Code, sec. 273. Under section 272 the department shall issue to an applicant found to be entitled thereto an operator's or chauffeur's license "as applied for." Under section 265, "An applicant for a chauffeur's license may state the type of vehicle or combination of vehicles he desires to operate." Plaintiffs argue that the fact that Churchill held a license to operate a vehicle with an unladen weight of only 6,000 pounds was evidence that the Motor Vehicle Department had determined that it would be unsafe for him to operate a vehicle of greater weight, and that such supposed ruling by the department would be some evidence of negligence. The court did not err in sustaining defendants' objection.

[7–10] We understand the law to be as stated in Strandt v. Cannon, 29 Cal.App.2d 509, 518, 85 P.2d 160, 164; "The weight of authority, as we see it, is that the operator's negligence is to be determined by the facts existing at the time of the accident, and whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one", and in the concurring opinion of Justice Marks and Presiding Justice Barnard, 29 Cal.App.2d at page 520, 85 P.2d at page 165: "In this kind of a case the courts are not interested in the competency or incompetency of a driver but only in his actions at the time and place of the accident." Appellants' counsel stated to the trial court and now urges that it was to be presumed that the Motor

Vehicle Department had determined that Churchill was not competent to drive a heavy truck. No such presumption existed, and even if that had been the opinion of some one in the department, evidence of the fact would have been no evidence at all of negligence. The fact that one was known to be a careless driver would be no better evidence that he was negligent upon a given occasion than would the fact that he was known as a careful driver be evidence that he was not negligent on that occasion. There was no causal connection between the fact that Churchill was driving a vehicle of a weight exceeding that permitted by his license and the accident which caused Mr. Armenta's death. It may be added that there was no evidence, and no offer to prove, that Churchill had applied for and been denied a license to operate a vehicle of greater weight than 6,000 pounds. When he applied for a license he may have stated in his application, as allowed by section 265, that he desired to operate the lighter vehicle. Also there was no evidence that he did not have an operator's license, and we think there was insufficient evidence to prove that he was a chauffeur, defined by section 71, Vehicle Code, as "a person who is employed by another for the principal purpose of driving a motor vehicle on the highways and receives compensation therefor." The evidence was that Churchill was in business for himself. He had purchased the truck himself, it was registered in his wife's name, but there was no evidence that he was driving the truck for his wife for compensation. If he was in business for himself, or jointly with his wife, and was not a chauffeur, as above defined, he was not required to have a chauffeur's license, even though he was using his wife's truck.

Appellants requested, and the court refused, an instruction based upon section 543 of the Vehicle Code, which provides: "No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety."

[11, 12] "Highway" was defined in the instructions in the language of section 81, Vehicle Code. Many of the instructions assumed that the accident occurred on a highway. In view of the evidence the jury could not have been in doubt as to that fact. The instructions as a whole clearly stated the principle that defendants' vehicle should not have been backed unless and until it could be done with reasonable safety. They made it clear that Churchill would have been guilty of negligence if he had moved his truck backwards when it was not reasonably safe to do so or without exercising ordinary care. We think plaintiffs would have gained nothing had the court instructed in the language of section 543 of the Vehicle Code. We do not discover any error in the court's refusal to admit into evidence a photograph of Mr. Armenta, taken during his lifetime.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 659

KARRAS et al. v. TITLE INS. & GUARANTY CO. et al.

Civ. 15442.

District Court of Appeal, First District, Division 1, California.

June 24, 1953.

Rehearing Denied July 24, 1953.

Hearing Denied Aug. 20, 1953.

Action, on counts of negligence, conversion, and breach of implied covenant, by one group of principal parties to an agreement, against other principal parties, and against title company which, purportedly as escrow agent, had accepted documents required under agreement, from the parties' mutual agent, but had returned one of two assigned notes to defendant principal parties before purported escrow was completed. The Superior Court, in and for the City and County of San

Francisco, entered judgment in favor of title company, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that, under evidence, title company was escrow holder and, therefore, was liable for having returned note to defendants without consent of plaintiffs, notwithstanding that not all documents required by agreement had been deposited, that escrow was not in condition to close, and that before escrow was finally completed much time and many documents were involved.

Judgment reversed.

1. Escrows ⇐5

Escrow instructions, which are a customary and necessary means of consummating real estate transactions, do not take the place of agreement for sale, but merely carry it into effect.

2. Escrows ⇐14(1)

Where agent of principal parties to a transaction went to title company, received escrow number, gave company agreement under which he was acting and then proceeded to deposit for parties, from time to time, the documents required by the agreement, title company was escrow holder and had no right to participate in withdrawal of documents by one party without consent of other party, and was liable to one of parties for returning note to other party without authorization.

3. Principal and Agent ⇐48

It is duty of an agent to obey the instructions of his principal, and to exercise reasonable skill and ordinary diligence in his employment.

4. Depositaries ⇐4
Escrows ⇐8(1)

Regardless whether title company, with which the mutual agent of principal parties to an agreement, from time to time deposited documents required of both parties under the agreement, was a true escrow holder or merely a depositary, it was required to obey instructions that it hold the documents until the further instructions of both parties.

5. Escrows ⇐14(1)

In action, on counts for negligence, conversion, and breach of implied covenant, against purported escrow agent which accepted two notes that had been assigned by parties to an agreement to other parties, but which ignored instructions and terms of agreement and returned one of notes to the assigning parties, who had replaced returned note with own note, evidence was not sufficient to establish collectibility of assigned note and uncollectibility of new note, and plaintiff parties were not entitled to recover damages against escrow agent in absence of establishment of such fact.

Davis, Barber & Zief, San Francisco, for appellants.

Royal E. Handlos, San Francisco, for respondent.

BRAY, Justice.

Plaintiffs appeal from a judgment in favor of defendant title company.

Questions Presented.

1. Where parties to an exchange agreement deposit certain documents with a title company to be held by it for further instructions, may the company return to one party a document deposited by him without the consent of the other? 2. Have plaintiffs proved damage?

Facts.

The complaint charged defendant title company, in the first count, with negligence in the handling of an escrow transaction by returning a certain promissory note to one of the parties; in the second count defendant is charged with conversion, and in the third count with breach of the implied covenant to use diligence in following instructions.

Plaintiffs and J. R. and Vera S. Ryan entered into a written contract wherein plaintiffs agreed to transfer their interest in a certain hotel business and shares of stock in a certain realty company, to the Ryans in exchange for the interests of the latter in a certain hotel building. It provided that "D'Orazi Investment Company is hereby authorized as agent for both parties hereto * * *." The Ryans agreed to, and by the agreement did, assign to plaintiffs promissory notes totalling $12,330, photostatic copies of which were said to be at-

tached. (Although no photostats were attached, the two notes in question were intended to be included.) "The parties hereto and each of them do hereby appoint and designate the Titel [sic] Insurance and Guarantee Company * * * as the escrow holder in the herein matter for the purpose of effectively carrying out the terms of the herein agreement." Within five days the Ryans were to deposit with defendant an assignment and actual transfer, among other documents, of the above mentioned notes, and plaintiffs, among other documents, were to deposit with defendant a transfer of said stock and a release of it by the pledgee. An unsigned third party to the agreement was the realty company whose stock was to be transferred to the Ryans, and who was a part owner in the hotel business which plaintiffs were to exchange with the Ryans.

April 19, 1950, Victor D'Orazi, owner of D'Orazi Investment Company, took the original contract signed by plaintiffs and the Ryans, but not by the realty company, to defendant's office where he was waited on by Vice-President Bell. D'Orazi testified he informed Bell that he was representing both parties to the exchange, that Bell's company was to handle it, that he wanted an escrow number on it, that as both principals were short of money it might be a difficult escrow, so Bell "should keep the documents until I [D'Orazi] could get them all in the file." Bell testified that he could not remember the conversation "beyond the fact that we may have discussed what might happen, what probably would be the manner in which the deal would be closed." He denied, however, that D'Orazi said he represented both parties. He did open up a file and give it a number. D'Orazi gave him the contract for which Bell gave him a receipt showing "Application 448471 * * Received of D'Orazi Inv. Co. * * * Agreement of Exchange * * * which we are to hold for Mr. D'Orazi." D'Orazi signed the receipt "Approved and accepted." Bell did not read the agreement. April 20th, D'Orazi delivered to Bell certain documents including certain leases which he had received from the Ryans and which the agreement provided were to be assigned to plaintiffs. Defendant's receipt therefor had the same application number as the agreement receipt and a notation to assign the documents to plaintiffs. April 25th, D'Orazi delivered to Bell certain documents apparently received from plaintiffs. Defendant's receipt therefor under the same number stated as to one of the leases listed, "Make assgt. to Bay Shore Realty" and as to all documents, "Hold all for further instructions." Then on the same day D'Orazi delivered to defendant two promissory notes, Herndon to Ryan, one for $2,900 and the other for $9,600, assigned by the Ryans to plaintiffs under the terms of the agreement. The receipt therefor bears the same number as the others and states "To be held in file." Under "Approved and accepted" appears D'Orazi's signature. On June 16th, Meizel, one of the plaintiffs, delivered certain documents to defendant and was given a receipt under the same number for those documents plus all papers regarding plaintiffs' hotel theretofore deposited by D'Orazi. The receipt stated they were to be delivered or recorded on receipt of the documents and moneys which the Ryans were required to deliver under the agreement. The receipt referred to the original agreement and stated that that agreement was on file with defendant for information only and not as a part of the escrow, and defendant was instructed to disregard it and to be guided solely by the instructions contained in the receipt. The approval of this receipt by Meizel constituted the first formal instructions given defendant. On June 30th, before all documents and the stock mentioned in the agreement were deposited, defendant, without notice to or permission of either plaintiffs or D'Orazi, delivered both notes to J. R. Ryan. In July Bell notified D'Orazi that the notes were no longer in the file and the latter informed plaintiffs. Demand was then made of defendant that it get the notes back, and defendant was notified it would be held responsible. Later, defendant was able to get the $2,900 note returned to the file, but the $9,600 note never was returned, Ryan having delivered it to an attorney for satisfaction of a judgment against him. From time to time thereafter other documents and

the stock provided for in the agreement were deposited with defendant by D'Orazi.

D'Orazi testified that the loss of the note, together with defects which were found in Ryan's title and which had to be cleared up, delayed the closing of the transaction. The Ryans had taken possession of plaintiffs' hotel business. D'Orazi testified that before the closing of the escrow arrangements this business was "subject to a receivership." Plaintiffs' brief states that this meant that the Ryans had lost the business. On October 13th a detailed letter of instructions to the defendant was signed by the Ryans, which among other matters stated that the $9,600 note required to be deposited under the agreement was now in possession of certain attorneys as security for the satisfaction of a judgment against Ryan. Defendant was instructed to deliver it to plaintiffs when delivered to defendant by said attorneys. Defendant was instructed to use any cash it might have received from the leases on plaintiffs' hotel properties to obtain the note and if such moneys were not sufficient the Ryans stated they would supply the necessary additional cash. The letter further stated that J. R. Ryan had executed his note to plaintiffs in the sum of $9,600 which would be deposited by D'Orazi. This note was security for the return of the Herndon $9,600 note and was to be returned to Ryans if and when the defendant should receive the Herndon note and deliver it to plaintiffs. Mrs. Ryan joined in the instructions upon the understanding that she would not be liable on the J. R. Ryan note. Plaintiffs, the same day, signed a consent to this letter of instructions subject to the reservation and agreement that they did not waive in any way their rights arising from the withdrawal of the Herndon note. On October 18th, plaintiffs signed instructions to defendant in effect telling defendant to complete the exchange, and in doing so to deliver the J. R. Ryan note to Pacific National Bank and the Herndon note, if and when received, to a designated one of the plaintiffs. The exchange was then effected and while the record does not definitely disclose, apparently the notes were distributed as instructed.

The court found that the allegation in plaintiffs' complaint that on or about April 25, 1950, "defendant * * * then and there took delivery of, and agreed to hold and handle, said papers, instruments and documents as the escrow holder in said transaction" was untrue. It further found that the approval and consent of plaintiffs to the delivery by defendant of the Herndon note to the Ryans was not necessary or required. It also found that the documents deposited with defendant were not to be delivered or used by defendant until it received specific instructions from all the parties as to the closing of the transaction, and that when it returned the note to Ryan it had not received such instructions nor sufficient funds and documents to close the transaction; that in delivering the Herndon notes to defendant D'Orazi was acting as the Ryans' agent and therefore the Ryans were entitled to withdraw them.

1. The Deposit of the Documents.

[1] The evidence does not support the court's findings that in depositing the notes D'Orazi was acting solely for the Ryans nor that defendant did not undertake to hold and handle the documents for the parties. The fact that the escrow was not complete at the time of the return of the notes is immaterial. The uncontradicted evidence establishes that D'Orazi went to defendant, gave it a copy of the instrument, asked for and received an escrow number. All the receipts bore the statement "It is understood that the title evidence to be issued will be in our usual form. * * *" Thus the defendant knew these documents were being deposited preliminarily to the issuance by defendant of title insurance. In view of the court's finding we must accept Bell's testimony that D'Orazi did not tell him he was the agent of both parties. But the agreement which Bell accepted said so. Moreover, the agreement provided that each party was to deposit specified documents in escrow with the title company. These were deposited from time to time by D'Orazi, pursuant to the agreement and not as representing alone the particular party who gave him the particular document. Defendant knew that these documents were being deposited pursuant to the

agreement. "Escrow instructions are a customary and necessary means of consummating real estate transactions, they do not take the place of the agreement for sale but merely carry it into effect." Keelan v. Belmont Co., 73 Cal.App.2d 6, 12, 165 P.2d 930, 933. They were all given the same number. Receipts for them were given stating that they were to be held, in one instance, for D'Orazi, in the others for further instructions. On April 20th the agreement and leases which came to defendant from the Ryans through D'Orazi were, according to defendant's own receipt, to be assigned to plaintiffs. The agreement as between plaintiffs and the Ryans was a binding agreement. The fact that it was not signed by the third party is unimportant. It never was signed by that party. Both the Ryans and plaintiffs treated the transaction as solely between them. On June 16th the Ryans gave specific instructions which they said were to supersede the agreement. At the time, however, plaintiffs had not consented that they would. So far as the relationship between plaintiffs and defendant was concerned the documents which defendant then held were presented to defendant by D'Orazi, acting as agent of both parties and pursuant to the agreement. Defendant had no right to ignore that agreement at the instance of only one of the parties to it. At the time plaintiffs agreed to these instructions the notes had already been delivered by defendant to Ryan. Plaintiffs made their consent subject to the reservation of all rights arising from such delivery.

[2] The situation here is a very simple one, in spite of the facts that the stock had not been deposited, nor was the escrow in condition to close, nor that before the escrow was finally completed much time and many documents were involved. The agent of the two principal parties to a transaction goes to the title company, receives an escrow number, gives it the agreement under which he was acting and then proceeds to deposit for *both parties* the documents required by that agreement to be deposited. Obviously the title company thereby "took delivery of, and agreed to hold and handle, said papers, instruments and documents as the escrow holder in said transaction." The withdrawal by either party of the documents deposited for him by the agent of both would be a violation of the agreement, and the title company would have no right to participate therein without the consent of the other party. Had D'Orazi himself withdrawn the note and delivered it to Ryan he would have been in the position of the agent in Holloway v. Thiele, 116 Cal.App. 2d 68, 253 P.2d 131.

[3, 4] "It is the duty of an agent to obey the instructions of his principal and exercise in his employment reasonable skill and ordinary diligence, and, if defendant violated instructions or acted negligently in retaining the check in its files, it would ordinarily be liable for any loss occasioned by its breach of duty." Rianda v. San Benito Title Guarantee Co., 35 Cal.2d 170, 173, 217 P.2d 25, 27. In that case the court pointed out that the above principle applied whether the title company there was to be considered as a true escrow holder, or as an agent of the parties. So here, whether defendant be considered a true escrow holder or as defendant claims, a depositary, it was required to obey instructions, namely, hold the documents until the further instructions of both parties.

A somewhat similar situation to that in our case occurred in Citizens' Nat. Bank of Roswell v. Davisson, 229 U.S. 212, 33 S.Ct. 625, 57 L.Ed. 1153. There, the contract between the parties, together with a check of one of them, was placed in an envelope and taken to the bank by the parties. On the envelope was endorsed that the check was "to be held in escrow until September 10, when final settlement is to be made. Deed and abstract to be placed in escrow with this." 229 U.S. at page 220, 33 S.Ct. at page 628. Up to September 10th, the title of the property to be transferred had not been cleared so the parties extended the time of performance. Sometime after September 10 and before the final clearing of title, the bank returned the check to the maker. The court, in holding the bank liable, pointed out that the memorandum on the envelope was not a complete expression of the agreement of the parties and was unintelligible except by reference

to the agreement in the envelope which the bank did not see. It then stated, 229 U.S. at page 223, 33 S.Ct. at page 629:

"Upon the whole case, we are clear that the effect of the deposit of the contract and check with the bank was to constitute it a custodian or stakeholder for the benefit of both parties, holding the money without right or interest in it, bound above all things not to take sides between the parties, and answerable ultimately to the one or the other, according to their respective rights as between themselves. * * *

"The fact that no officer of the bank read this contract or knew of its terms is of no avail to the bank. By the very circumstances of the deposit it was put upon notice that it was assuming a duty that could not be fully understood or fairly performed without a knowledge of the contents of the contract; it had possession of that instrument, with full opportunity to examine it; except for its own negligence it would have known the terms thereof."

Miller v. Sears, 91 Cal. 282, 27 P. 589, cited by defendant, is not in point, as there the papers were delivered to the defendant to hold by the plaintiff alone and such delivery was not absolute and beyond the control of the plaintiff, who later withdrew them. Moreover, the court found that there was no agreement of sale between the plaintiff and the purchaser.

Although the principles of Rianda v. San Benito Title Guarantee Co., supra, 35 Cal.2d 170, 217 P.2d 25, apply, the facts are different. There the title company kept uncashed a check deposited with it by the parties to a real estate transaction. This check was sent to the company which had undertaken to hold the documents for the parties, without any instructions to cash it. Even later instructions failed to mention the check. Over a month after the check was given the defendant, the buyer drew his account from the bank so that the check could not be paid and refused to go ahead with his agreement to purchase. In holding that the seller could not recover from the title company for not cashing the check, the court pointed out the complete absence of any instruction to it to cash the check. Under the instructions, it was to do as defendant should have done here with the note, hold it. As it did that, it could not be held liable.

2. Damages.

As we have stated, the court erred in finding that defendant would not be liable for returning the Herndon note. However, a further question arises which was not determined below. Have plaintiffs proved any damage?

[5] The *fact* that plaintiffs accepted a note signed by J. R. Ryan as security for the return appears in the evidence but the *circumstances* of its receipt do not. D'Orazi testified that to close the transaction plaintiffs accepted the Ryan note "with the understanding that they were not to waive any damages that might have been incurred from the failure to receive the note on the part of the title company, release of it." There is no evidence in the case that the Herndon note was collectible. The fact that plaintiffs received $1,200 on the $2,900 Herndon note is no evidence of the collectibility of the $9,600 note. Nor is there any evidence that the Ryan note given for it is not collectible. D'Orazi testified that at the time Ryan delivered the Herndon note to the attorneys for the judgment creditor, the Ryans were in financial stress and that the Ryans lost by receivership the hotel business they were here acquiring. However, that, and the fact that Ryan had paid nothing on the note at the time of trial, is not sufficient evidence of the note's uncollectibility. Obviously, if the Herndon note is uncollectible, or if the Ryan note is collectible, plaintiffs have not been damaged by defendant's action. The true facts will have to be determined on a new trial.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

118 Cal.App.2d 800

McRAY v. WINTER et al.

Civ. 15501.

District Court of Appeal, First District, Division 2, California.

June 30, 1953.

Hearing Denied Aug. 27, 1953.

Action in ejectment by devisee against husband of testatrix, wherein husband filed cross-complaint to quiet title to the allegedly devised property. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., rendered judgment for husband, and devisee appealed. The Court of Appeals, McComb, J. (assigned), held that where devisee failed to obtain ruling from trial court, excluding testatrix's will purporting to devise property to devisee, Court of Appeals would not review action of trial court in failing to receive will in evidence.

Affirmed.

1. Husband and Wife ⇐263, 266

Separate property of either spouse may be transmuted into community property without necessity of written agreement, and intention of parties that property held in name of one is to be considered as community property may be shown by circumstantial, as well as by direct evidence.

2. Appeal and Error ⇐931(1)

On appeal all conflicts in evidence must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in to uphold finding of trial court.

3. Appeal and Error ⇐1010(1)

All that is required on appeal is that finding has substantial support in evidence.

4. Husband and Wife ⇐264

In devisee's action in ejectment against husband of testatrix, wherein husband filed cross-complaint to quiet title to devised property on ground that such property was community property, evidence supported finding that property was community property of husband and testatrix at time of testatrix' death.

5. Appeal and Error ⇐242(4)

Before error may be predicated on failure of trial court to receive evidence, party aggrieved must obtain ruling from trial court upon his offer of proof.

6. Appeal and Error ⇐242(4)

In action in ejectment by devisee against husband of testatrix wherein husband filed cross-complaint to quiet title to devised property on ground that such property was community property, failure of trial court to receive will, purporting to devise property to devisee, in evidence would not be reviewed where devisee failed to attain ruling from trial court on offer of will in evidence.

7. Appeal and Error ⇐1071(1)

In action in ejectment by devisee of property against husband of testatrix, wherein husband filed cross-complaint to quiet title to such property on ground that property was community property, even though finding "that at all times mentioned" husband and testatrix were owners of property in question was contrary to admitted fact that when testatrix married husband property was her separate property, such finding when construed with the other findings did not constitute prejudicial error. Const. art. 6, § 4½.

8. Husband and Wife ⇐264

In action in ejectment by devisee of property against husband of testatrix, wherein husband filed cross-complaint to quiet title to such property on ground that property was community property, evidence supported finding that property which was originally separate property of wife had been transmuted to community property by acts of parties.

9. Appeal and Error ⇐1071(6)

In action in ejectment by devisee of property against husband of testatrix, wherein husband filed cross-complaint to quiet title to such property on ground that property was community property, failure of court to find that agreement by which property which was originally separate property of wife was converted into community property was an oral one was not prejudicial error.

10. Appeal and Error ⇐880(2)

If there were any error in failing to make finding that action as to coplaintiff should be dismissed without prejudice, co-

plaintiff was only party who could take advantage thereof.

Robert K. Byers and Ernest Rusconi, Gilroy, Marshall S. Hall, San Jose, for appellant.

Machado & Machado, San Jose, for respondent.

McCOMB, Justice (assigned).

From a judgment in favor of defendant Herman Winter, after trial before the court in an action predicated upon plaintiff's complaint in ejectment and defendant's cross-complaint to quiet title to a parcel of property, plaintiff appeals.

Facts: Defendant and Kate Johnson were married on September 30, 1918. At the time of their marriage, Mrs. Winter owned as her separate property a lot 60′ x 40′ located in the City of Gilroy. There was a mortgage of $1,000 on the lot and on an adjacent lot also owned by Mrs. Winter, which was likewise her separate property.

Defendant, who was a mechanic and also steadily employed, gave all of his wages to his wife. In 1922, she had saved $1,800 from his earnings and they discussed the question of building a dwelling house on the lot here in question, and it was agreed that his earnings should be used to pay for such house and that the lot and house should become the community property of the parties.

The trial court found that the property was in fact community property.

Questions: First: *Was there substantial evidence to sustain the trial court's finding that the lot which had been the separate property of Mrs. Winter, and the house built thereon, had been transmuted from her separate property to the community property of defendant and his wife?*

[1] *Yes.* Separate property of either spouse may be transmuted into community property without the necessity of a written agreement and the intention of the parties that property held in the name of one is to be considered as community property may be shown by circumstantial as well as direct evidence. (Tomaier v. Tomaier, 23 Cal.2d 754, 757[5], 146 P.2d 905; Williamson v. Kinney, 52 Cal.App.2d 98, 102[1], 125 P.2d 920.)

[2] It is also settled that on appeal all conflicts in the evidence must be resolved in favor of the respondent (in this case the defendant) and all legitimate and reasonable inferences indulged in to uphold the finding of the trial court. (Estate of Bristol, 23 Cal.2d 221, 223[2], 143 P.2d 689.)

[3] It is likewise true, as stated by Mr. Justice Dooling in Estate of Raphael, 115 Cal.App.2d 525, 530, 252 P.2d 979, 982, "The 'clear and convincing evidence' rule is one for the guidance of the trial court and all that is required on appeal is that the finding finds substantial support in the evidence. (Citing cases)."

Applying the foregoing rules to the facts in the instant case we find that the record discloses that when defendant and his wife discussed building on the lot they had a conversation, concerning which defendant testified as follows:

"Q. Did you at any time have an agreement with Mrs. Johnson to pay off the property and take an interest in it? A. Yes, we talked that over.

"Q. When was that discussed? A. It was about '22, early part of '22.

"Q. What did you agree on at that time? A. It was to build a house.

"Q. To build a house? A. Yes.

"Q. Did you agree that you would have an interest in it? A. Yes, Talked about building a house there, and she said she had $1,800 of my wages saved. We could use that and take a loan out for the balance, and I said, 'Where would I come in at? This property belonged to you before I married you.' And she said we'd build a house together and both houses would belong to both of us, and when you die both houses would be mine, and if I die both houses would go to you."

* * * * * *

"A. In 1922, yes, we did.

"Q. All right. And concerning the building of what property? A. The little house on the lot.

"Q. And that is known as what property? A. That's 38 North Rosanna.

"Q. All right. And what was that conversation that you had with your wife? A. Well, my wife and I were talking about building a little house to have a little income, and she says she had $1800 of my wages saved that we could use on it and that. I said, 'Where do I come in at? You had this lot before we were married.' And she said, 'We build the house together and both houses be yours if I die, and if you die, both houses be mine.' That is what she told me."

* * * * * *

"Q. And at that time you proceeded to build the small cottage, and that is known as 38 North Rosanna? A. We agreed to build a little house.

"Q. And at that time, you have testified that you agreed that it would belong to both of you? A. Yes.

"Q. Both places? A. That's right.

"Q. Now, was anybody else present at that time when your wife talked this over with you? A. No, just my wife and I.

"Q. Was anything said about reducing it to writing? A. In writing?

"Q. Yes. A. No.

"Q. Was anything said about making a joint tenancy deed out of it? A. We made the agreement; we were man and wife, and naturally that is the way I trusted her.

"Q. Did you ask her to put the property partly in your name and partly in her name? A. She said we'd build the house together and both houses would belong to both of us."

In addition to the foregoing evidence, testimony was received that $1800 of defendant's wages went into the building placed on the property; that a loan on the property was obtained from the Bank of Italy in the sum of $1500, which was paid by defendant's wife with money obtained from his earnings; that from 1922, until the death of defendant's wife, improvements and repairs on the property were made by defendant or paid for out of his wages.

[4] Clearly, the foregoing constituted substantial evidence to sustain the trial court's finding that the property was community property of defendant and his wife at the time of her death. (See Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398; Estate of Raphael, 91 Cal.App.2d 931, 936[3], 206 P.2d 391.) It needs no citation of authority in support of the proposition that we must disregard conflicting evidence and inferences.

Second: *Did the trial court err in excluding the will of Kate Johnson Winter, which will purported to devise the property in question to plaintiff?*

[5, 6] This question is not properly before this court for consideration for the reason that an examination of the record fails to disclose that the trial court made a ruling excluding the will from evidence. The law is settled that before error may be predicated upon the failure of the trial court to receive evidence the party aggrieved must obtain a ruling from the trial court upon his offer of proof. (Campbell v. Genshlea, 180 Cal. 213, 220[8], 180 P. 336; cf. Smith v. Smith, 163 Cal. 630, 631, 126 P. 475.) This not having been done, we will not pass upon the question. (Flynn v. Young, 25 Cal.App. 2d 614, 619[5], 78 P.2d 245.)

Third: *Did the trial court commit prejudicial error in finding that: (a) "at all times mentioned herein, said defendant and said Kate Johnson Winter were the owners and entitled to possession of the real property described in plaintiff's amended complaint"; (b) the property in question was converted into community property by agreement and "by their respective acts and declarations during their marriage"?*

[7] *No.* (a) Plaintiff contends that the finding "that at all times mentioned" defendant and his wife were the owners of the property in question is contrary to the admitted fact that when Mrs. Johnson married defendant the property was her separate property. This is true, but since findings must be construed as a whole and under Article VI, section 4½ of the Constitution nonprejudicial error disregarded, it is obvious that the construction placed on the finding by plaintiff is immaterial and that no prejudicial error resulted to her. Therefore, we disregard it.

[8] (b) Plaintiff claims that the finding that the property was converted into community property by acts of the parties is not supported by the evidence. This contention is devoid of merit for the reason that there was evidence, as set forth above, of both the declarations of the parties and their acts which sustain the trial court's finding.

[9] Fourth: *Did the trial court commit prejudicial error in failing to find that the agreement by which the property was converted into community property was an oral one?*

No. The trial court made a finding of the ultimate fact, which was that the separate property of defendant's wife had been transmuted into community property. As community property it is entirely immaterial whether the evidence resulting in this transmutation was oral, written or both.

[10] Fifth: *Was it prejudicial error for the trial court not to find that the action as to plaintiff McRay's co-plaintiff, Albert Johnson, should be dismissed without prejudice?*

No. Clearly if there was any error in failing to make such a finding the only party who would be aggrieved and could take advantage thereof was plaintiff Alfred Johnson, who is not here appealing.

Affirmed.

NOURSE, P. J., and DOOLING, J., concur.



118 Cal.App.2d 794

PETERSON et al. v. GELTZ et al.

SCHIEFFELBEIN v. GELTZ et al.

Civ. 15488.

District Court of Appeal, First District, Division 2, California.

June 30, 1953.

In actions against minor and his parents, who had signed his license application, for injuries sustained when automobile driven by minor struck pole on shoulder of highway, the Superior Court, San Mateo County, Edmund Scott, J., rendered judgments for plaintiffs, and defendants appealed. The District Court of Appeal, McComb, J., assigned, held that evidence sustained trial court's findings that driver was not intoxicated at time of accident or immediately preceding it; that plaintiffs had not been guilty of contributory negligence; and that plaintiffs had not legally assumed the risk of riding with the driver.

Affirmed.

1. Appeal and Error ⇐981
New Trial ⇐102(3)

Whether newly discovered evidence could with reasonable diligence have been discovered and produced at trial is question addressed to sound discretion of trial court, and its action therein will not be disturbed unless it is clear that such discretion has been abused.

2. New Trial ⇐101

A party to an action may not excuse production of evidence relating to conversation in which he himself participated on ground that he had forgotten it until after trial; and same rule should apply to case where he forgets to impart his knowledge to his attorney.

3. Appeal and Error ⇐981
New Trial ⇐108(1)

Whether newly discovered evidence, if introduced on retrial, would result in different conclusion is question addressed to sole discretion of trial judge, whose action will not be disturbed in absence of manifest showing of abuse of discretion.

4. New Trial ⇐90

In actions against minor and his parents, who had signed his license application, for injuries sustained when automobile driven by minor struck pole on shoulder of highway, wherein trial court found that accident had been caused by minor's recklessness rather than his imbibing of intoxicating beverages, trial judge did not on record, abuse his discretion in denying defendants' motions for new trials, upon ground of surprise, predicated upon trial testimony of one of plaintiffs which was allegedly contra-

dictory of such plaintiff's pre-trial statements to defendant-father and another to effect that every one had been drinking too much on night of accident. Vehicle Code, § 352.

5. Automobiles ⇐224(8)

Injured party will not be barred from recovering for a companion's negligence merely by reason of fact that after consuming intoxicating liquor together they subsequently ride in same automobile and one is injured through the carelessness of other.

6. Automobiles ⇐244(20, 56)

In actions against minor and his parents, who had signed his license application, for injuries sustained when automobile driven by minor struck pole on shoulder of highway, evidence sustained trial court's findings that driver was not intoxicated at time of accident or immediately preceding it; that plaintiffs had not been guilty of contributory negligence; and that plaintiffs had not assumed the risk of riding with the minor. Vehicle Code, § 352.

George M. McLeod, Oakland, for appellant.

Francis W. Murphy and Bullock, Wagstaffe & Daba, Redwood City, for respondents.

McCOMB, Justice (assigned).

Defendants appeal from judgments in favor of plaintiffs after trial before the court without a jury in actions to recover damages resulting from an automobile accident. There are also purported appeals from the orders denying their motions for a new trial.

Facts. On June 1, 1949, defendant Robert James Geltz, aged 20, drove an automobile in a southerly direction on El Camino Real in San Mateo County. The accident arose as a result of Robert swerving his car back and forth on the slippery highway, losing control thereof and striking a pole on the shoulder of the highway, causing personal injuries to plaintiffs Peterson and Schieffelbein.

Prior to the time of the accident the defendant Robert James Geltz, plaintiffs and others had attended a party at which they had consumed intoxicating beverages.

Defendants H. G. Geltz and Margaret A. Geltz, the parents of Robert, were joined as defendants on the theory that their liability arose under the provisions of Section 352 of the Vehicle Code of the State of California [1], since they had signed his application for an operator's license.

The trial court found that Robert James Geltz was not intoxicated at the time of the

1. Section 352 of the Vehicle Code reads as follows:

"(a) (Liability imposed upon signer or signers of application: Joint and several liability: Liability of employer.) Any liability of a minor arising out of his driving a motor vehicle upon a highway is hereby imposed upon the persons or person who signed and verified the application of such minor for a license for all purposes of civil damages and said persons or person shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct, except that an employer signing such application shall be subject to the provisions of this subdivision only if an unrestricted operator's or chauffeur's license has been issued to the minor pursuant to such employer's written authorization.

"(b) (Minor's negligence or wilful misconduct imputed to parents or guardian: Joint and several liability.) Any negligence or wilful misconduct of a minor whether licensed or not under this code in driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor shall be imputed to such parents or such person or guardian for all purposes of civil damages and such parents or such person or guardian shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct.

"(c) (Limitation of liability.) No person, nor the persons collectively if the negligence or wilful misconduct of the minor in operating a motor vehicle is imputed hereunder to more than one person, shall incur liability under this section in any amount exceeding five thousand dollars for injury to or death of one person as a result of any one accident or, subject to said limit as to one person, exceeding ten thousand dollars for injury to or death of all persons as a result of any one accident or exceeding one thousand dol-

accident, that the accident was not the proximate result of his having drunk intoxicating beverages, and that Robert James Geltz zigzagged the car which he was driving intentionally and with wanton disregard of the result thereof.

Defendants moved for a new trial upon the ground of alleged surprise when one of the plaintiffs allegedly testified in a manner contrary to his pretrial assurances of what his testimony would be. This motion was denied and defendants have appealed from the judgments, on appeal from which we will review the orders denying the motions for a new trial.

[1–4] *Questions*: First: *Did the trial court abuse its discretion in denying defendants' motions for a new trial upon the ground of surprise which ordinary prudence could not have guarded against?*

No. Defendant H. G. Geltz filed an affidavit in which he stated that John Peterson, husband of plaintiff Hazel Peterson, had stated to him prior to the trial that he knew everyone had been drinking too much on the night of the accident and that he would so testify at the trial.

John E. Nunnemaker's affidavit was also filed in which it was stated that John Peterson had told him all of those present on the night of the accident were drinking and he, John Peterson, was also drinking.

Defendant H. G. Geltz stated in his affidavit that he relied on the assurance of John Peterson that he would testify as set forth above and went east on a business trip, and was not present when the case was called for trial. Further, that when Mr. Peterson took the witness stand at the trial he in fact testified that the sobriety of defendant Robert Geltz was all right on the night in question and that he, Peterson, had had only two or three drinks. It is further alleged that had Mr. Peterson testified as he assured Mr. Geltz and Mr. Nunnemaker that he would, it is probable the trial court would have found defendant Robert Geltz was under the influence of intoxicating liquor at the time of the accident and had the trial judge so found, judgment would have been entered in favor of defendants H. G. Geltz and Margaret Geltz. (See Weber v. Pinyan, 9 Cal.2d 226, 235, 70 P.2d 183, 112 A.L.R. 407.)

There was also filed an affidavit of defendants' trial attorney, John A. Cost, who stated that he had not been advised as to the conversation between plaintiff John Peterson and defendant H. G. Geltz about the accident, and he did not learn of the existence of John Nunnemaker until subsequent to the trial.

The trial court's ruling must be sustained for two reasons:

First: Whether newly discovered evidence could with reasonable diligence have been discovered and produced at the trial is a question addressed to the sound discretion of the trial court and its action will not be disturbed unless it is clear that such discretion has been abused. (Bliss v. Security-First National Bank, 81 Cal.App.2d 50, 59[10], 183 P.2d 312.) In the instant case it is apparent from the affidavits which were filed that the alleged newly discovered evidence was known to defendant H. G. Geltz prior to the time of the trial and he considered it of no importance for he did not even communicate it to his attorney. In passing upon a similar point our Supreme Court in Converse v. Ferguson, 166 Cal. 1, at page 7, 134 P. 977, at page 979, says: "A party to an action may not excuse the production of evidence relating to a conversation in which he himself participated, on the ground that he had forgotten it until after the trial. Moran v. Abbey, 63 Cal. [56] 57. And the same rule should apply to a case where he forgets to impart his knowledge to his attorney. We find no error in the court's refusal to grant a new trial." On this ground alone the trial court's action in denying a new trial is sustainable.

Second: Whether newly discovered evidence if introduced on a retrial would result in a different conclusion is a question ad-

lars for damage to property of others as a result of any one accident.

"(d) (Minor acting as agent or servant.) The provisions of this section have no application when the minor is acting as the agent or servant of any person."

dressed to the sole discretion of the trial judge, whose action will not be disturbed in the absence of a manifest showing of abuse of discretion. (Bliss v. Security-First National Bank, supra; Moore v. Franchetti, 22 Cal.App.2d 75, 79, 70 P.2d 492.) In the present case Robert Geltz and all the other witnesses testified he was not drunk at the time of the accident, nor during the preceding evening, and that he was driving in a normal manner for several blocks prior to the time of the accident. The trial judge had observed the witnesses and heard the testimony, and having weighed it with the alleged newly discovered evidence, came to the conclusion that a different result would not be reached on a retrial. Clearly such conclusion was supported by the evidence and is binding upon this court.

Rodriguez v. Comstock, 24 Cal. 85 and Delmas v. Martin, 39 Cal. 555, relied on by defendants are not here applicable. In the Rodriguez case defendants were able to show by affidavits which they submitted that they would be able at a new trial to supply testimony to establish a particular material fact. In the present case there is no showing that at a new trial the testimony of John Peterson would be any different, or that the testimony of H. G. Geltz or John Nunnemaker would supply any material proof that at the time of the accident defendant Robert Geltz was under the influence of alcohol. In the Delmas case, which involved an action to recover real property, plaintiff first put in evidence a deed to himself of the property from one Peter Davidson, and when defendants put in evidence an earlier deed from Davidson to a man named Black, plaintiff introduced evidence of an unrecorded deed from Black to himself, dated a few days before the commencement of the action. Plaintiff obtained judgment. In support of a motion for a new trial on the grounds of surprise due to the introduction of the last mentioned deed from Black to plaintiff, defendants submitted an affidavit from Black that he had deeded the property to one LePage before deeding it to plaintiff, and he gave plaintiff a deed at plaintiff's request and without consideration. An affidavit from one defendant was produced to the effect that he had obtained title from LePage, and that plaintiff knew this, and he was prepared to prove such title. Clearly the foregoing evidence indicated that defendants were prepared to offer proof that plaintiff's claim of title was based on a deed derived from Mr. Black, who had already disposed of all interest he had to defendants' predecessors in title. It is evident that in such case upon a retrial it was highly probable a different result would ensue.

[5, 6] Second: *Was there substantial evidence to sustain the trial court's findings of fact that (1) Robert Geltz was not intoxicated at the time of the accident or immediately preceding it; (2) plaintiffs were not guilty of contributory negligence, and (3) plaintiffs did not legally assume the risk of riding with defendant Robert Geltz?*

Yes. (1) All of the witnesses, including Robert Geltz, testified he was not drunk at the time of the accident or during the preceding evening, and that he was driving in a normal fashion for several blocks prior to the scene of accident. This testimony supports the first questioned finding.

(2)–(3) The testimony just recited supports the trial court's finding that plaintiffs were not guilty of contributory negligence and did not assume the risk of riding with defendant Robert Geltz. The law is settled that the mere fact that because parties have been consuming intoxicating liquor together and they subsequently ride in the same automobile, and one is injured through the carelessness of the other, the injured party is not barred from recovering for a companion's negligence. (See Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 501, 55 P.2d 870; also Erickson v. Vogt, 27 Cal. App.2d 77, 83, 80 P.2d 533; McMahon v. Schindler, 38 Cal.App.2d 642, 646, 102 P.2d 378.)

The purported appeals from the orders denying the motions for new trial being non-appealable, are dismissed. The judgments are and each is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

118 Cal.App.2d 777

HENDERSON v. DRAKE.

Civ. 15487.

District Court of Appeal, First District, Division 1, California.

June 30, 1953.

Action for, in first count, face value of draft alleged to have been accepted and delivered in Mexico by defendant, and, in second count, for amount of Mexican judgment obtained by plaintiff upon the same draft, with the then accrued interest added. The Superior Court, City and County of San Francisco, William F. Traverso, J., granted plaintiff's motion for a new trial, and defendant appealed. The District Court of Appeal, Peters, P. J., held that the trial court had been justified in granting the new trial as to both causes of action because of its determination that it had committed error in denying a continuance and on ground of insufficiency of evidence.

Affirmed.

1. Appeal and Error ⇐933(4), 979(2)

On appeal from order granting new trial for insufficiency of evidence, all presumptions are in favor of order and burden on appellant is great, since a clear abuse of discretion must be made to appear.

2. New Trial ⇐72

Where insufficiency of evidence is ground for new trial motion, trial judge has power to pass upon weight of evidence, whether case was tried before court alone or before jury.

3. Appeal and Error ⇐854(6)

Where trial court has specified several grounds for granting new trial motion, appellate court must affirm order granting new trial if any one ground upon which it might have been granted is supported by record.

4. Appeal and Error ⇐1072

An order granting a new trial to a plaintiff cannot be upheld if evidence produced at original trial, plus evidence erroneously excluded, plus proper newly discovered evidence, would not support judgment for plaintiff.

5. New Trial ⇐34

Trial court could properly grant new trial because of improper denial of motion for continuance.

6. Bills and Notes ⇐517

Evidence produced at original trial and offered on motion for new trial would support finding that accepted draft sued upon had been duly executed and delivered.

7. Evidence ⇐81

In absence of proof to contrary, it will be presumed that law of foreign country is same as that of California. Civ.Code, § 3097.

8. Evidence ⇐35

Judicial notice provisions of civil procedure code apply only to sister states and not to foreign countries. Code Civ.Proc. § 1875.

9. Bills and Notes ⇐517

Statutory presumption of delivery when instrument is no longer in possession of party whose signature appears thereon is sufficient to establish a prima facie case as to due execution and delivery in favor of one in possession of negotiable instrument admittedly signed by person whose name appears thereon. Civ.Code, § 3097.

10. Evidence ⇐87

In California, a presumption is evidence, is alone sufficient to create a conflict in evidence, and may support a finding even in face of uncontradicted conflicting testimony produced by adverse party.

11. Evidence ⇐89

Even if statutory presumption of delivery arising when instrument is out of possession of party whose signature appears thereon is not applicable to a document in a foreign language where record shows that signer does not understand foreign language in which document is written, it is incumbent upon party seeking to avoid presumption to show that she did not in fact understand such language. Civ.Code, § 3097.

12. Bills and Notes ⇐518(1)

Evidence produced at original trial and offered on motion for new trial would support finding that there had been adequate consideration for acceptance of draft sued upon. Civ.Code, §§ 1614, 3105; Code Civ. Proc. § 1963, subds. 21, 39.

13. New Trial ⇨71

Where evidence, and inferences and presumptions arising therefrom, are in conflict, trial court is justified in granting new trial on grounds of insufficiency of evidence.

Erskine, Erskine & Tulley, J. Oscar Goldstein, Burton J. Goldstein, San Francisco, for appellant.

H. W. Glensor, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Henry K. Henderson, a lawyer authorized to practice in Mexico, brought this action against defendant, Lily Zellerbach Drake. The complaint contains two counts. The first count was for $17,922 upon an accepted draft alleged to have been made and accepted and delivered in Mexico by defendant. The second count was for $19,259.35 upon a Mexican judgment obtained by plaintiff upon the same draft, with the then accrued interest added. The draft was given to Henderson, it is claimed, in payment for legal services rendered to Mrs. Drake. The cause was tried before the court without a jury, and resulted in a judgment in favor of defendant on both causes of action and on all major issues. Thereafter, the trial court granted plaintiff's motion for a new trial upon all the grounds urged in the motion, including, specifically, the insufficiency of the evidence to sustain the judgment. Defendant appeals from the order.

[1-4] The burden of appellant on such an appeal is great. All presumptions are in favor of the order. It must be sustained unless a clear abuse of discretion is made to appear. Insufficiency of the evidence having been made a ground for granting the motion, the trial judge had the power to pass upon the weight of the evidence. Dorsa v. MacNeil, 112 Cal.App.2d 807, 247 P.2d 577; Norden v. Hartman, 111 Cal. App.2d 751, 245 P.2d 3; In re Estate of Lekos, 109 Cal.App.2d 42, 240 P.2d 387; Ridenour v. Scarcella, 107 Cal.App.2d 554, 237 P.2d 322. This is the rule whether the case was tried before the court alone or before a jury. People v. One 1947 Cadillac, 109 Cal.App.2d 504, 240 P.2d 1035; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 451, 168 P. 1033; Sweeley v. Leake, 87 Cal.App.2d 636, 197 P.2d 401. If the court, as here, has specified several grounds for granting the motion, the appellate court must affirm the order granting the new trial if any one ground upon which it might have been granted is supported by the record. Mercantile Trust Co. v. Sunset etc. Co., 176 Cal. 451, 168 P. 1033. Of course, an order granting a new trial to a plaintiff cannot be upheld if the evidence produced at the original trial, plus the evidence erroneously excluded, plus proper newly discovered evidence, would not support a judgment for the plaintiff. Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86; Henderson v. Braden, 35 Cal.App. 2d 88, 94 P.2d 625; McAtee v. City of Marysville, 111 Cal.App.2d 507, 244 P.2d 936.

Appellant does not controvert these propositions, but claims that the evidence produced in the original trial and that offered on the motion for a new trial would not support a judgment in respondent's favor. An examination of the record demonstrates that the contentions of appellant are unsound. That being so, the order granting the new trial must be affirmed.

The amended complaint alleges, in the first cause of action, that on May 12, 1946, in Mexico City, appellant accepted a sight draft payable to respondent for 87,000 pesos, currently of the value of $17,922 in United States money. Demand and non-payment are averred, as well as a nine per cent Mexican legal interest rate. The second cause of action avers that a Mexican court of general jurisdiction duly rendered a judgment in favor of respondent in an action on the draft on September 28, 1948, for 87,000 pesos plus 6,492 pesos interest and costs. The total value of this judgment is claimed to be $19,259.35, all unpaid. The answer to the first cause of action denies the basic allegations, and contains a denial that the draft was presented for acceptance or accepted as alleged. As affirmative defenses appellant pleaded absence of presentment for payment, lack of protest for nonpayment, and that, if the draft existed, re-

spondent induced appellant to accept it without consideration and by false and fraudulent representations. As to the second cause of action, the answer, among other things, denies the general jurisdiction of the Mexican court, the due rendition of the judgment, and the presentation for acceptance or acceptance of the draft itself. The Mexican judgment is affirmatively attacked on the ground that it is a personal judgment secured without service of process on or notice to appellant, and without appearance by her or by her attorney.

At the inception of the trial, and before, the trial court denied a requested continuance to counsel for respondent made on the ground that it was imperative that Henderson, then in Mexico, be present at the trial.[1] The claimed improper denial of this continuance was made a ground for the motion for a new trial, and the order granting the new trial included error in that ruling as one of its grounds.

The facts in reference to the denial of this requested continuance are as follows: The instant case, and a related case brought by one Cruz against Mrs. Drake[2], were finally set for trial for June 25, 1951, the setting order listing the Cruz case ahead of the Henderson case. On this date the chief counsel for Henderson and Cruz sought to have the Henderson case tried first, stating to the court at that time that he did not need Henderson at the trial to testify.[3] This request was denied by the trial court and the Cruz case proceeded to trial.

On July 2, 1951, in the middle of the Cruz trial, counsel for Henderson stated that he was going to have to request a continuance of the Henderson case in order to permit Henderson to come to San Francisco and testify. Henderson's presence was now necessary, it was claimed, because appellant had offered an amendment to her answer which changed the original issues involved in that by the amendment she charged in detail that the Mexican judgment had been secured against her by the fraud of, and a conspiracy between, Cruz and Henderson. Henderson's counsel pointed out that his client was then traveling in Mexico and could not be reached until he arrived back in Mexico City on July 5th, and even then could not come by air because of a promise made to his family at the time of the death of his brother in an air accident that he would never fly. It was also pointed out that the trial judge wanted to leave on his vacation the following week. For these reasons, Henderson's counsel orally requested a continuance until August or September. The trial judge stated that he would postpone his vacation until July 16th and that the Henderson case would go to trial at the conclusion of the Cruz case. The court, at that time, also granted permission to appellant to file her challenged amendment. Henderson's counsel stated that, because of this order, it was now indispensable to have Henderson present, and that he would try his best to have him at the trial the next week.

Counsel for Henderson felt so strongly that Henderson should be present that he told one of appellant's counsel that he was contemplating dismissing the Henderson case, and then refiling. To forestall this, on July 3, 1951, and while the Cruz case was still on trial, counsel for Drake moved to amend the prayer of the answer to seek affirmative relief. A somewhat protracted argument then took place, resulting in appellant's counsel withdrawing not only her proposed amendment of July 3rd, but also the amendment, already allowed, of July 2nd. The court then ordered the case to trial upon the original answer.

On July 11, 1951, at the conclusion of the trial of the Cruz case but before decision had been rendered in that case, and upon taking up the Henderson case, respondent's counsel made a formal motion

1. It should be mentioned that before respondent requested this continuance, counsel for respondent had consented to two continuances requested by counsel for appellant.

2. The same counsel represented Cruz as here represents Henderson. Mrs. Drake's counsel was the same in both actions.

3. This fact does not appear in the present record but was stipulated to at the oral argument rather than require the augmentation of the record.

for a continuance, supported by affidavits, in order to secure the presence of Henderson, it being claimed that in view of some of the evidence produced in the Cruz case the presence of Henderson was required.

In support of this motion, the attorney for Henderson averred that he had told Henderson it was not necessary for him to attend the trial; that in reliance on that, Henderson had taken a trip to Florida and Vera Cruz; that during the Cruz trial it was charged that Cruz and Henderson entered into a conspiracy to defraud Mrs. Drake; that such charges now made it imperative that Henderson be present; that the attorney had been unable to reach Henderson until July 4th, at which time Henderson promised to leave Mexico City on July 6th and come to San Francisco; that on July 5th Henderson contracted virus pneumonia which made travel impossible. The facts of the sickness and inability to travel were confirmed by the affidavit of a doctor in Mexico City.

Counsel for appellant opposed the motion on several grounds. It was claimed that Henderson was in fact unwilling to come to San Francisco and testify; that he was afraid to submit his case to the same judge who had tried the Cruz case; and that if Cruz went back to Mexico appellant would be unable to secure him to testify. The trial court denied the motion for a continuance and ordered the Henderson case to trial the next day, July 12, 1951.

[5] It is quite apparent that the granting or denial of this continuance was probably within the discretion of the trial court, and that a ruling either way on the motion probably would not be disturbed on an appeal. It is equally apparent that, on the motion for a new trial, after the court had presumably discovered how imperative Henderson's presence was for the presentation of his case, it decided it had abused its discretion in denying the motion and concluded that the motion should have been granted. As already pointed out, this was one of the grounds upon which the motion for a new trial was granted. In view of the ground of insufficiency of the evidence also made part of the order granting, we must assume that the trial court reweighed the evidence on this controverted matter and decided, in effect, to reverse itself. It seems clear that, upon a motion for a new trial on the ground of insufficiency, the trial court, in reviewing the weight of the evidence, may review its factual determination upon which it originally predicated its discretionary order. No reason appears why the trial court on such a motion cannot change its mind as to the weight to be given facts upon which discretionary action is predicated as well as to the weight to be given other evidentiary material. This ground alone supports the trial court's order granting the new trial as to both causes of action, and requires an affirmance.

We turn now to a separate consideration of each cause of action. As to the first cause of action, appellant urges that there was no evidence produced at the trial or offered as newly discovered evidence on the motion for a new trial that would support a judgment for respondent.

The evidence shows that Mrs. Drake, an elderly widow, lived in Mexico for some time prior to 1946. Between 1943 and 1946 she employed Cruz, apparently as a secretary. Cruz claimed, and Mrs. Drake denied, that during most of this period he acted for her under several powers of attorney. Mrs. Drake and Cruz were the sole witnesses to the events that culminated in the execution of the draft that is the basis of this action. Both told vague, poorly recollected and conflicting stories. Cruz, over objection, was permitted to testify as a witness called by respondent under section 2055 of the Code of Civil Procedure on the theory that he had been appointed the managing agent for Mrs. Drake. He testified that he prepared and typed the draft, which is in Spanish, at appellant's request, and, pursuant to their usual custom, left it at her house in Mexico City. He did this after a conversation with Mrs. Drake in which she told him that Henderson was pressing for payment of his bill for legal services; that his bill was excessive; that Cruz should make the draft for about 80,000 pesos, or even "for a million" because she was "not going to pay it anyway." He did not see the draft signed or delivered, but several days later Mrs. Drake

told him that "Mr. Henderson came by and got it." On his own trial Cruz had testified, and such testimony was used as impeachment testimony in the present trial, that he was present when Mrs. Henderson accepted the draft and delivered it to Henderson.

The draft, and a translated copy, were admitted into evidence, without objection. It is in the form of a sight draft drawn on a third party and reads as follows:

"87,000 Pesos

Mexico, D. F. 12th of May, 1946.

"On the 12th of May, 1948, on sight you will make payment by this Sole Exchange Draft in the City of Mexico to the order of Henry K. Henderson the sum of Eighty Seven Thousand Pesos Exactly.....Value received you will deposit in account——— notice of To Mrs. Lily Zellerbach Vda. de Drake.—Marsella 8.—Mexico, D. F.—Yours truly.—(signed) Fernando Garcia.—Scroll.—Accepted: Mexico D. F.—12th of May 1946.—(signed) Mrs. Lily Drake.—"

The identity of Fernando Garcia, the drawer of the draft, was a mystery, both Cruz and Mrs. Drake testifying that they did not know nor had they ever heard of such a man.

The Mexican consul, a lawyer who qualified as an expert on Mexican law, testified for respondent to the effect that the above document was a sight draft of a type frequently used in Mexico, and which, once accepted, became, in legal effect, a promissory note. After acceptance the obligation to pay is binding whether the draft has a drawer or not. He also stated that occasionally such drafts are issued without a drawer.

Mrs. Drake admitted that the signature on the draft was hers, but claimed that her signature had been secured by fraud. She denied that she had ever signed a draft in favor of Henderson for 87,000 pesos, denied that she had ever discussed such a draft with Cruz, or that anyone had ever told her to accept any paper signed by this unknown Garcia, denied that she had ever delivered such a document to Henderson, or that Henderson had ever discussed with her or had ever billed her for any such amount, and denied seeing Henderson after January of 1946. With some reluctance she admitted that Henderson had performed some legal services for her in Mexico, for which she had not paid him, because, she claimed, he had not billed her for the services, and denied that she ever discussed fees with him. She admitted that Henderson as her attorney had negotiated a reduction in the rent of her residence to half its former level. She also testified, very vaguely, about some litigation involving a Mr. Desmond in which Henderson represented her. Desmond had apparently sued Mrs. Drake for slander and she admitted that Henderson had appeared in court on her behalf in this action. She could not recall whether Henderson had induced her to sign the retraction that apparently ended this action. She also admitted that she had sued Desmond to recover some property that she claimed had belonged to her deceased husband, and that Henderson had represented her in that action. She also admitted that Henderson had appeared in the Mexican Labor Court in her behalf growing out of some labor claims. She left Mexico in September, 1946, and has never returned. She admitted that Henderson tried to see her before she left, but she refused to allow him to come into the house.

Without objection a letter dated August 12, 1946, from Mrs. Drake to Henderson was admitted into evidence. It reads as follows:

"Dear Mr. Henderson,

"Words cannot express my appreciation for all you have done for me since Mr. D's death.

"I regret having been so much trouble to you. It seems that I have been constantly pressed by all sorts of trouble in this uncivilized country. You know how these Mexican pigs are. You are too much of a gentleman lawyer, you bother too much about ethics. I have needed a gangster lawyer. I intend to be hard and crooked as you should be. Mr. Stafford and the entire bunch of useless bandits at the American Consulate have been of little help.

"When I go to New York I intend to have my say about the National City Bank bunch also.

"I realize that your fees, including expenses and sums advanced when I needed them are not without reason. I regret having given you a promissory note. If I had the eighty seven thousand pesos I would pay you now. I know that just the inheritance matter alone is worth it.

"The American government is no better than the Mexican. They are both out to steal all they can get.

"It is unfortunate that we had to leave Monte Carlo but as you know it was on account of the war.

"You will hear from me soon and you will get your money as soon as I receive my dividends from my company. I intend to pay even before the note is due. You were right about that Desmond bum. He is a horrible person. I wish I had heeded your advice.

"Sincerely

"Mrs. Frank Drake."

Mrs. Drake admitted that the signature on this letter was hers, but testified that she had never seen the letter before she came to court, and contended that Cruz must have typed the letter above her signature as part of the claimed conspiracy against her.

The expert witness produced by respondent produced and there was introduced into evidence various sections of the Mexican Commerce Code applicable to Mexican commercial transactions. One section provides that in actions on negotiable instruments "only the following exceptions and defenses can be made." Then follows eleven defenses. Lack of consideration is not listed as a defense. Based on this section, respondent argues that lack of consideration for a negotiable instrument is not a defense under Mexican law, even as between the original parties to the instrument. The expert did not directly so testify, nor is there any evidence to the contrary.

In an affidavit filed on the motion for a new trial Henderson set forth many other services rendered Mrs. Drake that he would have testified to had he been present, and he and his attorney averred the discovery of several letters from Mrs. Drake in which she admitted some of these services.

[6–8] On this record appellant first contends that there was a total lack of any evidence that would have supported a finding of the due execution and delivery of the draft. The point is without merit. The draft was in possession of Henderson. It was admittedly signed by appellant. Cruz testified that he prepared the draft at appellant's request, and that she told him that it had been delivered to Henderson. That evidence alone is sufficient to establish a prima facie case of due execution and delivery. Certainly that evidence, plus the presumptions that supplement it, is sufficient. The last sentence of section 3097 of the Civil Code[4] provides: "And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

[9, 10] The presumption found in this section is sufficient to establish a prima facie case as to due execution and delivery in favor of one in possession of a negotiable instrument admittedly signed by the person whose name appears thereon. Hockett v. Pacific States Auxiliary Corp., 218 Cal. 382, 23 P.2d 512; Umbsen v. Crocker First Nat. Bank, 33 Cal.2d 599, 203 P.2d 752. No citation of authority is necessary to establish that in this state a presumption is evidence, is alone sufficient to create a conflict in the evidence, and may support a finding even in the face of uncontradicted conflicting testimony produced by the adverse party.

[11] Appellant seeks to defeat the applicability of the presumption by asserting that it does not apply to a document in a foreign language where the record shows

4. There was no evidence of what the Mexican law on this subject may be. In the absence of proof to the contrary, it will be presumed that the law of a foreign country is the same as that of California. See discussion 5 Cal.Jur. p. 430, § 12. The judicial notice provisions of section 1875 of the Code of Civil Procedure only apply to sister states and not to foreign countries.

the signer did not understand the foreign language in which the document here is written. Even if this limitation on the doctrine did exist (a point we do not decide), certainly it was incumbent upon appellant to show that she did not understand Spanish. Although it is urged in the reply brief of appellant, page 5, that "The record demonstrates that Mrs. Drake did not speak Spanish and that if she did sign this draft she could not have known what she was signing," we have been referred to no evidence produced during the trial to the effect that Mrs. Drake did not understand or could not read Spanish. The only reference made by appellant in support of the above statement is to an affidavit of Mrs. Drake made on motion for a new trial to the effect she was unable to "write" the language. Moreover, the trial court could, on the motion for a new trial, pass upon her credibility, and disbelieve the averment.

[12] Appellant next contends that there was no substantial evidence that would have supported a finding of consideration. This contention is clearly without merit. Appellant herself testified as to some legal services rendered by Henderson. That evidence alone proved consideration. This evidence is supported by the several presumptions of consideration, this being an instrument in writing. §§ 1614 and 3105 of the Civil Code, and § 1963, subds. 21 and 39, of the Code of Civ.Proc.; see Cohen v. Kaufman, 89 Cal.App.2d 463, 200 P.2d 834. It should also be mentioned that on the motion for a new trial Henderson averred that, had he been present, he would have testified to many other legal services, which he enumerated, that he claims were rendered to appellant. Thus there was ample evidence upon which the trial court could have found consideration. This conclusion makes it unnecessary to pass upon respondent's further contention that he proved that under Mexican law lack of consideration could not be urged as a defense to a negotiable instrument. The respondent's proof of this was unsatisfactory. He merely introduced the Commerce Code section above mentioned, but did not have his expert elaborate on the subject or discuss it. That undoubtedly can and will be gone into further on the new trial.

From this discussion it appears that the trial court was justified in granting the new trial as to both causes of action because of its determination that it had committed error in denying the continuance, and, as to the first cause of action, on the ground of insufficiency of the evidence.

It also appears that, in addition to the continuance ground, there were other sound reasons for granting the new trial as to the second cause of action, that is, on the Mexican judgment. It appears that Mrs. Drake did not personally appear, nor was she personally served in that action. Jurisdiction over her was attempted by service upon Cruz, it being contended that he possessed two powers of attorney from Mrs. Drake which, under Mexican law, it was claimed, permitted the obtaining of personal jurisdiction over an absent party by personal service on the possessor of such a power.

Cruz produced both powers. The first dated January 5, 1944, conferred upon Cruz the power to administer Mrs. Drake's property. This power may be disregarded, because, according to plaintiff's expert, it did not confer on the agent the authority to appear and represent Mrs. Drake in litigation. The second power was executed February 6, 1945, before the Mexican Consul General in New York City. This document, in Spanish, confers upon Cruz a general power of attorney and specifically confers the power upon him to act for Mrs. Drake "for litigations and collections," a provision which, according to the expert, permitted its possessor to be served or to appear on behalf of any person executing the power. The expert explained that, under Mexican law, the power of attorney is issued by a notary or consul by having the principal sign a book called the "protocol." A certified copy of that record serves as the power of attorney. Any interested person can secure a copy. As a matter of practice, a person who does not understand Spanish who desires to execute such a power may have it translated, and the notary or consul must explain the general purport of the document to the prin-

cipal. Under Mexican law the power may be revoked, but is presumed valid until the signature of the principal is disproved. The expert also noted that there was no indication that the power had been recorded in Mexico, and stated that if the power were to be used in litigation involving the principal it had to be filed in a court in Mexico.

Appellant testified that she had never conferred any power of attorney on Cruz; that while she remembered signing a document in the New York consulate she did not know it was a power of attorney; and that the document was never translated or explained to her.

The record shows that service was had upon Cruz, who did not appear or defend the action, and that judgment by default was taken against Mrs. Drake.

The Mexican judgment roll was introduced into evidence without objection, accompanied by a translation. The expert on Mexican law produced by respondent gave some confused testimony on the procedural requirements of Mexican law. He testified that under Mexican law the power of attorney had to be presented to and filed in the proceeding before a default, based upon service upon the agent, could be taken against the principal. Respondent claims that such is only one way of proving the existence of the power to accept service, and that the existence of the power can be proved in other ways, as was done here. Moreover, as respondent points out, although there is no express recital in the judgment roll showing that the power was filed with the Mexican court, there is a recital in the judgment that "The Executory Commercial channels has [sic] been complied with."

[13] The evidence on this issue as to whether the judgment would be valid or invalid in Mexico was far from satisfactory. It undoubtedly will be clarified on the new trial. On the present state of the record we can say that the evidence and the inferences and presumptions arising therefrom, are in conflict. This being so, and the order granting the new trial having specified insufficiency of the evidence, the trial court was justified, on this ground, in granting the new trial as to this cause of action.

The order granting the new trial is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

41 Cal.2d 166

In re FERRALL'S ESTATE.

HAMILTON v. BANK OF AMERICA et al.

L. A. 22204.

Supreme Court of California, in Bank.

June 30, 1953.

Proceeding by guardian of incompetent person to compel trustees to exercise discretion vested in them to invade corpus of testamentary trust estate to provide for care, needs and comforts of incompetent person. The Superior Court, Los Angeles County, rendered decision adverse to trustees and contingent remaindermen and they separately appealed. The Supreme Court, Shenk, J., held that in view of testator's intention that no part of trust should pass to incompetent person's husband and that husband should not be relieved of his responsibility for maintenance of incompetent person, the trustees did not abuse their discretion in denying invasion of corpus so long as husband was able to provide for all of incompetent person's needs not met by the income.

Reversed.

Carter and Schauer, JJ., dissented.

Prior opinion, 248 P.2d 108.

1. Wills ⇐684(10)

The sole discretion of trustees to determine amounts to be paid from corpus of trust created by will stating that if income from corpus was insufficient to meet needs of testator's daughter then in their sole discretion the trustees were to pay from corpus amount sufficient to meet daughter's needs was subject to judicial review to determine whether trustees exercised their discretion fraudulently, in bad faith or in an abuse of discretion.

2. Husband and Wife ⇐4

It is duty of husband to support his wife even though she has estate of her own. Civ.Code, § 155.

3. Husband and Wife ⇐4

Where husband seeks affirmative relief on ground that there has been shift in primary obligation of support of wife, it is incumbent upon husband to plead and prove facts which would justify such a shift. Civ.Code, § 155; Code Civ.Proc. § 1981.

4. Trusts ⇐270

Trust must be administered in accordance with intentions of settlor.

5. Trusts ⇐177

Testamentary trustees are presumed to have acted in good faith.

6. Wills ⇐684(10)

Where will disclosed that testator making outright gift of income from testamentary trust to daughter and giving daughter such amounts of corpus as in sole discretion of trustees were required to meet her needs not satisfied by such income, did not intend that any portion of trust should pass to daughter's husband or that husband should be relieved of his responsibility for maintenance of daughter, trustees did not abuse their discretion in denying invasion of corpus so long as husband was able to provide for all of daughter's needs not met by the income. Civ.Code, § 155.

Earle M. Daniels, Burdette J. Daniels, Hallam Mathews and Eugene M. Elson, Los Angeles, for appellants.

Potter, Potter & Rouse and Bernard Potter, Jr., Los Angeles, for respondent.

SHENK, Justice.

Separate appeals have been taken by the trustees and the contingent remaindermen of a testamentary trust from an adverse decision in a proceeding brought by the guardian of the beneficiary, an incompetent person, under Section 1120 of the Probate Code. The proceeding was brought to compel the trustees to exercise the discretion vested in them to invade the corpus of the trust estate to provide for the "care, needs and comforts" of the beneficiary.

John C. Ferrall died testate on October 5, 1940. Surviving were his son, George D. Ferrall, his daughter, Mrs. Faye F. Hamilton, the beneficiary of the trust here involved, and three grandsons, the children of George. The will was duly admitted to probate in Los Angeles County and a decree of distribution entered on February 5, 1943. The decree became final.

The will and the decree of distribution contained the following provisions:

"(d) After payment of any expenses of management of the trust estate and administering this trust, including the compensation for the services of the trustees, all income from the trust which is available for distribution shall be distributed monthly to and for the use and benefit of my daughter, Faye F. Hamilton, during her lifetime, or unless sooner terminated in accordance herewith. That if at any time the income from the corpus of the trust herein created is insufficient to meet the needs of my daughter, Faye F. Hamilton, then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter, Faye F. Hamilton, such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts. * * *

"(f) Anything herein contained to the contrary notwithstanding, this trust shall cease and terminate upon the following conditions:

"(1–a) Provided my daughter, Faye, F. Hamilton, be living, this trust shall terminate upon the death of Alex C. Hamilton, or his divorce from my said daughter, Faye F. Hamilton, in which event all the property held by the trustees herein shall be distributed to my daughter, Faye F. Hamilton, or

"(1–b) Upon the death of my daughter, Faye F. Hamilton, this trust shall cease and terminate and all the property held by the trustees under the terms hereof shall be distributed one-half to my son, George D. Ferrall, and one-half to my three grandchildren, George D. Ferrall, Jr., John Charters Ferrall and Frank M. Ferrall, share and share alike."

At the time of the execution of the will and prior thereto Mrs. Hamilton was afflicted with an incurable disease known as Multiple Sclerosis. Her condition was known to the testator. After his death her condition became worse and in January, 1942, she was placed in a sanitarium. Thereafter she was bedridden most of the time and required medical and nursing care. In 1948 she was declared to be an incompetent and her husband, Alex C. Hamilton, was appointed guardian of her person and estate.

On two previous occasions the trust here involved has been before the courts. In the first action Mrs. Hamilton sought to have the trust declared invalid by reason of the inclusion therein of clause (1–a) above set forth on the ground that it was an invitation for divorce proceedings between herself and her husband, was against public policy and rendered the entire trust provisions of the will void. Her efforts in that proceeding, if successful, would have resulted in the distribution to her of one-half of the estate freed from the trust requirements. She was unsuccessful. Hamilton v. Ferrall, 1949, 92 Cal.App.2d 277, 206 P.2d 663.

In June 1947, Mrs. Hamilton petitioned the court to direct the trustees to make payments to her of $450 per month from income and corpus for her "needs, care and comforts", and to reimburse her from that source for sums theretofore paid by her for that purpose from her personal funds. The trial court in that proceeding found that it was the intention of the trustor to provide for the maintenance of his daughter from corpus; that $400 per month was a reasonable sum to be paid for that purpose, and ordered the trustees to pay to her from that source that sum per month, commencing June 10, 1947, and until further order of the court.

On appeal that judgment was reversed on the ground that before the court could intervene to review and control the action of the trustees in their administration of the trust there must be pleadings, proof and findings of fraud, bad faith or abuse of discretion on their part; and that no such pleading, proof or finding had been made. In re Estate of Ferrall, 1949, 92 Cal.App.2d 712, 207 P.2d 1077.

While the appeal from the latter judgment was pending the guardian caused a demand to be served upon the trustees. The demand stated that the condition of the beneficiary had greatly deteriorated; that she required $475 per month for her

care at the sanitarium; that prior to June, 1947, she had disposed of most of her personal assets; that neither she nor her husband was in a position to defray the costs and expenses necessary to provide for her care, needs, and comfort; demanded that the trustees "exercise" their "discretion" as provided by the terms of the trust to invade the corpus for that purpose; and that to that end they enter upon an immediate investigation of the facts and of the condition and requirements of the beneficiary.

This demand was served on the trustees on January 31, 1949. On February 11, 1949, the trust officer in charge of the Ferrall trust at the Bank of America advised the guardian by letter that the trustees were not in a position to take any action on the demand until the questions involved on the appeal then pending were finally decided by a court of last resort. He requested that Mr. Hamilton furnish data as to the guardianship assets and disbursements from its inception, a statement as to his income, expense and financial status, and a financial statement of Hamilton's Men's Shop, Inc. The stock in that corporation was entirely owned by Mr. Hamilton and was apparently community property. About a year later Mr. Hamilton complied with this request. Thereafter the trustees determined that the beneficiary's expenses were being currently paid at the sanitarium; that she was not in need and there was no duty upon them to invade the corpus; that the primary obligation for her support and maintenance rested on her husband, and that he was paying her bills.

In May, 1950, the trustees announced their refusal to comply with the demand. The present proceeding was then commenced in August, 1950, by the beneficiary, through her guardian, under Section 1120 of the Probate Code by the filing of a Supplemental Petition to have it determined in accordance with the terms of the demand: (1) that the necessary expense for the care of the beneficiary is and has been since January 31, 1949, the sum of $475 per month; (2) that the beneficiary, prior to January 31, 1949, had expended and disposed of all of her personal assets, and that her only income from the trust estate is approximately $50 per month; (3) that by the terms of the will of the decedent the beneficiary is entitled to receive $475 per month from the trust estate and that resort to the corpus of the trust estate to that extent should be had, and (4) that the trustees did exercise their discretion and did refuse to invade the corpus for the beneficiary's needs, but that in so acting the trustees abused their discretion and acted in bad faith.

It was also prayed that the court instruct and direct the trustees to pay to the guardian of the beneficiary the sum of $475 per month "and to resort to and invade the corpus of the trust to such extent as may be necessary or required from January 31, 1949, until further order of the court."

The trustees filed a joint answer to the petition for instructions wherein they alleged among other things that, pursuant to the demand made upon them on behalf of the beneficiary, they had made a full and complete investigation of the matters and things set forth in the demand and that following their investigation they did, on June 15, 1950, exercise their discretion and refused to invade the corpus of the trust estate, for the care and maintenance of the beneficiary. They alleged that in so doing they did not act in bad faith or abuse their discretion, and alleged that they acted in good faith and with reasonable and prudent judgment.

At the trial the following facts were stipulated to be true: that the testator knew that his daughter was afflicted with a progressive disease at the time he executed his will in 1938 and at the time he died in 1940; that in January 1942 the condition of the beneficiary was such that she had to be placed in a sanitarium; that she had required medical and nursing care ever since; that during most of the period since 1942 she was completely incapable, physically and mentally, of handling her own affairs; that the average expense for her needs, including sanitarium charges for room and board, nurses, medical care and supplies, for the period January 31, 1949, to May 15, 1950, was and is $400 a month; that during that period Mrs. Hamilton had an income

of $128.83 per month, including $82.50 from the trust estate, $38.00 from certain insurance, and $8.33 as dividends from certain stock, but that her available income averaged only $79.23 per month because of certain payments for attorneys' fees in connection with prior litigation; that her sole remaining personal assets included $70.70 in cash and 50 shares of Union Oil Company stock; and that the value of the corpus of the trust estate was $27,000. It was shown at the trial that this $27,000 consisted of negotiable and liquid assets.

Because of the issue whether the trust instrument contemplated that the beneficiary should be in actual need before the trustees were required to invade the corpus, evidence in the present proceeding was introduced as to possible community property earnings or community property interest of the beneficiary and her husband. The court did not make a finding that the husband had or had not ability to pay. It did find that during 1949 he had received $12,315.70 from Hamilton's Men's Shop, Inc., and that this sum had been returned as salary in the federal and state tax returns of Mr. and Mrs. Hamilton for that year.

The court construed the language of the trust instrument to indicate the testator's intention that the only condition imposed by him on the invasion of the corpus of the trust was whether the income from the corpus was "insufficient to meet the needs of my daughter." The court found that the trustees had decided that the income from the corpus was insufficient for those purposes. It also found that there was no express or implied requirement in the trust that the trustees consider either the individual income of the beneficiary, her personal assets or her other resources in determining her needs; and that in refusing to invade the corpus for the purpose of paying any portion of the cost or expense of providing for the needs, care or comfort the trustees had abused their discretion; that they did not act in a state of mind in which it was contemplated they would act by the testator; and that they had acted beyond the bounds of a reasonable judgment.

Judgment was entered ordering the trustees to determine, in the exercise of their discretion, the amounts necessary and sufficient, commencing January 31, 1949, which was the date of the demand, to meet, provide and pay for the necessary needs, care and comfort of the beneficiary; to determine the amount of net income distributed or distributable to her; and without regard to or consideration of her separate property or income or her interest in the community property or other sources of income, to invade the corpus and pay therefrom amounts representing the difference between the net income and the amounts they found necessary to provide for her proper care, needs and comfort. The trustees and the remaindermen filed separate appeals.

[1] The contentions of the appellants are, first, that the decision of the trial court is contrary to the law established in the prior litigation, and secondly, that the evidence is insufficient to support the finding that the trustees were guilty of an abuse of discretion in refusing to invade the corpus as required by the demand served upon them.

As to the first point the appellants rely especially on the language of the court in Re Estate of Ferrall, supra, 92 Cal.App.2d 712, at pages 715–716, 207 P.2d 1077, at page 1079 where it is said: "As above shown, the decree creating the trust provided that 'if at any time the income from the corpus * * * is insufficient to meet the needs of my daughter, Faye F. Hamilton, then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter, Faye F. Hamilton, such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts.' Under that provision a court is not deprived of power to determine the fact as to whether the income from the corpus is insufficient to meet the needs of Mrs. Hamilton. By that provision, however, the matter of determining the amounts to be paid from the corpus, in the event that the income is insufficient to meet her needs, is left to the sole discretion of the trustees. Section 2269 of the Civil Code provides: 'A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be con-

trolled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.' An absolute discretion, as to the amounts to be paid from the corpus, was conferred by the trust provisions herein. An absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on considerations going to the soundness of the discretion so exercised."

It is therefore contended that it has been decided that it is within the "sole discretion of the trustees" to determine the amounts to be paid from corpus and that the determination of the trustees is binding on this appeal.

There is nothing in the former decision which would imply that the "sole discretion" vested in and exercised by the trustees in this case is beyond court review. If it were exercised fraudulently, in bad faith or in an abuse of discretion, it is subject to such review. Whether good faith has been exercised, or whether fraud, bad faith or an abuse of discretion has been committed is always subject to consideration by the court upon appropriate allegations and proof. In re Estate of Marre, 18 Cal.2d 184, 114 P.2d 586; In re Estate of Heard, 107 Cal.App.2d 225, 236 P.2d 810, 27 A.L.R.2d 1313; In re Estate of Smith, 23 Cal.App.2d 383, 73 P.2d 239. The Restatement of Trusts states the general rule that "It is against public policy to permit the settlor to relieve the trustee of all accountability to the courts." (Section 187, Comment k.) The appellants contend, however, that in the present case the evidence establishes that as a matter of law the trustees exercised their discretion in good faith and that they are not otherwise accountable for their actions.

The determination whether the evidence is sufficient to support the finding of the trial court that the trustees have been guilty of an abuse of discretion requires an inquiry into the intentions of the settlor in providing for his daughter as he did, and an examination of the conduct of the trustees in the administration of the trust.

[2] It was unquestionably the intention of the settlor that one-half of his estate be set aside in trust for the benefit of his daughter during her lifetime. He made an outright gift to her of the income from the trust but the gift to her of the corpus was conditional. Had he intended a gift of corpus as well as income he could have done as he did with reference to his son and grandchildren to whom bequests were made without the imposition of a trust. It is beyond question that the settlor intended to provide, and did provide, that no portion of the trust estate should pass to the hands of Alex C. Hamilton, the beneficiary's husband. This is readily apparent from the terms of clause (1–a) of Section II of the will wherein the settlor provided that if his daughter be living the trust should terminate upon the death of her husband or his divorce from her, in either of which events "all the property held by the trustees herein shall be distributed to my daughter." To make certain that Mr. Hamilton should share no interest in the trust estate, clause (1–b) followed providing that "Upon the death of my daughter, Faye F. Hamilton, this trust shall cease and terminate and the property held by the trustees under the terms hereof shall be distributed one-half to my son George D. Ferrall, and one-half to my three grandchildren", sons of George, share and share alike. Under the terms of the trust it was clearly intended that Alex C. Hamilton should not obtain an interest in the corpus and also that the only contingencies upon which Faye Hamilton would be entitled to a gift of the entire corpus were those by which her marriage to Alex C. Hamilton were terminated. By no process of reasoning or construction of the trust instrument could it properly be concluded that the settlor intended that during the life of his daughter and the continuance of her marriage Mr. Hamilton should be relieved of the responsibility for the maintenance of his wife. This primary responsibility is provided for in section 155 of the Civil Code as follows: "Husband and wife contract towards each other obligations of mutual respect, fidelity, and support." It is the duty of the husband to support his wife even though she has an estate of her own. In re Guardianship of Thrasher, 105 Cal.App.2d 768, 776, 234 P. 2d 230; Davis v. Davis, 65 Cal.App. 499, 501, 224 P. 478; Shebley v. Peters, 53 Cal.

App. 288, 200 P. 364; 41 C.J.S., Husband and Wife, § 15, page 404.

[3] The respondent does not question the authorities to the effect that it is the duty of the husband to provide support for his wife even though she may have an estate of her own, or that the court in guardianship matters may refuse to allow payment for the care of an incompetent wife from guardianship funds. But he takes the position that ability to pay on the part of the husband must be shown and, apparently, that the showing of ability to pay devolves upon the party who insists upon the discharge of the husband's legal obligation. But where, as here, affirmative relief is sought on the ground that there has been a shift in the primary obligation of support, it is incumbent upon the one seeking relief to plead and prove facts which would justify such a shift, as an element of his cause of action. Code of Civil Procedure, § 1981; see also Guardianship of Thrasher, supra, 105 Cal.App.2d 768, 234 P.2d 230.

The obvious intent of clauses (1–a) and (1–b) was to preserve the corpus of the trust intact for distribution to the remaindermen, all lineal descendants of the settlor, except in the event that the income was insufficient to meet the needs of Faye Hamilton. In construing this latter provision the clear and steadfast intent to withhold benefit of the corpus from Mr. Hamilton must be taken into consideration. Had the settlor intended "needs" to be the total amount required to maintain and support his daughter, Mr. Hamilton would have benefitted to the extent of his relief from his primary, legal obligation to support her to the extent of his ability, and there is no showing or finding that he was not able to do so. Obviously, money for actual needs was intended to be taken from the corpus. Since all requirements had been and were being supplied from other sources, namely, by or through Mr. Hamilton, an invasion of corpus for reimbursement to him or the guardianship estate would be directly contrary to the intentions of the settlor and greatly to the prejudice of the remaindermen whose interests the trustees were also bound to safeguard.

Courts in other states have construed provisions similar to those in the present case. In Matter of Martin's Will, 269 N.Y. 305, 199 N.E. 491, 492, a will provided for the outright gift of the income of a testamentary trust with a conditional gift of the principal to the beneficiary "as she may require for her care, support and comfort, during her natural life." The court concluded that the corpus could be invaded "only in the event that the income from the trust fund supplemented by her independent income shall be insufficient to provide for her proper care, support, and comfort." In a similar factual situation the Supreme Court of Rhode Island held that the testator did not intend that the trustees should invade the principal so long as the income and the available resources of the life tenants were sufficient for their comfortable support. Peckham v. Newton, 15 R.I. 321, 4 A. 758. In summarizing these and the holdings in other cases it was stated in 2 A.L.R.2d 1432: "By the weight of authority, unless the language of the trust instrument affirmatively reveals an intention to make a gift of the stated benefaction regardless of the beneficiary's other means, the trustee should consider such other means in exercising his discretion to disburse the principal. * * *"

[4] When we pass to the consideration of the duty of the trustees in the administration of the trust and their conduct in compliance therewith, there is no divergence of authority to the effect that the trust must be administered in accordance with the intentions of the settlor. The rule is well stated in Section 187, comment J, Restatement of Trusts, p. 488, as follows: "The extent of the discretion conferred upon the trustees depends primarily upon the manifestation of intention of the settlor * * * The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment." Even though it is provided that the trustees shall have absolute or unlimited or uncontrolled discretion, the

court may interpose if the trustee does not act "in a state of mind in which it was contemplated by the settlor that he would act." (comment j, p. 489.)

[5, 6] As to the question whether the trustees here involved acted "in a state of mind in which it was contemplated by the settlor" the evidence shows that the trustees concluded that the settlor intended that the beneficiary's needs be her actual needs and that they took into consideration Mr. Hamilton's primary obligation and ability to provide for them. The trustees are entitled to the presumption that they acted in good faith. In re Estate of Canfield, 80 Cal.App.2d 443, 451, 181 P.2d 732. They contend that there is no evidence to the contrary and that the record affirmatively shows as a matter of law that their conduct was proper. This conclusion must be sustained. On February 11, 1949, eleven days after the "notice and demand" that the corpus of the trust be invaded was served upon them, they requested information from Mr. Hamilton to establish the claim made by him as guardian. While awaiting this information they made an independent investigation and concluded that the obligations of the beneficiary were being met and that she was receiving adequate medical care and treatment. It was more than a year after their request for information that Mr. Hamilton supplied financial data. There was no showing by him that any medical bills remained unpaid or that he would be unable to provide his wife with medical care and treatment in the future. For ought that appears in the record Mr. Hamilton provided for his wife's maintenance from the time of their marriage until she became ill. And there is positive and undisputed proof that the costs and expenses of his wife's care and maintenance after she became ill were paid. Despite the request of the trustees, Mr. Hamilton failed to substantiate the allegations of the "notice and demand." The trustees were justified in concluding that the daughter was not in actual need and that the corpus of the trust should not be disbursed in payment of her expenses. Under these circumstances the conclusion is inescapable that on the facts furnished to them or within their knowledge from their own investigation the trustees were not guilty of an abuse of discretion in their refusal to invade the corpus for the purpose demanded. They made a reasonable investigation and did all that was required of them as fiduciaries to carry out the terms of the trust.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The more persuasive authority holds that where words such as those here used are involved, the amount required to be paid to the beneficiary of the trust is computed without consideration of his other sources of income and certainly not the resources of the husband of the beneficiary here. It is said: "It is a question of interpretation whether the beneficiary is entitled to support out of the trust fund even though he has other resources. Where the trustee is directed to pay to the beneficiary or to apply for him so much as is necessary for his maintenance or support, *the inference is that the settlor intended that he should receive his support from the trust estate, even though he might have other resources.*" (Scott on Trusts, § 128.4; emphasis added.) There being such an inference, the probate court could and did draw it and hence there is sufficient evidence to support its order.

It is not to be supposed that a testator would intend that a beneficiary generally, or intended here that her husband should lead a useless, idle life thus producing no independent income. That, however, is precisely the result if consideration must be given to independent resources. The natural tendency will be for the beneficiary or her husband, to eschew lucrative endeavor because every penny earned will be a penny lost as beneficiary of the trust. At least it is a reasonable inference that the testator did not have such an intention. As the court said in the leading case of Holden v. Strong, 116 N.Y. 471, 22 N.E. 960, 961:

"We do not understand that, in order to receive the benefit of the provisions of the will, it is necessary for him [beneficiary] to remain idle, and refrain from all personal exertion; neither does the fact that he is frugal and saving, and has accumulated a fund which he has deposited in the bank, deprive him of the right to the support provided for him. The trial court properly held that the trustee was to exercise a sound judgment and discretion as to whether the money necessary for the support and maintenance of the plaintiff should be delivered to him, and he allowed to procure it, or whether the board, clothing, etc., should be purchased and provided for him by the trustee." That case was cited with approval and followed in In re Clark's Will, 280 N.Y. 155, 19 N.E.2d 1001, at page 1003, where it was said: "The will clearly provides for payment by the trustee * * * of the entire income from the trust and of so much of the principal in addition thereto as, in the *sole judgment of the trustee,* shall by it be deemed necessary for every comfort and support of the widow. * * * In conformity to that purpose and intent, the trustee is required to furnish every comfort and support for the widow which it may deem in a sound discretion necessary out of income and, if required, out of the corpus, even to the extent of exhausting the entire corpus of the trust, *without taking into consideration or account the personal income of the beneficiary from any other source.* Holden v. Strong, 116 N.Y. 471, 22 N.E. 960; Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237." (Emphasis added.) The Clark case was decided (1939) six years after In re Martin's Will, 1933, 269 N.Y. 305, 199 N.E. 491, relied upon by the majority, and the Clark case does not even mention the Martin case.

To the same effect as the Clark case and the quotation from Scott on Trusts, see Cross v. Pharr, 215 Ark. 463, 221 S.W.2d 24; Hoops v. Stephan, 131 Conn. 138, 38 A.2d 588; In re Worman's Estate, 231 Iowa 1351, 4 N.W.2d 373; Pearce v. Marcellus, 137 N.J.Eq. 599, 45 A.2d 889; In re Leonard's Estate, 115 Vt. 440, 63 A.2d 179; and cases collected, Scott on Trusts, § 128.4; Lyter v. Vestal, 355 Mo. 457, 196 S.W.2d 769, 2 A.L.R.2d 1383, 1431.

Finally, the same rule is stated: "It is a question of interpretation whether the beneficiary is entitled to support out of the trust fund even though he has other resources. *The inference is that he is so entitled.*" (Rest.Trusts, § 128e; emphasis added.)

I would, therefore, affirm the judgment.

SCHAUER, Justice (dissenting).

I concur in the views expressed by Justice CARTER. It further appears to me that the death of the beneficiary, Mrs. Hamilton, provides no ground for avoidance of payment to her estate of the sums which she was entitled to receive while she was living. (See Bd. of Soc. Welfare v. County of L. A. (1945), 27 Cal.2d 81, 86, 88–89, 162 P.2d 630.) I, too, would affirm the judgment.



41 Cal.2d 216

PEOPLE v. HARRISON.

Cr. 5424.

Supreme Court of California, in Bank.

July 3, 1953.

The defendant was convicted of first degree murder. The Superior Court, Riverside County, John G. Gabbert, J., entered judgment and defendant appealed. The Supreme Court, Schauer, J., held that where there was undisputed prima facie showing that defendant's confession made at hospital by defendant who had slashed his throat and wrists was voluntary, confession was admissible without proof by prosecution of negative fact that defendant was not under influence of drugs when he made confession.

Affirmed.

1. Criminal Law ⇐531(3)

Where there was undisputed prima facie showing that confession made at hospital by defendant who had slashed his throat and wrists was voluntary, confession was admissible without proof by prosecution of negative fact that defendant was

not under influence of drugs when he made confession.

2. Criminal Law ⇐1183

That defendant convicted of first degree murder was illiterate negro who had spent most of life in South and much time in prison, that defendant may have been intoxicated at time of offense, and that defendant upon being apprehended after unsuccessful suicide attempt freely cooperated with officers by describing offense and going over scene of crime and his escape were not grounds for reducing degree of crime or altering death penalty fixed by trial court. Pen.Code, § 1260.

Maurice C. Sherrill, Public Defender, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Alan R. Woodard, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

This is an appeal from a judgment of conviction of first degree murder. Trial by jury was waived, defendant introduced no evidence, and there was no motion for new trial. The prosecution evidence shows without dispute that defendant murdered Mrs. Theda Campbell in an attempt to perpetrate robbery. Defendant's contentions are (1) that the trial court erroneously admitted in evidence a confession which was not shown to have been voluntary; (2) that the death penalty is excessively harsh and the judgment should be modified by this court in the exercise of the power to "reduce * * * the punishment imposed" (Pen.Code, § 1260). We have concluded that neither contention has merit.

On August 10, 1952, one Karl Berg hired defendant to work in Berg's salvage yard in Indio. Defendant worked there until the afternoon of August 31. On that afternoon he "did a few chores" for Mrs. Campbell. At about 7 p. m. defendant returned to the salvage yard and asked to borrow some money. Berg observed that defendant had been drinking. He refused to loan defendant money, but paid him one dollar which he owed him. Thereafter defendant went to Mrs. Campbell's house and asked her for money. She refused the request. Defendant produced a knife and inflicted two fatal lacerations on the neck, two deep lacerations on the chest, and numerous superficial lacerations; also, Mrs. Campbell's ribs were broken. Defendant ransacked Mrs. Campbell's house but found nothing of value. (One of the officers who thereafter searched the house testified that he found her purse, containing money, but that the house was such a "welter of confusion" that he did not discover the purse on his first examination of the premises.)

Defendant fled to Arizona, where he was found by the California police on September 12, 1952. He struggled with the officers who attempted to arrest him and escaped from custody. They found him the next morning lying in a field; he had slashed his throat and both his wrists. The officers took him to the hospital. In the ambulance defendant, who could barely speak, admitted that he had done some work for Mrs. Campbell and stated that he cut his throat because "he wanted to die for he knew what he was going back for."

[1] The next morning, September 14, the officers questioned defendant in the Arizona hospital. The evidence is undisputed that he made a statement without duress or offer of immunity or reward; that his mental condition appeared to the officers to be good and that he answered questions intelligently; and that he was questioned only with permission of the hospital attendants. The resulting confession was admitted in evidence over objection of defense counsel that it had not been shown that at the time defendant was not under the influence of drugs and was in a mental and physical condition to make a rational and coherent statement.

Thereafter defendant made other confessions which were to the same effect as the confession of September 14 and the above summarized evidence. Also, defendant was connected with the crime by various items of real evidence (bloody footprints, hidden bloody clothing to which

he directed the officers). His confessions include express admissions that he went to Mrs. Campbell's house for the purpose of obtaining money.

The prosecution was not required to prove the negative fact that defendant was not under the influence of drugs when he made the confession of September 14. There was a prima facie showing that the confession was voluntary, and this showing was not disputed. "Any evidence tending to show that appellant may have been in pain when he gave the statements at the hospital did not affect their admissibility but only the jury's [here, the trial court's] consideration of the weight and effect to be given them." (People v. Amaya (1952), 40 Cal.2d 70, 76, 251 P.2d 324.

[2] The argument of defendant's counsel as to reduction of punishment is based on matters which were called to the attention of the trial court before he passed sentence; i. e., that defendant is an illiterate negro who had spent most of his life in the South, much of it in prison; that the evidence tends to show that he was intoxicated at the time of the offense; and that defendant, once he was apprehended after his unsuccessful suicide attempt, freely cooperated with the officers by describing the offense and going over the scene of the crime and his escape with them. These circumstances are not ground for reducing the degree of the crime or altering the character of the punishment. The majority of this court have taken the view that "When, as in this case, the trial court is vested with discretion to determine the punishment (Pen.Code, § 190), and there has been no error, this court has no power to substitute its judgment for that of the trial court." (People v. Odle (1951), 37 Cal.2d 52, 58, 230 P.2d 345, 349; see also People v. Thomas (1951), 37 Cal.2d 74, 78, 230 P.2d 351; People v. Dessauer (1952), 38 Cal.2d 547, 555, 241 P.2d 238.)

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

118 Cal.App.2d 744

PEOPLE v. HYDEN.

Cr. 782.

District Court of Appeal, Fourth District, California.

June 26, 1953.

Prosecution for possession of morphine. The Superior Court of San Diego County dismissed action, and the People appealed. The District Court of Appeal, Barnard, P. J., held that question whether the two milligrams of morphine involved were sufficient to be considered as being of any significance not only required evidence but was matter of defense, and, therefore, holding that, as a matter of law, such amount of morphine was not sufficient to sustain conviction was error.

Judgment reversed and cause remanded.

1. Criminal Law ⇐238

Evidence at preliminary hearing upon charge of possession of morphine was sufficient to show probable cause. Health and Safety Code, § 11500; Penal Code, §§ 995, 999a.

2. Criminal Law ⇐304(1)

In prosecution for possession of morphine, questions concerning amount of morphine which would be sufficient to be considered as being of significance or relative effect of two milligrams of morphine were not matters of which the trial judge could properly take judicial notice. Health and Safety Code, § 11500.

3. Poisons ⇐9

In prosecution for possession of morphine, question whether the two milligrams of morphine involved were sufficient to be considered as being of any significance not only required evidence but was matter of defense, and, therefore holding that, as a matter of law, such amount of morphine was not sufficient to sustain conviction was error. Health and Safety Code, § 11500; Penal Code, §§ 995, 999a.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., and George McClena-

han, Deputy Dist. Atty., San Diego, for appellant.

No appearance for respondent.

BARNARD, Presiding Justice.

The People have appealed from an order dismissing this action. The defendant was charged by information with the possession of a narcotic, morphine, in violation of section 11500 of the Health and Safety Code. While a substitution of attorneys for the defendant was filed in this court, no brief on his behalf was filed.

At the preliminary examination there was evidence that about 1:00 o'clock on the morning of September 6, 1952, a waitress in a restaurant found a brown paper package on the seat of a booth where the defendant had been sitting. The defendant, and three other youths who were with him, had just left the booth when the waitress found the package. She opened the package which contained an eyedropper, a blackened spoon and two syringes. She called the police, who came in a few minutes and talked to the boys who were still around their car, which had not left the premises. The officers turned over this package with its contents to a chemist, who testified that from the articles in the package he recovered two milligrams of morphine. A bottle containing this morphine, except that portion used up in making tests, was introduced in evidence. There was sufficient evidence that these articles, which contained the morphine, had been in the possession of this defendant and he was held to answer.

An information was filed in the superior court, after which the defendant moved, under section 995 of the Penal Code, to have the information set aside on the ground that he had been committed without reasonable or probable cause. At the hearing the defendant's counsel contended that the evidence was insufficient to show possession at the time defendant was apprehended, and argued "that he no longer possessed, that he abandoned it." This motion was denied and the case was set for trial.

The case came on for trial before another judge. At the outset, the court asked the district attorney to state what he expected to prove. The district attorney stated that he expected to prove all the material allegations of the complaint, including the fact that the defendant did willfully, unlawfully and feloniously, on September 6, 1952, possess a certain narcotic, to wit, morphine. The court then asked "What quantity of morphine do you expect to prove that the defendant possessed at the time here involved?" The district attorney said that he expected to prove a sufficient quantity as defined in the Health and Safety Code. The court asked him to be more specific as to the amount he expected to prove, and asked if the chemist had testified at the preliminary hearing as to the quantity of morphine found. When told that the chemist had testified that he had recovered two milligrams of morphine from these articles, the court asked whether the district attorney expected the chemist's testimony to be any different at the trial, or whether he expected to offer "any additional proof as to the quantity involved in addition to what was produced at the preliminary hearing?" Receiving a negative reply the court asked to hear from the attorney for the defendant, who moved that the case be dismissed on the ground that the evidence would be insufficient, assuming that the People proved what the district attorney said they would. He then argued that the amount of morphine involved was so infinitesimally small that it would not support a conviction. After some discussion, the court asked the attorney for the defendant whether he also based his motion upon the ground that the defendant had not been legally committed by the magistrate, and upon the ground that the defendant had been committed without reasonable or probable cause. Receiving an affirmative reply to both questions the court granted the motion, quoting from People v. Cole, 113 Cal.App.2d 253, 248 P.2d 141, and saying that what was there said applies with equal force to this case, and that the amount of two milligrams "is certainly insignificant." A written order of dismissal was filed, and this appeal followed.

[1] The evidence at the preliminary hearing was sufficient to show probable cause, and a motion to set aside the infor-

mation on that ground had been denied. The statutory remedy in that situation is found in section 999a, Penal Code, providing that a petition for writ of prohibition may then be filed, which must be done within 15 days after denial of the motion. Whether or not such a motion may be renewed after the expiration of this 15-day period, and after a plea has been entered, need not be here decided.

[2] When the motion leading to the order appealed from was made, the sufficiency of the evidence with respect to the matter of possession was not considered. The motion was actually based and granted on the sole ground that the amount of morphine found was so insignificant, under the ruling in the Cole case, that it would not support a judgment against the defendant. Not only was the decision in the Cole case based upon several considerations other than the insignificant fragments found in the defendant's car, but there is considerable difference between morphine and marijuana with respect to quantities and effects. There was no evidence as to the relative effect of two milligrams of morphine, or as to what amount of morphine would be sufficient to be considered of any significance, and it would seem that that matter is not one concerning which judicial notice could properly be taken.

[3] Whether or not that quantity was sufficient not only required evidence, but was a matter of defense. Moreover, other elements here appeared which would materially affect the significance to be attributed to even a small amount of morphine. The evidence at the preliminary examination was sufficient to show that the defendant had been in possession of such morphine as was here found, and it also showed that this morphine was recovered from the articles found in the package, justifying the inference that it was knowingly possessed and that these articles had been used in the manner in which morphine is usually administered to human beings. There was also evidence that one of the officers examined the defendant on September 8, 1952, and found that he had needle marks on his inner arm. The officer then asked the defendant how long he had been using narcotics, and he replied that he had not been using them long. When asked "When he had his last shot" the defendant stated he had had the last one on September 4, 1952. When the amount of morphine is considered in connection with the articles in which it was found, and with the admission of the defendant that he was using narcotics, it cannot be said that the statements in the Cole case, with respect to the small quantity of narcotics there found, are in any way controlling under such circumstances as here appear. It was error to hold, as a matter of law, that the amount of morphine found, standing alone, was conclusive. The evidence on both sides should have been received, after which it could have been determined whether or not it was sufficient to sustain a conviction.

The judgment is reversed, and the cause remanded.

GRIFFIN and MUSSELL, JJ., concur.



118 Cal.App.2d 71

PEOPLE v. ADAMSON.

Civ. 8220.

District Court of Appeal, Third District, California.

June 26, 1953.

Condemnation proceeding by State for purpose of acquiring strip of defendant's land for highway purposes. The Superior Court, Placer County, Lowell L. Sparks, J., entered judgment from which defendant appealed. The District Court of Appeal, Third District, Schottky, J., held that when defendant had by cross-examination attacked credibility of witness of State on ground of bias in that such witness, while a member of County Planning Commission, had suggested that defendant's proposed subdivision map be sent to State Division of Highways, State could properly introduce in rebuttal of such impeaching testimony a letter to County Board

of Supervisors requesting submission of such information to Division of Highways because of contemplated alignment project, notwithstanding absence of proof of authentication, since objective of letter was to show motivation for such conduct on part of witness.

Judgment and order denying new trial affirmed.

1. Witnesses ⇐376

In eminent domain action by State for purpose of acquiring strip of defendant's land for highway purposes, wherein defendant had on cross-examination attacked credibility of State's witness by attempting to show bias, in that such witness, while member of County Planning Commission, had suggested that map of defendant's proposed subdivision be sent to State Division of Highways, admission, as rebuttal evidence, of a letter to County Board of Supervisors containing request that Division of Highways be advised of any planned development in such area, was proper. Code Civ.Proc. § 1870, subd. 16.

2. Witnesses ⇐410

If a party introduces evidence which tends to impeach a witness of his opponent, the latter may in rebuttal offer evidence to support his witness' credibility. Code Civ. Proc. § 1870, subd. 16.

3. Evidence ⇐370(1)

The authentication of a document is not a prerequisite to its admission in evidence when the execution of it is not in issue, but only the fact of the existence of a document of such tenor.

4. Evidence ⇐370(4)

In eminent domain action by State to acquire land for highway purposes, wherein defendant sought to impeach credibility of witness for State by showing certain conduct while that witness was member of a county planning commission, letter, the execution of which was not in issue, introduced by State for purpose of showing motivation for such conduct on part of witness need not have been authenticated, since genuineness of instrument was irrelevant on purpose for which letter was offered.

5. Eminent Domain ⇐221

In action by State to condemn strip of defendant's property for highway purposes, wherein there was conflicting testimony as to value of the strip to be taken, the weight to be given to the testimony of the various witnesses was matter for the jury.

6. Eminent Domain ⇐222(5)

In action by State to condemn strip of defendant's property for highway purposes, wherein it appeared that defendant's property had access to certain existing roads and that State contemplated the construction of a freeway which would be connected to outer highway, and that point of such connection was shown on State's map of proposed construction, possibility that point of connection might thereafter be changed was conjectural and speculative, and defendant was not entitled to instruction requiring jury to consider, in assessing damages, the discretionary right in State agency to thereafter change the point of connection between the outer highway and the freeway.

7. Eminent Domain ⇐130

Although the assessment of damages in an eminent domain proceeding must include all damages, present and prospective, that might be inflicted by the condemning authority, such assessment may not be based on remote, conjectural or speculative damages.

8. Eminent Domain ⇐271

Damages not necessarily included in the issues in a condemnation action may be recovered in a subsequent action, including damages for a change in an improvement, such as a street, which has actually been constructed.

9. Eminent Domain ⇐262(5)

In action by State to condemn strip of defendant's land for highway purposes, modification of defendant's proposed instruction on damages for severance, by elimination of reference to the damages accruing from use of the improvement in manner proposed by State, was not prejudicial error, when subsequent instructions fully covered the question of proposed use and informed jury that such element might be taken into consideration in assessing damages.

10. Trial ⇐260(1)

A court is not required to give all instructions requested by the parties, but is only required to instruct the jury fully and fairly as to the law applicable to the case.

11. Eminent Domain ⇐221

In action by State to condemn strip of defendant's land for highway purposes, wherein there was great disparity between opinions as to value as given by witnesses for State and those for defendant, such conflicting testimony presented an issue of fact for determination by jury.

Macbride & Gray, Sacramento, for appellant.

Robert E. Reed, Harry S. Fenton, Warren P. Marsden, Russell S. Munro, Sacramento, for respondent.

SCHOTTKY, Justice.

Respondent filed an action in eminent domain for the purpose of acquiring for a state highway and, in particular, a freeway, 8.02 acres of unimproved land and certain abutter's rights of access owned by appellant. The property sought to be condemned is located easterly of Roseville, outside of the city limits, and will accommodate the new freeway which will bypass that city. The 8.02 acres of land being condemned is a part of a larger parcel of land consisting of more than 280 acres which appellant had purchased in 1945 for $17,000, including a six-room house, barn and other buildings. No buildings are located on the portion of said land being condemned, and at the time of the trial the portion of the property being condemned and the remaining property of appellant were being used for ranch purposes.

At the time the condemnation action was filed appellant's property enjoyed access to Sunrise Avenue and to Rocky Ridge Road, only. The proposed freeway is on an entirely new alignment and had not been constructed at the time of the trial. The rights of access acquired in the condemnation action were appellant's existing rights of access to Rocky Ridge Road and Sunrise Avenue.

The case was tried before a jury. J. N. Stanley, a registered civil engineer employed by respondent, testified as to the extent of the property being taken and the nature of the construction of the improvement in the manner proposed by respondent. Maps showing the general route of the new freeway, the entire ownership of appellant at this location, and the planned construction of the improvement by respondent, were explained by Mr. Stanley, who was cross-examined thereon by counsel for appellant, and the maps were introduced into evidence.

Three valuation witnesses testified on behalf of appellant. Mr. Leineke testified that the value of the part taken was $16,040, the damage to the remainder was $22,046, or a total of $38,086. Mr. Festerson testified that the value of the part taken was $20,050, the damage to the remainder was $17,125, or a total of $37,175. Mr. Minard testified that the value of the part taken was $20,000, the damage to the remainder was $17,000, or a total of $37,000. Appellant herself, as the owner of the property, also testified as to the value of her property.

Three valuation witnesses testified on behalf of respondent. Mr. Pugh testified that the value of the part taken was $2,885, the damage to the remainder was $2,012, or a total of $4,897. Mr. Royer testified that the value of the part taken was $2,807, the damage to the remainder was $1,799, or a total of $4,606. Mr. Nagel testified that the value of the part taken was $2,406, the damage to the remainder was $1,350, or a total of $3,756. Both the judge who presided at the trial and the jury viewed the property being condemned and appellant's remaining property; and the nature of the construction on the ground was by stipulation pointed out to them by respondent's engineering witness, Mr. Stanley.

The jury returned a verdict awarding appellant $2,807 for the 8.02 acres of land condemned, and $2,012 for damage to the remainder of appellant's property by reason of its severance from the part sought to be condemned and the construction of the improvement in the manner proposed, or a total award of $4,819. Judgment was en-

tered in accordance with this verdict, and thereafter appellant's motion for a new trial was denied by the trial court. Appellant has appealed from the judgment and from the order denying her motion for a new trial.

Appellant contends that the judgment and order should be reversed and urges as grounds for reversal that the court erred in admitting a certain letter in evidence and also erred in refusing to give certain instructions offered by her. We shall discuss these contentions in the order of their statement.

Tom J. Pugh was called as a witness for respondent and testified fully on direct examination as to the value of the property taken and also as to the amount of severance damages. Appellant did not cross-examine him at all on the issue of value but sought to impeach his credibility by showing bias, interest and prejudice. Appellant elicited from the witness Pugh testimony that before the filing of the instant action the witness was a member of the Placer County Planning Commission when appellant had submitted a proposed subdivision map of her property to that body and that he had either made or supported a motion to have said map rejected and sent or referred to the State Division of Highways. Respondent objected to the introduction of this testimony but the court overruled the objection under the well-settled rule that testimony from which inferences of interest, bias or prejudice may be drawn is properly admissible to impeach a witness. (27 Cal.Jur., Witnesses, secs. 9, 96, 97, 106, 107; Code of Civil Procedure, sec. 1847.)

Upon redirect examination of the witness Pugh, respondent offered in evidence a letter dated August 23, 1949, from the State Division of Highways to the Placer County Board of Supervisors, and reading as follows:

"Gentlemen:

"As you were advised by our letter of September 7, 1948, the State of California is planning to realign the State highway from 1 mile south of Roseville to ½ mile east of Roseville, as shown on the attached route map.

"Construction of this project is at least two years in the future. Right of way over a portion of the new alignment has already been acquired and the balance will be purchased over the next two years.

"In order to avoid conflict with any possible development in the area that we might not know of, which could not only increase the cost of the right of way, but also result in damage to private property, it will be appreciated if you will advise us of any planned development that is brought to your attention, both now and in the future.

"Early notification of any such conflicting development will enable us to contact the parties concerned and work out our problems to the best interests of all concerned.

"Yours very truly,
"C. H. Whitmore
"District Engineer
"By Gilbert Mulcahy
"District Right of Way Agent"

"GM:hw
"CC:JPM
"HFS"

Appellant objected to the introduction in evidence of this letter, first upon the ground that no foundation had been laid and also upon the ground that it was hearsay, but the court overruled appellant's objection and the letter was admitted and read to the jury. Appellant now argues that the court erred in admitting it and that she was prejudiced by such ruling.

[1, 2] There is no merit in this contention. Appellant had on cross-examination attacked the credibility of the witness Pugh and to show his alleged interest, bias and prejudice brought out the fact that while a member of the Placer County Planning Commission he had suggested that a proposed subdivision map of appellant's property which had been filed with the commission be sent to the State Division of Highways. In view of the fact that Pugh was later a witness for the state as to the value of the property, appellant was of course entitled to bring out this fact, and to assert that it showed the interest, bias and preju-

dice of the witness. But appellant having been permitted to do so, it was certainly proper for respondent to elicit from the witness that the map was sent to the Division of Highways because of the letter written by them to the Placer County Board of Supervisors. For as stated in 27 Cal.Jur., Witnesses, sec. 151, page 177: "If a party introduces evidence which tends to impeach a witness of his opponent, the latter may in rebuttal offer evidence to support his witness' credibility." (See, also, Code Civ.Proc. sec. 1870, subd. 16.)

[3, 4] The original letter in the files of the Placer County Board of Supervisors was offered in evidence and the objection was made that the genuineness of the document was not shown. The court overruled the objection and it was stipulated that a copy be substituted for the original. The letter in question was received by the Board of Supervisors and placed in its files, and according to Wigmore the authentication of a document is not necessary when the execution of it is not in issue, but only the fact of the existence of a document of such tenor. VII Wigmore, Evidence, sec. 2132; Pulsifer v. Walker, 85 N.H. 434, 159 A. 426, 81 A.L.R. 1052. Here the respondent apparently sought to prove only the existence of a document of such tenor, and that same was known to the witness, Mr. Pugh. The purpose of this was to attempt to establish that Mr. Pugh acted pursuant to this letter in having appellant's subdivision map referred to the Division of Highways, and thereby to re-establish the credibility of the witness, Mr. Pugh, in the eyes of the jury by negativing any inference of bias, interest, or motive on the part of him in testifying in this action on the issue of value and damages. The authenticity of the letter would seem to have no bearing on its intended use. Whether it be genuine or a forgery, it was merely offered to show that Mr. Pugh was motivated by it in his actions.

[5] Furthermore, even if the court erred in admitting the letter, it is difficult to understand how it could constitute prejudicial error. Appellant argues that she was prejudiced because the verdict of the jury indicated that the testimony of the witness Pugh was followed closely by the jury in its verdict. However, the record shows that two other witnesses for respondent placed a lower valuation on the property than did Pugh. The jury was correctly and fully instructed as to credibility of witnesses and the weighing of testimony, and it was for the jury to decide what weight should be given to the testimony of the various witnesses.

[6] Appellant next contends that the court erred in refusing to give her instruction 13A which reads as follows:

> "You are instructed that the rights of defendant to access to the outer highway are determined in this proceeding and cannot be decreased, but you are further instructed that said outer highway will be connected to the freeway only at such points as may be established by public authority and that this discretionary right of public authority referred to may be considered by you in determining the damages accruing to defendant by reason of the severance and the construction and use of the improvements in the manner proposed by the State of California."

Section 1248 of the Code of Civil Procedure, pertaining to what must be ascertained and assessed in condemnation suits, provides, in part, as follows:

> "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:
>
> * * * * * *
>
> "2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff".

By the resolution of the California Highway Commission the proposed outer highway was to be connected to the proposed freeway at a certain point. This outer highway could later be connected only at

such points as established by public authority. Appellant argues that this discretionary right in the public authority later to change the point of connection between the outer highway and the freeway is an element to be considered in ascertaining damages accruing by reason of the severance and construction of the improvement. Appellant contends that the point of connection might be changed at a later date causing additional damage, and that, therefore, the jury should have been given the instruction 13A.

In the instant case the proposed manner of construction was testified to in detail by respondent's engineering witness, Stanley, including the connection of the outer highway to the freeway.

A map, plaintiff's Exhibit 5, showing the manner of the connection of the outer highway to the freeway, was explained by this witness, and the map was introduced into evidence without objection. Appellant concedes that the connection testified to by Mr. Stanley, as shown in plaintiff's Exhibit 5, is the construction in the manner proposed by respondent. There was no evidence by any witness as to any proposed connection at any other location, nor was there any evidence that a change, even if made, would damage appellant's remaining property. It is clear that whether or not a change in the point of connection will ever be made is purely conjectural and speculative, and there is also no evidence that appellant would be injured by any change that might be made. Therefore, the question of any future damage by some change which may or may not be made in the future would be purely conjectural and speculative, and the following statement made by the trial court in refusing to give said instruction was fully justified:

> "And I am not going to give the Instruction 13–A. I think it is objectionable, as being conjectural. No one knows whether that is going to happen, and, if it does, whether it is going to be a detriment or whether it isn't."

[7] While it is true that in an eminent domain proceeding damages must be assessed once and for all and must include all damages, present and prospective, that might be inflicted by the condemning authority, East Bay Municipal Utility District v. City of Lodi, 120 Cal.App. 740, 8 P.2d 532, and cases cited therein; County Sanitation District No. 2 of Los Angeles County v. Averill, 8 Cal.App.2d 556, 47 P.2d 786, such assessment of damages may not be based on remote, conjectural or speculative damages. City of Los Angeles v. Geiger, 94 Cal.App.2d 180, 210 P.2d 717, and cases cited therein.

[8] Appellant seems to fear that the point of connection between the outer highway and the freeway may be changed in the future, and that in that event she would be precluded by the instant action from bringing an inverse condemnation proceeding to recover additional severance damages to her remaining property. However, it is the law of this state that damages not necessarily included in the issues in a condemnation action may be recovered in a subsequent action. County Sanitation District No. 2 v. Averill, supra; Janssen v. County of Los Angeles, 50 Cal.App.2d 45, 123 P.2d 122; 10 Cal.Jur., Eminent Domain, sec. 113; 18 Am.Jur., Eminent Domain, sec. 369.

In County of Los Angeles v. Rindge, 69 Cal.App. 72, at page 81, 230 P. 468, at page 471 the court said:

> "* * * Although perhaps the precise point has not been decided in this state, we perceive no good reason why additional compensation might not be recovered, after a prior award in a condemnation proceeding, upon proof being made that, by reason of changes made in the improvement as actually constructed, damages were incurred which were not taken into account and could not properly be taken into account in the assessment of damages made by the jury in the trial of the condemnation suit."

Since the decision in the Rindge case, supra, any doubt as to whether or not damages may be recovered for subsequent changes in street or highway construction has been dispelled by our Supreme Court

in the following cases: Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818; Beals v. City of Los Angeles, 23 Cal.2d 381, 144 P.2d 839. In all of these cases the right to recover such damages in inverse condemnation proceeding was upheld.

The record shows that counsel for respondent conceded at the trial that damages for a connection at any other location could be awarded in a subsequent action if there were a changed manner of construction which caused legal damage to appellant's remaining property. At the trial appellant's counsel sought to obtain a stipulation that the connection would forever remain at the location shown in plaintiff's Exhibit 5, and respondent's counsel stated:

> "I am certainly not going to enter into any stipulation that would tie our hands in the future. It seems clear enough to me that if the connection was ever changed Mrs. Adamson would have an inverse condemnation against us, if the property was actually damaged."

Furthermore, the court, in order to remove any doubt as to what was included, inserted in its findings of fact, the interlocutory judgment, and the final order a statement that the connection of the outer highway to the freeway has been designated by the plaintiff, the public authority in charge thereof, at the location shown on plaintiff's Exhibit 5 in evidence in this proceeding, "and that the connection at this location is a part of the construction of the highway in the manner proposed by the plaintiff herein."

We are convinced that the trial court correctly determined that appellant's proposed instruction 13A should not be given to the jury.

Appellant next contends that the court erred in modifying her proposed instructions Nos. 23 and 24. Said instructions, as offered by appellant, read as follows:

Instruction 23. "The Court instructs the jury that after the jury has ascertained and assessed the value of the land, sought to be condemned, the jury must then ascertain and assess the amount of damages, if any, that will accrue to the lands of defendant as described in her answer not sought to be taken, by reason of its severance from said portion sought to be taken and the construction of the improvement in the manner proposed by the plaintiff, and the use of said improvement thereafter.

> "This damage, if any, is usually referred to as severance damage and is to be ascertained and assessed by the jury as directed in the next instruction."

Instruction 24. "The Court instructs the jury that the property sought to be condemned and taken in this case is only a part of a larger parcel of land belonging to the defendant; that the sole function of the jury is to ascertain and assess the compensation that is to be paid by the plaintiff to the said defendant, namely, first, the value of the property actually taken, and all improvements thereon, if any, pertaining to the realty, and, secondly, the damages, if any, that will accrue to the portion of the land not sought to be condemned and taken by reason of the severance thereof from the portion condemned and taken, and the construction *and use* of the improvement in the manner proposed by the plaintiff. This damage, if any is an element of the just compensation guaranteed to the owner."

Said offered instructions were given as submitted with the exception of the italicized portions. Appellant contends that it was error for the court to omit the words "and the use of said improvement thereafter" from instruction 23 and the words "and use" from instruction 24.

However, instructions 27, 28, 29 and 31 proposed by appellant and given by the court seem to have adequately covered the question of the proposed "use" of the land condemned as bearing on the question of severance damages. For instruction 29 reads in part as follows:

> "If you find that by taking the right of way *for the use* described in the complaint, damages will result to the

property that is not taken, then it is your duty to consider * * * and in so far as you may find that any of such conditions depreciate the market value of the property and are the result of the taking *and use of the property which the plaintiff seeks to condemn,* you will award the defendant damages therefor." (Emphasis added.)

Instruction 27 reads as follows:

"You are instructed that the defendant is entitled to recover not only for the damages to the lands not taken by reasons of its severance from the portions sought to be condemned, but are also entitled to damages, if any, to the portion not taken by reason of the construction of the improvements in any manner consistent with *the use proposed by the plaintiff.* Determination of such damages is exclusive with the jury." (Emphasis added.)

Instruction 31 reads in part as follows:

"If you find that by taking the right-of-way *for the uses and purposes for which it has been condemned by the State,* damage will result to the larger tract or parcel of which the portions sought for a right-of-way is a part, then you will consider the dimensions and location of the tract or parcel sought to be condemned for the right-of-way, *the purpose for which it is to be used,* * * * for the purpose of determining the market value of the portion of the larger tract not taken, to ascertain the damage, if any, to the part not taken." (Emphasis added.)

And instruction 28 reads as follows:

"You are instructed that in determining the damage, if any, to the lands not taken, you are to take into consideration *all the facts and circumstances established by the evidence in this case,* bearing upon the extent of such damages." (Emphasis added.)

[9, 10] It is clear, therefore, that appellant suffered no prejudice from the modification by the court of instructions 23 and 24. Moreover, a reading of all of the instructions given by the court convinces us that the jury was fully and correctly instructed on all phases of the law applicable to the case. As we said in Huston v. Schohr, 63 Cal.App.2d 267, at page 277, 146 P.2d 730, at page 735: "A court is not required to give all instructions requested by the parties, but is only required to instruct the jury fully and fairly as to the law applicable to the case."

[11] While not raising the point that the evidence was insufficient to support the verdict and judgment, appellant does assert that the damages awarded her "are far less than contemplated by law and are unfair and a denial of justice." There was, to be sure, a wide disparity between the amounts of damages testified to by appellant's witnesses and the amounts testified to by respondent's witnesses, and this presented an issue of fact which was determined by the verdict of the jury. Issues of fact are determined in the trial court. The record in the instant case is singularly free from error. The trial was presided over by an experienced and able trial judge who heard the testimony of the witnesses and also viewed the property. The trial court which had the power to weigh the evidence in passing upon appellant's motion for a new trial (a power which we as an appellate court do not possess), denied the motion. Both the judgment and the order denying the motion for a new trial are abundantly supported by the record.

The judgment and order are affirmed.

VAN DYKE, P. J., concurs.

119 Cal.App.2d 8

In re MILLS' ESTATE.

MILLS v. MILLS.

Civ. 15511.

District Court of Appeal, First District, Division 2, California.

July 3, 1953.

Hearing Denied Aug. 27, 1953.

Proceeding upon account of administratrix. The Superior Court, County of Alameda, Donald K. Quayle, J., entered order settling account and fixing administratrix' fees for special services, and administratrix appealed contending that amount allowed was insufficient. The District Court of Appeal, Nourse, P. J., held that fixing of such fees was within discretion of trial court, and would not be interfered with in absence of manifest abuse of such discretion.

Order affirmed.

1. Trial ⇐49

Where alleged offer of proof was merely a restatement of evidence already before court and argument of counsel as to its value as evidence, court's ruling rejecting such offer and informing counsel that it accepted as true all facts stated and that any further evidence of such facts would be superfluous, was not error.

2. Evidence ⇐18

In proceeding upon account of administratrix, involving the fixing of fees for special services, where whole probate file showing such services was before court, court had judicial knowledge of their value.

3. Executors and Administrators ⇐501

The fixing of administrator's fees for special services was within discretion of trial court, and would not be interfered with by reviewing court in absence of manifest abuse of such discretion.

4. Executors and Administrators ⇐497

In allowing or disallowing administrator's claim for extra allowance of fees for special services, trial court necessarily takes into consideration the value of the estate.

Wagener & Brailsford and Donahue, Richards, Rowell & Gallagher, Oakland, for appellant.

Nichols, Elerding & Sherman, Berkeley, for respondent.

NOURSE, Presiding Justice.

From an order settling the account of administratrix and fixing her fees for special services she appeals contending that the amount allowed was insufficient. Appellant is the divorced widow of decedent. His mother, who is a judgment creditor in the sum of $10,000, contested the application. The trial court allowed appellant $1,500 for such additional services rendered in the conduct of the store which was the principal asset of the estate. The account of the operations of the store for the period in question showed an income of $32,626.62, with disbursements of $31,839.35. The trial court tried the issue on the hearing to the question of what was the value of appellant's services to the estate.

[1, 2] The first point raised by appellant is that the trial court erred in rejecting her offer of proof. It was not in fact an offer of proof but a statement and argument of counsel based on the evidence already before the court. Every evidentiary fact upon which appellant relied as proof of the value of her services was already in the record and counsel's "offer of proof" was merely a restatement of that evidence and an argument as to its value as evidence. The court merely informed counsel that it accepted as true all the facts stated and that any further evidence of those facts would be "superfluous". There was no error in the ruling, particularly since the whole probate file showing these services was before the court. The court thus had judicial knowledge of their value. Estate of Pailhe, 114 Cal.App.2d 658, 664, 251 P.2d 76.

[3, 4] The second point raised is that the trial court erred in not allowing appellant a greater amount for these services. This raises the simple question of discretion since the fixing of such fees is manifestly a matter lodged in the discretion of the trial court and one which cannot be interfered with by a reviewing court unless the abuse of such discretion is manifest. The rule is clearly stated in Estate of Ful-

ton, 23 Cal.App.2d 563, 567, 73 P.2d 664, 666, as follows: "Section 902 [Probate Code], supra, leaves the matter within the sound discretion of the trial court, and does not make it mandatory upon the court to grant extra allowance of fees on account of services. In making such allowance or disallowing a claim therefor, the trial court necessarily takes into consideration the value of the estate". See also Estate of Pomin, 33 Cal.App.2d 544, 92 P.2d 479. None of the cases cited by appellant is to the contrary.

Order affirmed with costs to respondent.

DOOLING, J., and McCOMB, J., assigned, concur.



119 Cal.App.2d 204

PEOPLE v. CROZIER.

Cr. 2820.

District Court of Appeal, First District, Division 2, California.

July 13, 1953.

Rehearing Denied July 28, 1953.

Hearing Denied Aug. 6, 1953.

Defendant was convicted of first degree murder. The Superior Court, City and County of San Francisco, Herman A. van der Zee, J., entered judgment of conviction and denied new trial motion, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained conviction.

Judgment and order denying motion affirmed.

1. Criminal Law ⇐525

In murder prosecution, defendant's confessions which showed unmistakeably that they were made by one in possession of his mental faculties, since they disclosed facts and details of murder which were within his knowledge only and which could not have been suggested to him by the arresting officers, were the best evidence of defendant's competency to confess.

2. Homicide ⇐253(1)

Evidence sustained conviction for first degree murder.

3. Criminal Law ⇐680(2)

In murder prosecution, admission of defendant's extrajudicial confessions before proof of corpus delicti was within discretion of trial court.

4. Criminal Law ⇐680(1), 1153(3)

In criminal prosecutions, order of proof is within discretion of trial court and a judgment will not be reversed merely because the customary order has not been followed.

5. Criminal Law ⇐429(1), 446

In murder prosecution, death certificate in standard form, duly authenticated, showing time, place and cause of death of victim, was prima facie evidence of facts, stated, and was admissible. Health and Safety Code, § 10551.

6. Criminal Law ⇐1169(9)

In murder prosecution, error, if one occurred, in including some facts not in evidence in hypothetical question put to medical expert, was not prejudicial, where reading of defendant's confessions with special attention to great number of details therein as to matters which at time were wholly in mind of defendant, but which subsequent investigation verified, could leave no doubt in jury's minds that defendant was correctly reciting matters then known only to himself.

7. Criminal Law ⇐722½

In murder prosecution, reference by district attorney to defendant's conviction in New York as for burglary instead of as for unlawful entry, as burglary is known in New York, was not misconduct.

8. Criminal Law ⇐1037(1, 2)

Where district attorney referred to defendant's New York conviction as one for burglary instead of one for unlawful entry, as burglary is known in New York, but no objection was made to statement and no request made for instruction to disregard it, misstatement was not reversible error.

9. Criminal Law ⇐722½

In murder prosecution, reference in argument of district attorney to defendant's long criminal record was not misconduct, where statement was tied strictly to evidence of prior crimes confessed by defendant or otherwise put in evidence.

10. Criminal Law ⇐814(17)

In murder prosecution, where state rested on direct evidence and particularly on defendant's confessions, instruction covering case of circumstantial evidence was unnecessary.

11. Criminal Law ⇐814(1)

In murder prosecution, where evidence of another homicide committed by defendant first entered record through defendant's confessions, and further evidence thereof was offered to substantiate confessions and to prove clarity of defendant's mind at time confessions were made, defendant's proposed instruction relating to such other homicide, which did not purport to limit evidence to its true purpose, but which went beyond issues, was properly rejected.

Robert C. Taylor, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant-appellant was tried to a jury on an information charging first-degree murder. He answered and pleaded not guilty and not guilty by reason of insanity. The jury found him guilty as charged, with a recommendation for clemency.

Without a demand on his part, but on suggestion of the trial court, defendant was first tried on the issue of his sanity at the time set for trial. He was duly found insane and was committed to a state hospital where he was held until his return for trial on a certification of recovery. He then withdrew his plea of insanity and stood trial to the jury on the information charging murder. From the ensuing judgment on the verdict, with a recommendation of life imprisonment, and from the order denying his motion for a new trial this appeal was taken. Counsel now appearing for appellant did not participate in the trial. He was assigned by this court to prosecute the appeal and we appreciate his able presentation of the points involved.

The story begins with the night of January 13, 1922, when a San Francisco police officer found the dead body of a woman lying on her bed with a gag in her mouth, a cloth around her neck, bound hand and foot, and with numerous contusions on her throat. The rooms in her apartment had been ransacked giving all the indications of a burglary.

Twenty-eight years later the defendant was arrested in the town of Darien, Connecticut, on a charge of drunkenness and larceny. He gave the lieutenant of police a written confession of the murder in San Francisco on January 13, 1922. This confession was shown to him on the following morning and he stated that it was true. Later in the same day he gave the Darien police another written statement confessing to the same crime. No promises or threats were made. He was advised that he was entitled to counsel but he rejected the offer. Both confessions were admitted in evidence at the trial as well as the oral confession made to the San Francisco police officer at the time of the arrest, and they constitute appellant's main attack on the judgment.

At this point it is proper to quote at length from the first confession as it unmistakably discloses that defendant was then clear of mind, and also because it discloses many facts relative to the murder which were then unknown to all the arresting officers. We quote: "I have been arrested for intoxication and larceny, burglary, etc. most all my life. I wish at this time to clear my conscious [sic] in regards to the murder that I committed in San Francisco, California on January 13, 1922, which was on a Friday. I was boarding at the rooming house conducted by Mrs. Elizabeth Platt at 1550 O'Farrell Street, San Francisco, California and on the above date, January 13, 1922, while she was show-

ing one Raymond Burleigh, alias Raymond Conklin and Andy Schrick both from Chicago, Illinois, graduates of Joliet Prison. While she was showing the room I threw my arms about her neck and she started to scream and Burleigh or Conklin put a rag into her mouth to stop her noise. She went limp and we put her on the bed and then searched the house for money and I don't remember finding any money but we did take two suits of mens clothes which were large size, about a 44 and one black suit case and one black handbag and a camera. We all left the house together and went to Oakland, California, where we pawned the camera in a pawn shop a short distance from the ferry. I attempted to pawn the suits in San Pedro, California, but the pawn broker seemed to be wise and left the store to change a twenty dollar bill and I saw a man come in that looked like a detective and I beat it out of the store leaving the clothing behind me. Mrs. Platt was about 59 years of age and on the day we killed her she was wearing a gingham dress, blue and white, mostly blue and was wearing white stockings at the time. At the time of the murder I was registered in the house book as either Frank or John Crosby. I had been there about three days in all. I remember some painters painting the house next door on a ladder. I was never picked up for this crime or questioned about it and it has been on my mind all these years and I realize that I have been in mental institutions many times, but the above facts are true and not a figment of my imagination or am I mentally unbalanced at this time and a check on these facts will prove it to be the truth and I stand ready to so state to any authorized police officer. I wish to further state that on the date of November 13 to 19th, 1942 while I was locked up for intoxication at Sacramento, California, under the name of Frank Buchanon I killed a Mexican who was locked up with me and several others, his name I don't remember. He was drunk and was going to strike me with his fists when I stuck him in the stomach with my knife. I found they had taken him out during the night and they threw me out in the morning. I have read the above statement and declare it to be the truth so help me God."

[1, 2] During his incarceration in Connecticut the defendant made two other confessions of the same import. These were all admitted in evidence over defendant's objection that he was incompetent at the time they were made. Expert testimony was taken showing his competency, but the best evidence of his competency is in the statements themselves as they show unmistakably that they were made by one in possession of his mental faculties since they disclose facts and details of the murder which were within his knowledge only and which could not have been suggested to him by the arresting officers. For these reasons there is no ground for the argument that the evidence is insufficient to support the verdict.

[3, 4] Appellant assigns error in that these confessions were admitted in evidence before the corpus delicti had been proved. Assuming this to be so, the order of proof is within the discretion of the trial court and a judgment will not be reversed merely because the customary order has not been followed. People v. Seymour, 54 Cal.App. 2d 266, 275, 128 P.2d 726; People v. Mehaffey, 32 Cal.2d 535, 547, 197 P.2d 12.

[5] It is argued that the death certificate showing the time, place and cause of death of the victim of the assault was improperly admitted in evidence. The certificate was in the standard form, duly authenticated, and was prima facie evidence of the facts stated. Section 10551, Health and Safety Code.

[6] Appellant criticizes a lengthy and involved hypothetical question put to the medical expert called by the People as including some facts not in evidence. The error, if one occurred, was not prejudicial. A simple reading of the confessions with special attention to the great number of details given therein (matters which at the time were wholly in the mind of the appellant, but which subsequent investigation verified) could leave no doubt in the minds of the jury that appellant was correctly reciting matters then known only to himself.

[7, 8] Misconduct is assigned to the district attorney in stating that he had on the way from New York commitment papers showing appellant's conviction for burglary in that state. The criticism is rather technical since appellant contended that under the New York statute the offense was known as "petty larceny and unlawful entry." "Unlawful entry" is known in this state as burglary and it does not appear that the district attorney was guilty of misconduct in referring to the New York crime as "burglary". However no objection was made to the statement and no request was made for an instruction to disregard it. It is not reversible error.

[9] Misconduct is also assigned to the reference in the argument of the district attorney to appellant's long criminal record. The statement was tied strictly to the evidence of prior crimes confessed by the appellant or otherwise put in evidence. It does not constitute error. Other assignments of misconduct do not require special treatment. Furthermore no objection was made to any of these statements; on one of them was of such a nature that an objection or a request for an instruction would have been prejudicial. This settles the questions on appeal.

Appellant requested the court to give an instruction on the effect an abnormal mental or alcoholic condition might have on the question of his mental capacity to make a true confession. The instruction was not given in the words offered but the court did instruct the jury to take into consideration all the facts proved "including the physical and mental condition of the defendant, if a confession were made, including any such circumstances as I have mentioned, ought to be construed by you in determining whether or not the confession was voluntary."

[10] Criticism of the trial court's refusal to give appellant's proposed instruction covering a case of circumstantial evidence is not sound. It related to cases based wholly on circumstantial evidence. Here the state rested on direct evidence and particularly on appellant's confessions. In such a case the instruction need not be given. People v. Nunn, 65 Cal.App.2d 188, 193, 150 P.2d 476.

[11] Finally appellant complains of the rejection of his proposed instruction relating to the homicide in Sacramento County. Evidence of this crime first came into the record through appellant's confessions. Further evidence of the time and circumstances of the homicide was offered from the records of Sacramento County to substantiate appellant's confessions and to prove the clarity of his mind at the time the confessions were made. This is not a case of proof of an "unrelated" crime which is the case of the authorities cited by appellant. If he had proposed an instruction limiting the evidence to its true purpose we have little doubt that such an instruction would have been given. The proposed instruction went beyond the issues and was properly rejected.

Judgment and order affirmed.

DOOLING, J., concurs.



118 Cal.App.2d 764

FREELAND et ux. v. JEWEL TEA CO. et al.

Civ. 19453.

District Court of Appeal, Second District, Division 1, California.

June 29, 1953.

Action for death of plaintiffs' two and a half year old daughter which occurred when driver of employer's truck, which was parked facing dead end of street, proceeded forward turning left across street into a driveway adjacent to plaintiffs' residence and left rear wheel struck defendant as driver backed out of driveway. The Superior Court of Los Angeles County, Robert H. Scott, J., entered a judgment on verdict of a jury in favor of plaintiffs and defendants appealed. The District Court of Appeal, Drapeau, J., held that negligence of driver and negligent conduct of decedent were for jury under evidence.

Affirmed.

1. Trial ⇐143

Trier of facts has duty to reconcile, if possible, any apparent conflict, whether such conflict is developed upon whole case or in testimony of an individual witness, and to give effect to all evidence, when nature of case will admit of such a disposition, or, if conflict is irreconcilable, to affix their own value to contradictory evidence.

2. Appeal and Error ⇐1011(1)

Where testimony in court below involves a substantial conflict, action of court below will not be disturbed on appeal.

3. Appeal and Error ⇐1001(2)

Where there is a fair and reasonable amount of evidence to support finding of a jury, finding will not be disturbed by appellate court, though in its opinion it is against preponderance of evidence.

4. Automobiles ⇐245(8, 74)

In action for death of plaintiffs' two and a half year old daughter which occurred when driver of employer's truck, which was parked facing dead end of street, proceeded forward turning left across street into a driveway adjacent to plaintiffs' residence and left rear wheel struck decedent as driver backed out of driveway, negligence of driver and negligent conduct of child were for jury under evidence that child and her older sister were running after truck from time truck left side of street on which it was parked, and that driver proceeded forward and without warning backed truck into public street where he knew many children were playing. Vehicle Code, §§ 543, 671(b).

5. Automobiles ⇐246(51)

In action for death of plaintiffs' two and a half year old daughter which occurred when driver of employer's truck, which was parked facing dead end of street, proceeded forward turning left across street into a driveway adjacent to plaintiffs' residence and left rear wheel struck decedent as driver backed out of driveway, given instruction reciting that driver had duty to exercise ordinary care to determine whether sounding of horn was necessary under circumstances correctly stated law and was applicable to issues presented by pleadings and raised by evidence. Vehicle Code, §§ 543, 671(b).

George A. Kuittinen, Studio City, for appellants.

Cecil L. Lacy, Santa Monica, and Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

DRAPEAU, Justice.

Late in the afternoon of January 24, 1951, defendant Besley, driving defendant Jewel Tea Company's truck, was selling its products to customers residing in the thirteen thousandth block of Leflose Avenue in Norwalk. At the north end of this block the street is dead-ended. The truck was parked on the east side of the street facing the dead-end. As a result, defendant Besley had to turn around in the street to make his exit. Because two other cars were parked directly in front of the truck, he backed the truck from its parked position. He then proceeded forward turning left across the street into a driveway on the west side adjacent to plaintiffs' residence. As he was slowly backing the truck out of the driveway, the left rear wheel struck Karen Freeland, the two and a half year old daughter of the plaintiffs, causing her death.

By the instant action for wrongful death, the parents sought damages from the owner of the truck and from the driver.

The jury returned its verdict in favor of plaintiffs. The trial court denied a motion for new trial. From the judgment entered pursuant to the jury's verdict, defendants appeal.

It is here urged that the evidence established without conflict that the child was holding onto the truck at the time of the accident. And, as a result, she was a trespasser toward whom appellants, unaware of her presence, owed no duty of care.

It was established that many children living in this block habitually played in and about this dead-end street.

Defendant Besley testified that usually there were around twenty children playing

in the street. On the day in question there were eight to twelve children varying in age from two to ten or twelve years playing in the parking way, around and in his truck. And because he had to back his truck before he could turn it, he cautioned every one of the children on the east side of the street to get on the parking way and off the street before he backed. After backing, he drove ahead and turned almost straight across the street into the driveway heretofore mentioned. He stayed in the driveway "just long enough to engage the truck in reverse gear and proceed backwards." Before he backed from the driveway, he checked in the right rear view mirror, also on the left side and stuck his head out the left side of the truck to see that everything was clear. He saw only the children still standing in the group on the east side of the street where he had left them on the parkway.

He did not sound his horn and brought his truck to a stop when he heard someone scream.

There were two eye-witnesses to the accident: Mrs. Foster and Mrs. Dumbleton, neighbors living on the east side of the block in question.

Mrs. Foster testified that she was standing on the lawn in front of her house talking to Mrs. Dumbleton. At that time ten or twelve children were playing in the area between her house and the barricades at the north end of the street. She first noticed Karen playing with her older sister on the lawn in front of their parents' home on the west side of the street. Later, when the truck moved across the street from east to west, the two sisters were following it closely. Karen "trotted along behind the truck * * * her hands on the bumper, jumping up and down, playing", her feet on the ground. When the truck got into the driveway "she raised her little hands off and we thought she was going to move to get out of the way, but she didn't fast enough." The truck paused just long enough to shift gears. It moved backward "a very few feet"; Mr. Besley "had to drive a little bit." As the truck started, the witness screamed. "The child was hit in the street * * * by the rear end of the truck."

Mrs. Dumbleton testified that she saw the truck parked on the east side of the street; that when Mr. Besley started the truck, Karen "took hold but when he started to move away she let loose * * *. And he went across the street and she followed behind but she did not have hold of the truck while he was going across." When the truck got into the driveway, "She was behind it. Not directly behind it. * * * she was quite a little ways from his truck while he was in the driveway—a few feet.

"Q. Yes. Mrs. Dumbleton, I don't want to persuade you to describe anything that isn't clear in your mind, but if you did notice where the little girl was while the truck was in the driveway and before it started to back out, it would be helpful if you would tell us. If you didn't notice, of course, your answer is 'I don't know.' Did you notice where Karen was at that time? A. Well, you have me just a little bit confused, but the only way I can explain it, as he pulled across the street they were still at that time on our side of the street, but as he got across into this driveway they ran across the street.

"Q. All right. A. And as he was backing out, just as he was backing out, real slow, she came up right behind and grabbed hold of his bumper. * * *

"Q. Did you happen to notice, one way or the other, where the little girl who was killed was at the moment when the truck started to back up? A. When he started to back up she was, I would say, approximately out here in the middle of the street yet."

This witness also testified that most of the truck was in the driveway before it started to back.

In support of their stand, appellants rely upon the statement of Mrs. Dumbleton that the child grabbed hold of the bumper as the truck started to back out of the driveway. They ignore Mrs. Foster's testimony that the child removed her hands from the bumper "when the truck got into the driveway"; that Mr. Besley "had to drive a

little bit" before reaching the child and that he drove "a very few feet" before the truck hit her. They also ignore Mrs. Dumbleton's testimony that most of the truck was in the driveway before Mr. Besley started to back, and that when he started backing the child was approximately out in the middle of the street.

This is an apt illustration of the inconsistencies and discrepancies usually incident to the stories of eye-witnesses to any exciting event.

[1] "It is the duty of the trier of facts to reconcile, if possible, any apparent conflict, whether such conflict is developed upon the whole case or in the testimony of an individual witness, and to give effect to all the evidence, when the nature of the case will admit of such a disposition, or, if the conflict is irreconcilable, to affix their own value to the contradictory evidence. * * *

[2, 3] "It is a cardinal doctrine often enunciated, that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the court below will not be disturbed. It is to be presumed that the trial judge reconciled and accounted for to his own satisfaction any and all inconsistencies which might be made to appear in the testimony. Wherever there is a fair and reasonable amount of evidence to support the finding of a jury, it will not be disturbed by the appellate court, though in its opinion it is against the preponderance of evidence." 10 Cal.Jur., pp. 1171, 1172, §§ 382, 383 and authorities there cited. See, also, Hodges v. Porikos, 88 Cal.App.2d 238, 245, 198 P.2d 577.

It is clear from the evidence that Karen, the deceased child, and her older sister were running after the truck from the time it left the east side of the street, and that from then until the accident occurred, appellant driver proceeded forward, and without warning, backed the truck into a public street where he knew many children were playing.

[4] In the circumstances, negligence of the driver and negligent conduct of the child became questions for the jury to decide.

In Conroy v. Perez, 64 Cal.App.2d 217, 224, 148 P.2d 680, 684, it was stated: "As the courts have frequently said, it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. Their conduct is unpredictable and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 23 P.2d 769. The presence of children is in itself a warning requiring the exercise of care for their safety. Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 275 P. 980. Moreover if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury. See 2 Cal.Jur. Ten Yr. Supp., p. 454."

Appellants assert that the driver of the truck was under no duty to sound the horn for the reason that, "The child was a trespasser, hence the defendants owed no duty 'except not to inflict wanton or wilful injury and to use ordinary care after he is seen': Wilson v. City of Long Beach, 71 Cal.App.2d 235, 240 [162 P.2d 658, 163 P. 2d 501.]"

Appellant further argues that the instruction to the jury regarding the use of the horn was misleading and prejudicial.

Under the evidence presented, it was for the jury to decide if the child was a trespasser. It was also a question of fact whether a warning was necessary. Section 543 of the Vehicle Code provides that no person shall back a vehicle on a highway unless and until such movement can be made with reasonable safety.

The instruction complained of reads: "You are instructed that Section 671(b) of the Vehicle Code provides as follows:

" 'The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used.'

"It was therefore the duty of the defendant driver to exercise ordinary care to determine whether the circumstances were

such that the sounding of his horn was necessary for safe operation."

[5] The instruction correctly states the law, was applicable to the issues presented by the pleadings and raised by the evidence; consequently it was not prejudicial.

The evidence presented amply supports the jury's verdict and the judgment. No errors appear in the record.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



Guardianship of HIROKO KAWAKITA et al.*

Civ. 4297.

District Court of Appeal, Fourth District, California.

June 25, 1953.

Hearing Granted Aug. 20, 1953.

Motion to vacate, annul, and declare void order for appointment of guardian. The Superior Court, Imperial County, L. J. Mouser, J., denied the motion to vacate the order of appointment, but vacated, annulled, and declared void all orders in guardianship proceeding subsequent to appointment of guardian insofar as they related to movant, and movant appealed. The District Court of Appeal, Mussell, J., held that where movant had instigated the guardianship proceeding, nominated guardian, and joined in petition for his appointment so that movant might engage in sale of land through guardian, and after guardian's appointment movant completed the sale, movant was estopped from denying the appointment.

Affirmed.

1. Guardian and Ward ⇐18

Portion of order denying motion to vacate, annul, and declare void order for appointment of guardian in so far as it related to movant who was civilly dead as result of death sentence, and who had not appealed from order denying motion could not be disturbed on appeal by co-movant.

2. Guardian and Ward ⇐17

Where movant seeking to vacate, annul, and declare void order for appointment of guardian instigated the guardianship proceedings, nominated guardian, and joined in petition for his appointment so that movant might engage in sale of land through guardian, and after guardian's appointment, movant completed sale, movant was estopped from denying appointment.

Morris Lavine, Los Angeles, for appellants.

Harry W. Horton and R. L. Knox, Jr., El Centro, for respondent.

MUSSELL, Justice.

On October 14, 1950, there was filed in the Superior Court of Imperial county on behalf of Hiroko Kawakita and Tomoya Kawakita a motion "to vacate, annul and declare void the order for appointment of W. H. Lorenz as guardian and all subsequent orders based thereon on the ground that the court was without jurisdiction to entertain the aforesaid guardianship proceedings and to make any of the orders in this proceeding." After the conclusion of the hearing had on this motion, the trial court, on July 24, 1951, made its order, in substance, that the motions of Tomoya Kawakita and each of them are denied; that the motion of Hiroko Kawakita to vacate the order of appointment of W. H. Lorenz as guardian be denied; and that as to Hiroko Kawakita only, all orders in the guardianship proceedings subsquent to the appointment of Lorenz as guardian are vacated, annulled and declared void.

Hiroko Kawakita, alone, has appealed from this order and since no appeal was taken by Tomoya Kawakita therefrom, we here consider and pass upon the validity of the orders insofar as they affect the appellant Hiroko Kawakita.

Facts

Hiroko Kawakita and her brother, Tomoya, of Japanese ancestry, were born in

* Subsequent opinion 271 P.2d 13.

Calexico, California. She was 21 years old on October 19, 1937, and he attained his majority on September 26, 1942. In 1923, Yasaburo Kawakita, the father of the two, then minors, was appointed as their guardian and in 1927 he furnished funds to purchase a lot in Calexico on which there was a two story building. The title to this property was taken in the names of Hiroko and Tomoya and they each owned an undivided one-half interest therein, subject to a trust deed in favor of their father for the purchase money advanced. Yasaburo filed a report of his guardianship in 1937 and nothing further was done by him in the guardianship proceedings until April, 1942, when he executed his resignation as guardian.

Tomoya Kawakita left California and went to Japan some time in 1939 and did not return to the United States until 1946. After his return, he was charged with the crime of Treason against the United States by indictment returned November 1, 1947, in which indictment several overt acts involving his brutal treatment of American prisoners of war in Japan were charged. He was convicted, after jury trial, and on or about October 5, 1948, judgment and sentence of death was imposed upon him. United States v. Tomoya Kawakita, D.C., 96 F.Supp. 824. A judgment of conviction was affirmed by the Supreme Court of the United States on June 2, 1952, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249, and since October 5, 1948, Tomoya has been subject to the provision of Section 2602 of the Penal Code of this state, which is that "A person sentenced to death is deemed civilly dead during the existence of the death sentence."

On or about February, 1942, Yasaburo Kawakita, who had been operating a grocery store on the premises involved, was evacuated from his residence and placed in an internment camp for Japanese aliens. Since it was impossible to conduct his grocery business, he, on or about March 10, 1942, executed a general power of attorney to his daughter, Hiroko, and this document was recorded April 14, 1942.

About May 1942, Hiroko, under Army orders, left California for the Japanese relocation center at Poston, Arizona, where she remained until August, 1945.

On April 2, 1942, Hiroko, both in her own name and as attorney in fact for her father, signed a contract for the sale of the real property involved, including the fixtures and stock of merchandise in the store, to one John Rashid. The price stipulated for the real property was $6,000. On April 3, 1942, an escrow was opened with the Bank of America National Trust and Savings Association, at Calexico, to consummate this sale. Instructions in the escrow were signed by Hiroko, individually, and as attorney in fact, and on May 13, 1942, she executed a quitclaim deed to Rashid conveying the real property to him. Rashid paid $6,000 for the real property, $2,000 for the fixtures and $3,428.95 for the merchandise.

On April 8, 1942, one W. H. Lorenz petitioned the Superior Court to be appointed as guardian for Hiroko and Tomoya, who were named in the petition as minors. Hiroko, who was then 25 years of age, filed a nomination in which she nominated W. H. Lorenz and joined in his petition for appointment as guardian of herself and brother. A notice of the hearing on the petition was posted and on April 27, 1942, the court made an order appointing Lorenz as guardian. On May 5, 1942, Lorenz petitioned the court for permission to sell the real property involved for the sum of $6,000. Notice of the hearing thereon was posted and published for a period of 15 days and on May 22, 1942, the court signed and filed an order permitting and approving the sale of the property to John T. Rashid for the sum of $6,000. On April 14, 1942, Rashid applied to the United States Treasury Department to purchase the real property involved from W. H. Lorenz, guardian, for the sum of $6,000 and a license was issued by the Federal Reserve Bank in San Francisco in behalf of the Secretary of the Treasury to consummate the sale and to deposit the purchase money (less certain deductions) to a blocked account in the Bank of America at Calexico in the name of Yasaburo Kawakita, as a "national" of Japan.

On May 17, 1947, Hiroko Kawakita, Tomoya Kawakita and Yasaburo Kawakita filed an action in the Superior Court of Imperial county against W. H. Lorenz and John T. Rashid to declare void the appointment of Lorenz as guardian, to quiet title to the property here involved and to recover damages for fraud. That action, No. 23271, was dismissed by the trial court on motion of defendants on February 29, 1952, and an appeal from the order of dismissal thereof is pending in this court, 258 P.2d 1039.

On October 14, 1950, Hiroko and Tomoya Kawakita filed the motion here involved to declare void the appointment of Lorenz as guardian and to set aside all subsequent orders based thereon. In substance, the basis of the motion is that the court was without jurisdiction to appoint Lorenz as guardian; that the petition for the appointment of Lorenz was not signed by Hiroko and Tomoya, personally; that no showing was made in said petition of the necessity for the appointment of a guardian; that Hiroko, at the time she signed the nomination of Lorenz as guardian, was 25 years of age; that the notice of sale of the property was not made in conformity with Sections 1516 and 1200 of the Probate Code; that no notice to the persons having custody was given as provided in Section 1441 of the Probate Code; that there was no property to be disposed of on May 5, 1942, when the petition for authority to sell was filed; that the petition for permission to sell the property was executed by Lorenz as guardian 5 days before he was officially appointed as such; that there was no appraisal of the property as required by the Probate Code, §§ 605–609, 611; that the notice of sale was not published as provided in Section 782 of the Probate Code and that the sole purpose of the appointment of Lorenz was to perpetrate a fraud on the court and on the alien property custodian of the United States.

In opposition to the motion, there was filed on behalf of Lorenz certain written objections, in substance as follows: That Tomoya Kawakita was "a civilly dead person" in that he had been indicted for and found guilty of Treason and had been sentenced to suffer the death penalty; that both Hiroko Kawakita and Tomoya Kawakita, prior to the filing of the motion in the guardianship proceeding, elected to affirm the transactions in the guardianship proceeding and upon the basis of that affirmation, to sue W. H. Lorenz and John T. Rashid in a civil proceeding in the Superior Court in and for the County of Imperial, civil action No. 23271; that the appointment of Lorenz as guardian was not void upon its face; that the court did have jurisdiction of the estate of Tomoya and Hiroko and that under the facts and circumstances involved, including a lapse of some 8 years, Tomoya and Hiroko should be estopped to challenge the validity of the guardianship proceedings; that Hiroko had, by her conduct, ratified the conduct of Lorenz as guardian and the proceedings had in the guardianship by joining outside of probate in the sale of the property and in the execution of a quitclaim deed to her interest in the property; that the motions and proceedings to vacate the orders are barred by the three-year statute of limitations; that the court had jurisdiction to appoint Lorenz as guardian under the facts and circumstances existing at the time.

At the hearing on the motion there was offered and received in evidence the files in Superior Court action No. 23271, supra, together with a certified copy of the record of conviction of Tomoya Kawakita. In opposition to the motion there was also offered the quitclaim deed of Hiroko to John Rashid. The offer of this deed was objected to and the court sustained the objection. Thereafter an offer of proof was made on behalf of the guardian to prove the execution and recording of this deed. However, the files in action No. 23271 contained an allegation that the deed was executed and these files were admitted in evidence. In behalf of the guardian it was urged that Tomoya Kawakita could not be heard in the matter because of his conviction and sentence and for the further reason that he had assigned his interest in the property to his attorney.

The order from which this appeal is taken is in three parts and, in effect, three separate orders are set forth therein;

[1] 1. The motions of Tomoya Kawakita are denied. Since he has not appealed from the order and is now civilly dead, this part of the order cannot here be disturbed.

[2] 2. The motion of Hiroko Kawakita to vacate, annul and declare void the order for appointment of Lorenz as guardian is denied. As to this order, the record shows that Hiroko instigated the guardianship proceedings, specifically nominated Lorenz as guardian and joined in his petition for appointment; that she was endeavoring to effect a sale of the property involved to Rashid and entered into a contract of sale with him; that she signed the escrow instructions for herself and for her father, from whom she had received a power of attorney; that she executed a quitclaim deed to Rashid as to her interest in the property; that the funds realized from the sale were placed in a bank in her father's name; and that she was a party plaintiff in the amended complaint filed in action No. 23271 in which damages were sought for fraud rather than rescission of the contract of sale. Under these circumstances, Hiroko Kawakita cannot now successfully maintain that the order appointing the guardian was void. She ratified the transaction and is estopped to deny the appointment.

3. The last order (or part of the order) is that all orders subsequent to the order appointing the guardian, and in particular the order concerning the sale of the property are vacated, annulled and declared void. It is apparent that by this order the court recognized appellant's objections to the validity of the sale by the guardian and set it aside. This was the real relief sought by appellant's motion. A guardian was appointed but his subsequent acts as such were declared to be null and void. Furthermore, the record shows that on October 2, 1946, Lorenz was, by court order, released and discharged as guardian.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

HIROKO KAWAKITA HAYASHI et al. v. LORENZ et al.*

Civ. 4531.

District Court of Appeal, Fourth District, California.

June 25, 1953.

Hearing Granted Aug. 20, 1953.

Action to declare void the appointment of guardian, to quiet title to property which had been sold by guardian, and for fraud. The Superior Court, Imperial County, Elmer W. Heald, J., rendered judgment of dismissal, and plaintiffs appealed. The District Court of Appeals, Mussell, J., held that where action was filed March 4, 1947, and plaintiffs made no effort to bring cause to trial until February 18, 1952, and reasons advanced for delay were without merit, action was properly dismissed.

Order of dismissal affirmed.

1. Dismissal and Nonsuit ⇐60(1)

Trial court's power to dismiss an action for failure of plaintiff to prosecute it with diligence is an inherent power, and statutory provision regarding dismissal must be read in light of existence of such power. Code Civ.Proc. § 583.

2. Appeal and Error ⇐948, 962

Dismissal of action for want of prosecution should not be disturbed on appeal except upon a showing of a clear abuse of discretion, and it is incumbent upon appellant to show that there has been such an abuse. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇐60(2)

The two year statutory period within which to bring action to trial is not an arbitrary limit to be followed in all cases, but is a general guide for determining whether a want of prosecution appears, and, if so, whether power to dismiss should be used in view of entire situation. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(1)

"Discretion" within statute authorizing dismissal of action for want of prosecution means discretion of trial court and not discretion of reviewing court. Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Discretion".

* Subsequent opinion 271 P.2d 18.

5. Judgment ⇐386(3)

A judgment or order which is void on its face and which requires only an inspection of judgment roll or record to show its invalidity may be set aside on motion at any time after its entry by court which rendered the judgment or made the order.

6. Dismissal and Nonsuit ⇐60(2)

Where action to declare void appointment of guardian, to quiet title to property which had been sold by guardian, and for fraud was filed March 4, 1947, and plaintiffs made no effort to bring cause to trial until February 18, 1952, and reasons advanced for delay were without merit, action was properly dismissed.

Morris Lavine, Los Angeles, for appellants.

Horton & Knox, El Centro, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from an order dismissing an action filed by them on March 4, 1947. The action was not brought to trial and the order of dismissal was made and filed on February 29, 1952, on motion of the defendants on the ground that the plaintiffs had failed to prosecute said action with reasonable diligence.

It is alleged in the amended complaint, in substance, that plaintiffs Hiroko and Tomoya Kawakita were the owners of certain real property in Imperial county subject to a trust deed in favor of Yasaburo Kawakita; that the defendants entered into a conspiracy to defraud plaintiffs of the real property and the beneficial interests therein; that as a part of the conspiracy, defendants induced plaintiff Hiroko to enter into a contract of sale of said property for a sum far below the market value thereof; that as a further part of the conspiracy, defendant Lorenz secured his appointment as guardian of Tomoya and Hiroko and subsequently, as guardian, sold the property to defendant Rashid for the sum of $6,000; that the proceedings in the guardianship matter were defective in many particulars and were fraudulently conducted by defendants; that plaintiffs Hiroko and Tomoya were damaged thereby in the sum of $30,000 and plaintiff Yasaburo in the sum of $21,028.83.

On October 19, 1950, Hiroko and Tomoya filed a motion in the guardianship matter to vacate the order appointing Lorenz as guardian and all orders made thereafter on the grounds that the orders were wholly void for lack of jurisdiction in the court and of the parties. On July 24, 1951, the court made its order denying the motions of Tomoya Kawakita, denying the motion of Hiroko Kawakita to vacate the order of appointment of Lorenz as guardian and further ordered that as to Hiroko only, all orders in the guardianship proceedings subsequent to the appointment of Lorenz as guardian were vacated, annuled and declared void. Hiroko Kawakita appealed from this order and the appeal therefrom was decided by this court on June 25, 1953, 258 P.2d 1036.

On February 18, 1952, plaintiffs filed a notice of motion in the instant case to set the cause for trial at some date before March 4, 1952. The hearing on this motion was continued to February 28, 1952, and on that date was considered with a motion by defendants to dismiss the action for failure to bring it to trial with reasonable diligence. The motion to dismiss was granted and this appeal followed.

[1] The rule is well settled that the power of a trial court to dismiss an action for failure on the part of the plaintiff to prosecute it with diligence is an inherent power which exists independent of statutory provisions and that the provisions of Section 583 of the Code of Civil Procedure and of other related sections must be read in the light of the existence of such inherent power. Simonini v. Jay Dee Leather Products Co., 85 Cal.App.2d 265, 268, 193 P.2d 53; Steen v. City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937.

[2] Section 583 of the Code of Civil Procedure provides that the court may in its discretion dismiss any action for want of prosecution * * * whenever plaintiff has failed for two years after action is

filed to bring such action to trial. It is also the rule that the action of the trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of a clear abuse of discretion and it is incumbent upon the appellant to show that there has been such an abuse. Simonini v. Jay Dee Leather Products Co., supra, 85 Cal.App.2d 268, 193 P.2d 54.

[3] In Jepsen v. Sherry, 99 Cal.App. 2d 119, 220 P.2d 819, 820, this court held that the two years mentioned in the statute, Secs. 583 and 1190 of the Code of Civil Procedure, is not an arbitrary limit followed in all cases, but was intended as a general guide in determining whether or not a " 'want of prosecution' " appears and, if so, whether the power should be used in view of the entire situation; that this discretion is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving rather than defeating the ends of substantial justice; and that each case must be decided upon its own peculiar features and facts.

[4] In Hillsdale Builders Supply Co. v. Eichler, 109 Cal.App.2d 117, 118, 240 P.2d 343, 344, it was held that "The cases are uniform in holding that when the trial court dismisses an action under this section [C.C.P. § 583] the 'discretion' mentioned therein is the discretion of that court, and not that of a reviewing court. It is equally true that the action of the trial court will not be disturbed except on a showing of a manifest abuse of such discretion." (Citing cases.)

In Rose v. Knapp, 38 Cal.2d 114, 117, 237 P.2d 981, 983, it is said:

> "The provision of section 583, requiring dismissal if an action is not brought to trial within five years after the filing of the complaint unless the parties have stipulated for an extension of the period, is mandatory, but it is subject to implied exceptions. As stated in Christin v. Superior Court, 9 Cal.2d 526, 532–533, 71 P.2d 205, 208, 112 A.L.R. 1153, 'The purpose of the statute is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years * * *' and one exception has been recognized 'where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile.' See also Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 67–68, 168 P.2d 665; City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 916–917, 207 P.2d 17; Judson v. Superior Court, 21 Cal.2d 11, 14, 129 P.2d 361; Westphal v. Westphal, 61 Cal. App.2d 544, 550, 143 P.2d 405. What is impossible, impracticable or futile must, of course, be determined in the light of the facts of the particular case."

It was held in Neustadt v. Superior Court, 112 Cal.App.2d 825, 827, 247 P.2d 569, that the extent of this exception is left undefined and a review of the cases shows merely that it is utilized in more or less justifiable situations, and that the problem is to determine whether the facts in any particular case fit the statement of the exception in the light of the facts to which that statement is applied.

In the instant case appellants argue that they could not go to trial until after the determination of the issues in the probate court proceedings and until after the final determination of the case of United States v. Tomoya Kawakita, D. C., 96 F.Supp. 824; that under the facts and circumstances, it would have been "impractical and futile" to have brought the case to trial before the decision on the motion to vacate the judgment and orders in the probate court and that the court erred in holding that Section 583 of the Code of Civil Procedure had any effect where there had been a partial trial within the prescribed five year period. We cannot agree with these contentions.

[5] In their amended complaint plaintiffs take the position that the sale in the probate proceedings was accomplished by fraud as a part of a conspiracy and damages only are sought. If the proceedings

in the court were void as claimed on the motion to vacate them in the guardianship matter and so appeared from the record or judgment roll, then such proceedings could be set aside on motion at any time. As was said in In re Dahnke's Estate and Guardianship, 64 Cal.App. 555, 560, 222 P. 381, 384:

> "It is well settled that a judgment or order which is void on its face, and which requires only an inspection of the judgment roll or record to show its invalidity, may be set aside on motion, at any time after its entry, by the court which rendered the judgment or made the order. People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am.St.Rep. 448; People [ex rel. Schwartz] v. Temple, 103 Cal. [447], 453, 37 P. 414. Equally well settled is it that a judgment or order, which is in fact void for want of jurisdiction, but the invalidity of which does not appear from the judgment roll or record, may be set aside on motion within a reasonable time after its entry, not exceeding the time limit prescribed by section 473 of the Code of Civil Procedure; and an independent suit in equity to set aside the judgment or order is not necessary. Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am.St.Rep. 198; People [ex rel. Schwartz] v. Temple, supra; Smith v. Jones, 174 Cal. 513, 163 P. 890. The motion, in such case, is not necessarily based upon section 473; but, in determining whether it is presented within a reasonable time, the period prescribed by section 473 within which motions under it may be made is, as said in Smith v. Jones, supra, 'the standard or criterion in all cases.'"

[6] It is apparent that the guardianship orders could be and were attacked in the instant case and if any such order was void on its face it could be set aside by that court. The only issue in the proceedings on the motion in the probate matter determined adversely to appellants by the trial court was as to the appointment of Lorenz as guardian. All of his acts as guardian were vacated, annulled and set aside and he was discharged. Under these circumstances plaintiffs were not in a position to argue that they were prevented by the probate proceeding from trying the instant case. In this connection it may be observed that the motion to vacate the orders in the probate proceedings was not filed until October, 1950, more than three years after the filing of the original complaint and there appears to be no valid reason why the plaintiffs could not have secured a trial in the instant action during that period.

The argument that there has been a partial trial of the probate proceedings is without merit. Those proceedings were in a separate action and not in the instant case. The cases cited by appellant upon this argument are all cases in which proceedings of some kind had been instituted in the identical action in which the dismissal was sought.

The contention that the action could not be brought to trial because Tomoya Kawakita has been sentenced to death after a trial on an indictment charging him with Treason is likewise without merit. Tomoya left California and went to Japan, and did not return to the United States until 1946. According to the allegations in the amended complaint he knew nothing of the proceedings in the probate matter or of the sale of the property involved until 1946. The sentence of Tomoya was pronounced on or about October 5, 1948, and since that date he is deemed to be civilly dead. Penal Code Section 2602. Civil death has been defined as the state of a person who, though possessing natural life, has lost all his civil rights and as to them is considered dead. 16 Am.Jur., p. 11. The record shows that on August 6, 1948, Tomoya assigned all his right, title and interest in the matter to his attorney. There was no showing that Tomoya's presence was necessary at the trial of the action or that it could not have been had in his absence.

The record shows that although the instant action was filed on March 4, 1947, plaintiffs made no effort to bring the cause to trial until February 18, 1952, and that the reasons advanced by plaintiffs for the delay were not sufficient to require the trial

court to deny the motion to dismiss under the rules herein stated. We cannot say that the trial court abused its discretion in dismissing the action.

The order of dismissal is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



PEOPLE v. BRADDOCK.*

Cr. 4991.

District Court of Appeal, Second District, Division 3, California.

June 30, 1953.

Rehearing Denied July 13, 1953.

Hearing Granted July 28, 1953.

Defendant was convicted, in a nonjury trial, of four Health and Safety Code violations, consisting of the issuance of four narcotics prescriptions on separate days for one who was not under his treatment. From the judgment entered by the Superior Court of Los Angeles County, and from an order denying his motion for new trial, defendant appealed. The District Court of Appeal, Shinn, P. J., held that where narcotic officer conceived plan to entrap physician into violation of law, had himself introduced to physician under assumed name, represented that he had a sick wife who was using certain drugs, made excuses for not bringing her to the doctor's office when told he should do so, ignored a request by doctor to call upon her, and obtained prescriptions in a fictitious name given as that of his wife, doctor could not be lawfully convicted of violation of law which forbids prescribing narcotic for one not under his treatment.

Reversed.

1. Criminal Law ⇐37

Defense of entrapment is valid when intent to bring about commission of unlawful act originates in mind of entrapping person and accused is lured into commission of offense which he would not otherwise have committed in order that he can be apprehended and prosecuted.

2. Criminal Law ⇐37

Where narcotic officer conceived plan to entrap physician into violation of law, had himself introduced to physician under assumed name, represented that he had a sick wife who was using certain drugs, made excuses for not bringing her to the doctor's office when told he should do so, ignored a request by doctor to call upon her, and obtained prescriptions in a fictitious name given as that of his wife, doctor could not be lawfully convicted of violation of law which forbids prescribing narcotic for one not under his treatment. Health and Safety Code, § 11163.

Arthur F. Larrabee, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Dr. Raymond M. Braddock was convicted in a nonjury trial of four violations of § 11163, Health & Safety Code,[1] consisting of the issuance of four narcotic prescriptions on separate days for one who was not under his treatment. He was granted probation upon condition that he spend nine months in the county jail, his motion for a new trial was denied, and he appeals.

The case was tried upon the transcript of evidence at the preliminary and some additional testimony at the time of trial. The case of the People rested upon the testimony of one Mantler, an inspector for

1. "§ 11163. Narcotic not to be prescribed etc., for person not under treatment. Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division."

* Subsequent opinion 264 P.2d 521.

the Bureau of Narcotic Enforcement, State of California. Defendant offered no evidence. Therefore, the evidence is unconflicting.

Defendant urges the defense of entrapment and also claims there was a material variance in that the information charged that the medicine was prescribed to E. J. Mantler, whereas the proof showed that it was prescribed for a fictitious person, "Julia Bates."

[1] Simply stated, the rule as to entrapment is that the defense is valid when the intent to bring about the commission of the unlawful act originates in the mind of the entrapping person and the accused is lured into commission of an offense he would not otherwise have committed in order that he can be apprehended and prosecuted. People v. Hall, 133 Cal.App. 40, 23 P.2d 783.

Mantler had himself introduced to Dr. Braddock by one Donald Grimes who, he testified, was a narcotic addict whom he had known for about a year. (There was no evidence that Grimes was known to the doctor to be a narcotic addict.) Grimes took Mantler to Dr. Braddock's residence and introduced him to the doctor as "Roy Bates." Mantler said he hoped the doctor would take care of his wife, to whom he gave the fictitious name of "Julia M. Bates," and he gave a false address for her. The doctor said he was supposed to see the patient and asked if she could be brought to him. The doctor asked what kind of medicine she used and Mantler said she had used all different kinds in the past two years. After a conversation about the doctor's dog and his cat, they entered the doctor's house and the doctor asked what it was Mantler wanted, whether his wife used Methadon and Mantler replied mostly Methadon or Demerol. A prescription was written and Mantler paid the doctor $15. During this time a man named Thomas came to the front door and Grimes went outside and spoke with him. Mantler testified Thomas was a narcotic addict in Los Angeles, but there was no evidence that the doctor was aware of that fact or even knew of the appearance of Thomas. Ten days later Mantler returned. He and the doctor visited in a friendly manner and in the conversation Mantler said he had been lucky in an unlawful poker game. He said his wife was not "doing so good," that she had run out of medicine but he had something for an emergency. The doctor asked if his wife gave trouble when she was short of medicine and Mantler said: "She very nearly ran me up the chimney of the house on occasions." The doctor wrote on his prescription book, "T. B." and said: "What else is wrong with her, I have forgotten what you said the last time" and Mantler said: "Well, she had an old hysterectomy a couple of years ago." Mantler paid the doctor $10. About ten days later he went to the doctor again, and on another visit ten days later, when the doctor asked how he was getting along, Mantler told him that things were "pretty tough." Although Mantler testified that on the first occasion he did not tell the doctor what was wrong with his wife, it appeared from his cross-examination that he had stated that she had "T. B." During the several visits the conversations were on a friendly basis and the doctor addressed Mantler as "Roy." Upon the second visit he asked Mantler to let him know when he could call upon "Julia Bates" at her home, and upon different occasions inquired how she was getting on. On one occasion they watched a world series ball game on television, and upon the occasion of the second visit Mantler offered the doctor $20, but he refused to take more than $10. After Mantler obtained the first prescription it was known to other inspectors in the enforcement office that he had obtained it by false representations to the doctor that "Julia Bates" was his wife and was in need of drugs. Upon Mantler's fourth visit defendant was arrested by Mantler and three other inspectors who seized all his prescription books and records.

[2] The only question which requires an answer may be stated as follows: When a narcotic officer conceives a plan to entrap a physician into a violation of the law, has himself introduced to the physician under an assumed name, represents that he has a sick wife who is using Methadon or Demerol (trade names), makes ex-

cuses for not bringing her to the doctor's office when told he should do so, ignores a request by the doctor that he call upon her, and obtains prescriptions in a fictitious name given as that of his wife, may the doctor be lawfully convicted of violation of the law which forbids prescribing a narcotic for one not under his treatment? The question describes the case of Dr. Braddock and our answer is a negative.

It is scarcely necessary to remark that the agent won the confidence of the doctor, who was soon calling him "Roy" and making friendly inquiries concerning the supposed wife. He appeared as a man who was burdened with a sick wife, for whom he generously provided the drugs for the relief of her distress, when she was unable to visit the doctor. So the doctor issued the prescriptions for one not under his treatment, and as a consequence stands convicted of four counts of felony. But let us see what the agent did: He conceived the plan of inducing the doctor to commit a crime; he persuaded the doctor to issue false and fraudulent prescriptions and became accessory to four misdemeanors, § 11165[2]; he made false and fraudulent representations, a felony under § 11170[3]; he gave a false name and a false address for the pretended wife, a felony under § 11170.5.[4] This was entrapment. In all our searching we have not found a case in which a physician was made the victim of such deception. We cannot say that this is the first time a presumably law abiding physician has been induced by false representations of a law enforcement officer to issue a prescription unlawfully, although we have been unable to discover another one. This satisfies us not only that such methods have not been found necessary in policing the medical profession in prescribing narcotics, but also that the employment of fraud and deception in the entrapment of physicians has been very generally and properly scorned.

There is, of course, much more involved here than the simple question whether Dr. Braddock violated the law. He stood mute, as was his right, and thus admitted the truth of Mantler's testimony. It is not because of a claim of innocence that he relies upon the defense of entrapment, but because it is the policy of the law not to punish violations initiated and induced by others for the purpose of bringing about a prosecution.

If we were to uphold the conviction of Dr. Braddock it would mean that we were approving the unlawful enforcement of the law and giving a free hand to law enforcement officers to use not only deceitful means, but unlawful means, to entice physicians, and others as well, to violate the law. The courts have consistently refused to temporize with such fraud, deceit and direct violation of statutory law as the record here discloses. The agent provocateur, so despised that he has been given no name in our language and can claim no place in our society, had best have the door shut against him whenever he appears. Our courts have given no encouragement to his hateful practices, no foothold in our field of law enforcement from which to extend his contaminating influence.

It was said in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 213, 77 L.Ed.

2. "§ 11165. False or fictitious prescription. No person shall issue a prescription that is false or fictitious in any respect."

3. "§ 11170. Acts and statements prohibited. (1) No person shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact.

"(2) No person shall make a false statement in any prescription, order, report, or record, required by this division.

"(3) No person shall, for the purpose of obtaining narcotics, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian, or other authorized person.

"(4) No person shall affix any false or forged label to a package or receptacle containing narcotics."

4. "§ 11170.5. False name and address. No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

413, 418: "The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of Butts v. United States, [8 Cir., 273 F. 35, 38, 18 A. L.R. 143], supra, as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it,'" and in the concurring opinion of Justices Roberts, Brandeis and Stone: "There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require. * * *

"The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury."

It has been the settled policy of the courts to condemn and repudiate unlawful enforcement of the law. We shall refer to only a few of the many cases. One in which the accused was entrapped into procuring and selling a narcotic is Cline v. United States, 8 Cir., 20 F.2d 494. A government narcotic agent arrested an addict but promised to release him if he "made a case" for the agent. The addict, pretending to be greatly in need of the drug, persuaded a friend to induce a chauffeur to obtain morphine for him. The friend received the morphine from the chauffeur, paid him $5 and when he delivered the morphine to the addict in exchange for $5, was arrested and convicted in a jury trial. It was held on appeal that the evidence sustained only one conclusion, namely, that the agent used the addict to trap the defendant.

In United States v. Healy, D.C.Mont., 202 F. 349, 350, the accused unlawfully sold liquor to an Indian who was not known by him to be such, but who was used by government officers as a decoy. After conviction the judgment was set aside, the court saying: "Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. * * * The practice cannot be tolerated, and a conviction for an offense so procured cannot stand."

In United States v. Eman Mfg. Co., D.C. Colo., 271 F. 353, 356, a government agent wrote the defendant enclosing $3 and re-

questing a case of a preparation claimed to be mislabeled. His purpose was to initiate a prosecution for an unlawful shipment in interstate commerce. Defendant, having made the shipment, was prosecuted and it was held, on the stipulated facts, "that in the interests of a sound public policy the defendant should be found not guilty and discharged."

In United States v. Lynch, D.C.N.Y., 256 F. 983, the Military Intelligence Department caused one Fancher to demand money for his influence in the award of a government contract and when money was offered to him by the defendant Lynch the latter was arrested and prosecuted for offering a bribe. The court said that under such circumstances the government was estopped from prosecuting on the ground that it caused and created that of which complaint was made. A verdict of acquittal was directed.

In United States v. Echols, D.C.Tex., 253 F. 862, a military police officer persuaded the accused to procure him a drink in order that he might arrest him therefor. The prosecution was dismissed although the defendant had offered to plead guilty. The court upheld the defense of entrapment and stated as follows, 253 F. at page 863: "In what is here stated there is no intention to excuse persons who yield to temptation, or to hamper or limit the acts of officers of the law in detecting crime by any means or device; but the zeal to detect crime ought not to be so vigorous as to induce officers to originate and procure the commission of the very offenses which they are enjoined to prevent. No faithful officer of the law will be hampered, nor will any criminal be aided, by the observance of this rule. Its disregard, however, may, and likely will, subject to persecution and conviction weak and spineless persons, who find it hard to resist temptation; and the government, through the zeal for conviction on the part of the arresting officer, may become the means of the ruin of its citizens, instead of their safeguard and protection. Such a possible result at once establishes the unimpeachable wisdom of the rule of public policy here enunciated, and requires that the plea of guilty, which the defendant offered to make, be by the court refused, and the case dismissed, which is accordingly now done."

United States ex rel. Hassel v. Mathues, D.C.Pa., 22 F.2d 979, was a similar case which stated and applied the rule of entrapment.

The People contend that the case is the ordinary one of an officer appearing as a willing buyer of narcotics from one who is willing to sell to anyone offering himself as a customer. Cases of this sort are legion, convictions are the rule and reversals the rare exception. People v. Makovsky, 3 Cal. 2d 366, 369, 44 P.2d 536; People v. Lindsey, 91 Cal.App.2d 914, 916, 205 P.2d 1114; cf. People v. Gallagher, 107 Cal.App. 425, 290 P. 504; Cline v. United States, supra, 8 Cir., 20 F.2d 494. But this is because one who is willing to peddle narcotics is necessarily a criminal at heart, looking for no inducement to break the law other than the money he expects to receive. It is an inescapable inference in such cases that a willingness to violate the law existed and that the act of violation was self-induced. Persuasion to make a sale does not taint the transaction with the vice of entrapment unless it induces the commission of an act that would otherwise not have been committed. People v. Makovsky, supra, 3 Cal.2d 366, 370, 44 P.2d 536; cf. Butts v. United States, 8 Cir., 1921, 273 F. 35; People v. Gallagher, supra, 107 Cal.App. 425, 290 P. 504. If this were such a case it would occupy but little of our time, for we would applaud and encourage every energetic and legitimate effort to stamp out the fearful and detestable traffic in narcotics.

In Sam Yick v. United States, 9 Cir., 240 F. 60, at page 65, the court stated: "While it may be true that the mere aiding of one in the commission of a criminal act by a government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have incited the party to commit the crime charged and lured him on to its consummation, the law will not authorize a verdict of guilty." It is, of course, conceded that officer Mantler conceived the plan to induce Dr. Braddock to commit a crime. The remaining question is whether,

in the language of the Sam Yick case, the officer "lured him on to its consummation," and we shall see from a discussion of the undisputed evidence that Dr. Braddock was "lured on" from start to finish.

The question here is whether it could reasonably have been inferred from the facts in evidence that Dr. Braddock was willing to write prescriptions for anyone willing to pay a price, and that he was not induced and persuaded to write them by the representations of the officer. Such conclusions, in our opinion, would have been based on nothing more than suspicion. Mantler kept up his deception to the last. Nothing occurred to cast doubt upon his representations. The doctor asked to see "Julia Bates" at his office and offered to call upon her at her home, but Mantler succeeded in persuading him that she could not be brought to the office and avoided the suggestion that the doctor call upon her. It was not shown that Dr. Braddock had ever before issued a prescription for a person who was not under treatment by him, or had otherwise violated the narcotic laws. Mantler made no effort to obtain a prescription for himself. He evidently believed deception would be necessary and he played his role straight through. He was the agent of the state through whom the state acted. It should not be permitted the state to escape responsibility for the acts of its agent by merely saying that although he spoke falsely he was not believed, and that the doctor was not deceived by his falsehoods into doing something he would not otherwise have done. Every reasonable inference is to the contrary. That the doctor believed the representations was evidenced by the fact that he acted upon them. That they were understood by Mantler to be the effective means of accomplishing his purpose was evidenced by the fact that he persisted in them and improved upon them to the point of arousing the doctor's compassion. If there was an intermixture of cupidity, this would not alter the legal aspects of the case. There is no pretense that the defendant was moved by purely charitable motives, or that he did not know he was violating the law, but this does not militate against the defense of entrapment. Defendant admitted to the officers, immediately after his arrest, that he had written the prescriptions because he needed the money, but this means only that he was the more easily persuaded. The defense of entrapment is not to be denied to the weak and needy. They are the very ones who become the victims of persuasion and deceit, and who deserve protection.

Defendant claims only that he was persuaded to violate the law and that the evidence supports his claim to the exclusion of any other reasonable conclusion. In answering this contention the People call attention to the testimony of Mantler that he had previously questioned defendant over the telephone and accused him of prescribing for addicts, which accusation defendant resented. Also, mention is made of the fact that Mantler testified that Grimes and Thomas were addicts, although it was not shown that defendant had knowledge of that fact or that he even knew the man Thomas. To give serious consideration to such self-serving testimony and vaguely suspicious circumstances as incriminating evidence would only magnify the error of the conviction. The mere presence of Grimes and Thomas was not any sort of evidence that defendant was a law violator. If they were "planted" there by Mantler, as they no doubt were, they could have been called as witnesses if they would have testified that defendant had prescribed for them unlawfully. It is therefore to be presumed that had they been called to testify as to their relations with defendant, if any, their testimony would have been adverse to the People. We therefore utterly reject the argument that as against this presumption the court could regard the presence of these men as an incriminating or even a suspicious circumstance. Moreover, the officers had seized and had possession of defendant's narcotic records. None was offered in evidence. The assertion of Mantler in the telephone conversation that defendant had been prescribing for addicts was not evidence. Defendant made no admission. His prescription books, which were required to contain copies of all prescriptions issued within two years, Health & Safety Code, § 11166.10, were in the

hands of the officers. It was to be presumed that if they had been produced in court they would not have disclosed anything favorable to the prosecution.

This case takes on added significance from the fact that in the present day courts and juries must place great reliance upon the testimony of officers who are charged with the duty of enforcing the narcotic laws. It is of common occurrence that convictions are had, and are affirmed on appeal, upon the uncorroborated testimony of such officers, even in the face of strong denials by the accused. We do not doubt that confidence in the veracity and motives of the officers is generally well deserved, and deem it somewhat more than unfortunate that any officer should stoop to falsehood and deceit in order to bring about the commission of a crime for the purpose of obtaining a conviction. It is shocking to learn that an officer of the law whose worth depends so much upon a high regard for the truth and a just regard for the rights of citizens should conceive and carry out a plan involving so much duplicity, and even more so that he should be assisted by other officers who were aware of the deception. That the narcotic laws are vigorously and systematically enforced we know from the multitude of arrests that are made and the convictions that are had, but it is better that some offenders should go unpunished than that over zealous officers should be permitted to indulge in practices which would tend to demoralize the law enforcement agencies and impair the confidence and trust of the people and the courts which it is necessary for such agencies to possess in order to be most effective.

This is clearly a case in which there was an entire absence of evidence and reasonable inference that the accused would have violated the law had he not been induced to do so by false representations and persuasion of a law enforcement officer. We do not believe that any conviction has been sustained on appeal upon such a record.

In conclusion, we quote from Woo Wai v. United States, 9 Cir., 223 F. 412, 415: "Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in People v. Mills, 178 N.Y. 274, 70 N.E. 786, 67 L.R.A. 131. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant."

If the conviction of Dr. Braddock should be affirmed it would be the only case to be found in the books in which a conviction was allowed to stand upon undisputed evidence that an officer of the law conceived the commission of a crime, used misrepresentation, deceit and unlawful methods to induce its commission, and when all the evidence and the reasonable inferences were that but for the machinations of the officer the unlawful act would not have been committed.

It is unnecessary to consider the question of variance between the information and the proof.

The judgment and order denying a new trial are reversed.

PARKER WOOD and VALLÉE, JJ., concur.

119 Cal.App.2d 90

WOOD v. WRIGLEY.

Civ. 4524.

District Court of Appeal, Fourth District, California.

July 7, 1953.

Action by nephew against aunt for damages for breach of alleged agreement to convey certain realty to nephew by will. The Superior Court, San Diego County, rendered judgment for nephew and aunt appealed. The Court of Appeal, Barnard, P. J., held that evidence, including letters of aunt to nephew in which aunt twice wrote that she had willed land to nephew and several times expressed intention to leave it to nephew aft-

er her death, was insufficient to support finding that such contract existed

Judgment reversed.

1. Wills ⇐58(2)

It is incumbent upon plaintiff seeking damages for breach of alleged agreement to convey certain real property to him by will to prove that minds of parties had met and that they had entered into a definite contract. Code Civ.Proc. § 1973; Civ.Code, § 1624.

2. Wills ⇐58(1, 2)

A contract to make a will must be clearly proved and unambiguous in all its terms.

3. Wills ⇐58(2)

In nephew's action against aunt for damages for breach of alleged agreement to convey certain realty to nephew by will, evidence, including letters of aunt to nephew in which aunt twice said she had willed land to nephew and several times expressed intention to leave it to him after her death, was insufficient to support finding that such contract existed.

4. Pleading ⇐127(1)

Where complaint contained allegations that valid contract existed by terms of which aunt obligated herself to will property to nephew in return for his services in managing property, answer containing allegations that agreement of aunt to leave nephew property by will was conditioned on agreement that income from property would be used to liquidate mortgage debt thereon and that nephew breached that agreement and appropriated income to his own use did not constitute admission of contract and consideration as alleged in complaint in action for damages for breach of contract.

Clarence Harden, San Diego, for appellant.

William S. Warden, Solana Beach, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for breach of an alleged agreement to convey certain real property to the plaintiff by will.

The plaintiff, who lived in Illinois, is the nephew of the defendant, who lived in California. In November, 1941, the defendant acquired by inheritance 80 acres of land in Illinois, which was known as "Westland". The plaintiff and his brother George, owned and operated 80 acres across the road from defendant's land. In November, 1941, under some arrangement between them, the plaintiff took over the management of defendant's land. He established a bank account in Illinois in the name of the defendant with himself as trustee, and deposited half of the proceeds from the crops on her land in this account. He wrote checks on this account for expenses on her land, and also drew on that account for his personal use without her knowledge. At the end of each year he sent her a book which he kept, showing the income, expense and balance for that year, which she examined and returned. The report for 1948 showed a balance in her favor on January 1, 1949, of $1,364.97.

In April, 1949, the defendant went to Illinois and discovered that there was only $73.69 in this bank account, that the plaintiff had been drawing on this account for his personal use, and that he had not paid the taxes for the preceding year, which he had told her he had paid. She changed the bank account, secured from the plaintiff the checkbooks and stubs from 1945 on, took the management of the land from him, and told the plaintiff's brother George what she wanted him to do on the land. In October, 1949, she sold the land. On January 14, 1950, the plaintiff wrote to the defendant saying, "I wish to settle up with you and would appreciate it very much if you would notify me as to how we stand at the present time." She replied to this letter on January 19, 1950, saying that he had the book "recording our business transaction"; that his statement on January 1, 1949, showed a balance of $1,364.97; that the balance at the bank on May 3, 1949, was $73.69; that this should have left a balance due her of $1,291.28; and that "If there is anything else due you have a record of it."

The plaintiff brought this action on August 24, 1950. The complaint alleged, in part, as follows:

"That during the year 1942, the plaintiff and defendant contracted and agreed as follows: that during the lifetime of the defendant, the plaintiff should and would operate, manage and oversee the cultivation, maintenance and tenancy of said real property, and would manage and keep account of the income and expense of such operations for and on behalf of the defendant; that as consideration for the covenants and agreements of the plaintiff as aforesaid, the defendant promised and agreed to convey said real property to plaintiff in fee simple by will at the time of defendant's death; and that the contract and agreement of defendant, as aforesaid, was evidenced by notes and memoranda in writing and subscribed by said defendant."

It was also alleged that the defendant had sold the land and thus made it impossible for her to perform her agreement to will it to the plaintiff, that the property was worth $8,000 at the time it was sold, and that the plaintiff had been damaged in that amount. The answer of the defendant denied that the contract and agreement alleged in the complaint was evidenced by any note or memorandum signed by the defendant. It also alleged that the agreement referred to was an oral one, and that the plaintiff had also agreed to use the income from the property to liquidate the mortgage debt thereon; that the agreement of the defendant to leave this property to the plaintiff by will was conditioned upon the agreement that said income would be used to liquidate the debt; that the plaintiff breached said agreement and failed to devote the income to the payment of the debt; and that the plaintiff appropriated the income to his own use.

The court found that in November, 1941, the plaintiff and defendant contracted and agreed as follows: (here follows the language of the complaint which is above quoted). It was further found that the plaintiff had fully performed or was willing to perform; that the defendant had repudiated her obligation by selling the property and thus "breached by anticipation her promise and obligation to will to the plaintiff said real property"; that the property was worth $6,000 when it was sold; and that the plaintiff was indebted to the defendant for money had and received in the sum of $1,291.28. Judgment for the balance of $4,708.72 was entered in favor of the plaintiff, and the defendant has appealed.

[1, 2] The first and main question presented is whether the evidence is sufficient to support the finding to the effect that a valid contract existed, by the terms of which the aunt obligated herself to will this land to the nephew in return for his services in managing the property. There is no evidence of any oral contract, which would be unenforceable in itself. Civ.Code, § 1624; Code Civ.Proc. § 1973. It was incumbent upon the plaintiff to prove that the minds of the parties had met, and that they had entered into a definite contract. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146. A contract to make a will must be clearly proved and unambiguous in all its terms. Page on Wills, Lifetime Ed., Vol. 4, pp. 842–843. If such a contract here existed, its existence and terms must be found exclusively in the letters relied on by the plaintiff.

The plaintiff testified that he had a business relation with the defendant; that it was "managing 80 acres of land"; that this relation began "in the fall of 1941"; and that the defendant was not there at that time. When asked if he had any agreement with her, oral or written, in regard to this business relationship, he replied: "Yes". When asked whether this agreement was oral or written, he replied: "It was written by letter." He then stated he had letters from the defendant relating to this business relationship, and these letters were introduced in evidence. He also testified that he did not recall receiving any letters "relating to the nature of your agreement as manager of this land" other than those introduced in evidence; that he kept a record and sent her the record book at the end of each year; that the balance shown in the bank account never did correspond with the balance shown in the statements which he had sent her bacause "I spent cash from the checking account for my own personal use"; and that, so far as

he knew, the defendant did not know that he had used such funds for his personal use until he turned the check stubs over to her at her request in April, 1949.

The only material portions of the letters from the defendant to the plaintiff, as stipulated by the parties, are as follows. On August 27, 1942, she wrote: "I made a will last week Kermit and I willed Westland to you." On April 21, 1944, she wrote:

"Kermit I am so proud of you Honey. I know you were everything that Lee always thought you were—and you have proven yourself again and again. Lee looked up to you as his most precious example and you have always been tops with me.—Westland will be all yours Kermit when I pass on—after the debt is paid off on it. I expect it to yield me a few dollars as well as giving you a living. You have won a hard fight and as I said it will be all yours when I go on."

On January 31, 1945, she wrote:

"Dear Kermit, Mae and Woods: Kermit don't worry over Westland—sometime you will be glad you held onto it, I still believe in the soil. * * *

"If you get discouraged and get a buyer—sell it and take half. I'm only holding it for you."

On March 15, 1945, she wrote:

"Kermit when I come to Illinois I won't draw on Westland—because I want us to get that precious soil all paid off and then put the cash away to build a modern home out there for Mae, Kermit, Nora and Bob—you will need so many things besides a house, will be a garage, a barn, a shed for stock, a well and cistern—oh my dreams run on."

On January 23, 1946, she wrote:

"Kermit again and again, I thank God for you my dear. Without you I know my interests in Illinois would have gone begging. As I told you before I have willed the Westland to you. After it is paid for or paid off I'd hope there will be a little income from it for both of us but whether or not it will be yours when I am gone—of course I intend living to a rotten old age but nevertheless it will be yours—I'd like you to divide it with George, but I don't need to tell you that you would anyway. However that will be up to you, as you see fit. Kermit is it possible for me here in California to give you power of attorney there in Illinois? I will if I can."

And on April 19, 1947, she wrote:

"My boy—please forgive me for being (yellow) for a few hours. I just got panicky for a time—Westland is yours and always will be. As I told you when it is clear I hope to have a little income from off of it. You see I told you, that you and you alone can take Lee's place and calm me down—please forgive me if you can and know that (more than you will ever know) I appreciate what you have done for me I know that not one of them would have taken over as you have. Westland is yours when Aunt Georgia is no more. Just let me get a little income off of it when it is clear. You know me so well Kermit. I've had to be brave and keep my chin up for so long that while I actually had all of me down in the depths. Guess I'm just getting old and hellish. Again I tell you Westland is yours. Keep this letter and if I ever go haywire again, send me a copy of it."

The defendant testified that she came into possession of this land in November, 1941; that she first wrote to the plaintiff about this land in November, 1941, in reply to a letter from him "telling me that he would take over for me if I desired"; that she arranged with the plaintiff to manage the land for her, but no formal agreement was made pertaining to this arrangement; that he later wrote her that he had taken over the management and had arranged for the land to be farmed; that in the beginning he was going to farm it himself; that he later wrote her that he and George were working the land together, and that one-half of the proceeds were paid over to George; that he did not tell her what the arrangement between himself and George

was; that this was a customary rent in Illinois; that the plaintiff continued to do this until she went back in April, 1949; that she received reports as to the receipts and expenses each year; that the only agreement she had with the defendant was what is contained in the letters, and that she kept telling him in these letters to pay the mortgage off as soon as he had the money; that at one time she would have been willing for him to sell the place and take half of the proceeds; that she went back in April, 1949, and saw the plaintiff whom she had not seen since November, 1939; that she told the plaintiff that since $1,300 was available she wanted to go the next morning and pay off the mortgage on the land, which then amounted to about $1,150; that the next morning she asked the plaintiff for the money, and he replied "I do not have it"; that when she asked where the money was, he replied: "Well, it is available but I can't get it"; that he did not tell her where it was; that she demanded and received the check stubs and checks and took the handling of the money out of his hands; and that she then instructed his brother George what she wanted him to do.

The evidence shows, without conflict, that the "business relationship" whereby the plaintiff was "managing" this 80 acres began in the fall of 1941. There is no evidence that any contract of this nature was made then, or that any statements were then made by either party concerning any will provision. The only evidence concerning what was done at that time is that the plaintiff was to farm the land, or hire it farmed, and was expected to turn over half of the proceeds to defendant. He did take charge of the land, and his account book shows entries of expense and income beginning with January 5, 1942, in which he accounted to her for one-half of the proceeds. Sometime in the second year, he wrote her that he and his brother George were working the land together, and that one-half of the proceeds were being paid to George. He and George owned and operated a place across the road and the only reasonable inference is that he shared in the tenant's part of the income. This arrangement, whatever it was, continued until April, 1949, when the defendant terminated it and apparently continued a lease arrangement with George for that season. There is no evidence of any change in the original arrangement, or of any different arrangement or contract at any time, unless it can be said to sufficiently appear from the letters written to the plaintiff by the defendant.

The first of these letters was written in August, 1942, some ten months after the arrangement began. It merely said that she had made a will willing this land to him. Nearly two years later, in April, 1944, she wrote him that "Westland will be all yours Kermit when I pass on". Some ten months later, in January, 1945, she wrote him that sometime he would be glad he held onto the land and if he got discouraged he might sell it and take half, that she was only holding it for him. The land had not produced much return up to then, and this statement merely indicates that she was willing at that time to give him half of the proceeds if he wanted to sell it. A year later, in January, 1946, she wrote that she had willed Westland to him, that "It will be yours when I am gone", and that she wanted him to divide it with his brother George. This letter in no way suggests such an agreement as that here claimed. In the final letter, written in April, 1947, she said that he was taking the place of her dead son, referred to her depressed spirits, and assured him that "Westland is yours when Aunt Georgia is no more."

[3] In these letters the defendant twice said that she had willed this land to the plaintiff and several times expressed an intention to leave it to him after her death. Nothing is said in any of them to indicate anything in the nature of an agreement or that she had agreed to will the property to him because of anything he had agreed to do. These letters are not sufficient to show any agreement to the effect relied on by the plaintiff, nor any of the terms of any such agreement. They amount to no more than a promise, at best, and disclose no such an agreement on the defendant's part, or a

consideration therefor. The plaintiff did not testify that any letters were written by him which would affect the situation which existed during the years. As was said in Monsen v. Monsen, 174 Cal. 97, 162 P. 90, 92: "Beyond all this, the evidence relied on, even if it could be regarded as tending to show with sufficient precision the making of any contract, fails utterly to support the precise contract alleged and found." The evidence produced is not sufficient to support the finding that an enforceable contract to convey this property by will was entered into by these parties.

[4] The plaintiff argues that a consideration sufficiently appears, irrespective of the evidence, because the answer admitted that the consideration was the plaintiff's promise to manage the farm and keep accounts. The complaint described one agreement while the answer described a different agreement. At best, there was no admission of the contract and consideration which was alleged in the complaint. The trial was mainly devoted to the issue as to whether such a contract ever existed. The burden was on the plaintiff to prove the contract relied on, including the matter of consideration.

It is unnecessary to consider all the other points raised. It appears probable, however, that the amount of the damages allowed was excessive in any event. The court allowed the full value of the property. It is stated in the brief, and not denied, that the defendant was 55 years old at the time of the trial. Under plaintiff's claim he would not be entitled to the property until her death, had the agreement been made and performed. It would seem logical that a proper discount for cash in advance should be made in such a case. See, Caminetti v. Pacific Mutual Life Ins. Co., 23 Cal. 2d 94, 142 P.2d 741; Aetna Life Ins. Co. v. Geher, 9 Cir., 50 F.2d 657.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

BARTONE et al. v. TAYLOR-BENSON-JONES CO., Limited.

Civ. 19644.

District Court of Appeal, Second District, Division 2, California.

July 7, 1953.

Rehearing Denied July 24, 1953.

Hearing Denied Sept. 4, 1953.

Action for specific performance of contract for purchase and sale of realty. The Superior Court, Los Angeles County, entered judgment for plaintiffs and defendants appealed. The Court of Appeals, McComb, J., held that escrow instructions drawn in accordance with terms of offer made by plaintiffs to purchase defendants' lot, did not constitute acceptance of defendants' counteroffer which materially changed terms of plaintiffs' original offer.

Reversed.

1. Contracts ⇐23

An acceptance to result in formation of binding contract must meet exactly and precisely the terms proposed in offer, and if something different is made a condition of alleged acceptance, no contract arises unless original offeror accepts counteroffer. Civ. Code, § 1585.

2. Vendor and Purchaser ⇐17

Escrow instruction drawn in accordance with terms of offer made by plaintiffs to purchase defendants' lot did not constitute acceptance of defendants' counteroffer which materially changed terms of plaintiffs' original offer. Civ.Code, §§ 1585, 1586.

W. L. Engelhardt, Los Angeles, for appellants.

Enrico J. Verga, Inglewood, for respondents.

McCOMB, Justice.

Defendants appeal from a judgment granting plaintiffs specific performance of a contract for the purchase and sale of real property.

Facts: Plaintiffs through their broker Benjamin Radin submitted to defendants a written offer dated February 14, 1952, to

purchase a lot situated in the city of Inglewood, California. In this offer it was stated "Buyer will pay all cash. Present owner to retain the oil rights."

When this offer was made to defendants, defendants made several insertions in it before accepting the same, among which were that "the oil and gas lease on said premises" were reserved, and "surface rights only included in sale." The sentence reading "Present owners to retain oil rights," was changed to read "Present owners to retain the oil, gas and mineral rights under said premises and are reserved from sale." After the changes were made the offer was signed by defendants.

The following day plaintiffs caused written escrow instructions to be prepared by the Regent Escrow Company, Inc., which instructions were signed by plaintiffs. These instructions so far as they relate to the present case contained these provisions:

> "It is understood and agreed that there is an oil and gas lease on the property on which there is no right of entry and on which there is a 500 ft. relinquishment by the lessee and that the royalties on this lease shall remain the property of the sellers."

In addition the escrow instructions provided for the sale of fee title to the real property and not for the surface rights only. A copy of the proposed escrow instructions were sent to defendants but were never executed. On February 20, 1952, defendants wrote a letter to the broker, enclosing a copy for plaintiffs, in which defendants stated that they rescinded their contract for the reason that it had never been accepted and that there had been no meeting of the minds on the contract.

The trial court gave judgment in favor of plaintiffs.

Question: *Do the foregoing facts sustain a finding that there was a contract between the parties?*

No. The following rules are here applicable:

1. "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal." Section 1585, Civil Code.

2. "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards." Section 1586, Civil Code.

[1] 3. An acceptance to result in the formation of a binding contract must meet exactly and precisely the terms proposed in the offer, and if something different is made a condition of the alleged acceptance, no contract arises unless the original offeror accepts the counter offer. (Howard v. Chow, 27 Cal.App.2d 755, 757[1], 81 P.2d 994; Gale v. Wood, 112 Cal.App.2d 650, 655, 247 P.2d 67; Ajax Holding Co. v. Heinsbergen, 64 Cal.App.2d 665, 669[1], 149 P.2d 189.)

[2] Applying the foregoing rules to the facts of the instant case it is apparent that when the original offer was made to defendants material changes were made therein, to wit, (a) the surface rights alone were to be sold, and (b) the seller was to retain all oil, gas and mineral rights, not merely the rights in the oil and gas lease then on the premises.

This constituted the counter offer.

The counter offer was not accepted by plaintiffs when they signed the escrow instructions for the escrow instructions (a) provided for the sale of the fee title to the property and not for the surface rights only, and (b) did not provide that the seller should retain all the oil, gas and mineral rights, but merely that the royalties on the oil and gas lease then on the property should remain the property of the sellers.

Clearly this was not an exact and precise acceptance of the counter offer, and since defendants withdrew such counter offer before it was accepted by plaintiffs and never accepted the latter's counter offer, there was no meeting of the minds and no contract was ever entered into.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, TRAYNOR, and SPENCE, JJ., dissenting.

118 Cal.App.2d 871

LOS ANGELES COUNTY v. CARPENTER et al.

Civ. 19459.

District Court of Appeal, Second District, Division 1, California.

July 1, 1953.

Condemnation proceeding by county to take certain properties for street purposes. The Superior Court, Los Angeles County, Arthur Crum, J., awarded $110.00 for each parcel of land involved divided equally among owners of lots within such parcels and certain property owners appealed. The District Court of Appeal, Scott, J. pro tem., held that the evidence sustained finding that each parcel of land involved had a value of $110.

Judgment affirmed.

1. Eminent Domain ⇐205

In condemnation proceedings by county to take certain properties for street purposes, wherein property owners offered single witness as to property value, conflicting testimony of witnesses for county as to highest and best use and value of subject properties, interest of such witness and his family in subject properties and his testimony in another proceeding respecting use of subject properties, and testimony indicating actual use of subject properties as roadway for several years, were properly considered in evaluating testimony of such sole witness.

2. Eminent Domain ⇐149

In condemnation proceedings by county to take certain properties for street purposes, evidence sustained finding that each parcel of land involved had value of $110.

3. Appeal and Error ⇐1008(1)

Where question of fact from which reasonable minds might draw different conclusions is presented for review, District Court of Appeal is bound by fact findings of trier of facts.

4. Appeal and Error ⇐931(1)

In determining sufficiency of evidence to support findings, all substantial conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in to uphold findings if possible.

Robt. E. Rosskopf, Beverly Hills, for appellants.

Harold W. Kennedy, County Counsel, and Arthur Loveland, Deputy County Counsel, Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendants appeal from a judgment in a condemnation proceeding, asserting as the sole ground of appeal that the amount of the award is inadequate.

Four parcels of land are involved embracing 22 lots divided among the parcels with 2 lots in one parcel, and 5, 7 and 8 respectively in the others. These lots made up a strip of level land 25 feet wide and 2311 feet long, with a total area of about one and one-third acres. They were taken for street purposes.

The trial court awarded $110 for each parcel divided equally among the owners of the lots within the parcel. Appellants assert that the awards were so grossly inadequate as to amount to confiscation.

[1] Experienced and qualified appraisers called as expert witnesses for plaintiff testified that the highest and best use of the lots in the 25 foot strip was for road purposes. A nominal value was placed on each parcel, the highest amount testified to by witnesses for plaintiff being the amount awarded to defendants.

Defendant Carpenter was the only witness for defendants as to value. He fixed values substantially higher than plaintiff's witnesses and considered that their highest and best use was "to put small houses on them". The total valuation placed by him was $11,500. It appears that this witness owns part of the property and his mother and sister own the rest. This sole witness, however, was confronted at the trial of this case with testimony he had given in another case brought by a school district to acquire land including certain larger lots owned by this same witness. These lots are contiguous to and immediately east of three of the

lots being acquired in this proceeding. He testified in that case that access to the larger lots was over this 25 foot strip. An award was made to him in the other case for the larger lots with that testimony by this same witness before the court. In this case, now before us, the witness claimed that there is a 50 foot alley which provided access to these larger lots but qualified that claim by testifying that, "I believe part of it was used as an alley. It had been graded on occasions, it is not in daily use." The trial court determined that it was a 15 (and not 50) foot alley.

Appellants state that the trial court found "that the evidence was insufficient to establish an existing private or public easement" over the subject property. This does not appear in the findings signed by the court. There was testimony to indicate that there was actual use of the property as a roadway and that it had been so used by individuals and vehicles for more than five years. All of these matters were properly considered by the trial court in evaluating the testimony of the only witness called by defendants who testified as to the value of the property.

[2] Analysis of evidence and arguments as to the weight to be given it are included in the brief filed by appellants. We have no doubt that these matters were presented to the trial court and were carefully considered.

[3] "When * * * 'there is presented for review simply a question of fact from which reasonable minds might draw different conclusions this court is bound by the findings of the trier of fact.'" Aboudara v. City & County of San Francisco, 114 Cal.App.2d 630, 632, 251 P.2d 32, 34.

[4] "As to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible." Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 596.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

LISSMAN v. McDONALD et al.

Civ. 15475.

District Court of Appeal, First District, Division 2, California.

July 16, 1953.

Suit by plaintiff as executrix and widow for declaratory relief to demand and determine her rights as a limited partner to share in annual profits of the partnership. The Superior Court, Monterey County, H. G. Jorgensen, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Nourse, P. J., held that the partnership agreement was clear and that widow was entitled to withdraw her share, as limited partner, of annual profits of partnership.

Judgment affirmed.

1. Evidence ⇐448

Where partnership agreement taken as a whole and construing all the clauses together was clear and certain, it was not necessary to admit or consider parol evidence in the construction thereof.

2. Partnership ⇐364

Under partnership agreement, executrix and surviving widow of member of partnership was entitled to withdraw her share, as limited partner, of annual profits of partnership.

Altman & Ellis, San Francisco, for appellants.

Freed, Gebauer & Freed, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff, as executrix and surviving widow of Camille Lissman, sued in declaratory relief to demand and determine her right, in the capacity of a limited partner, to the share of the annual profits of the partnership. Plaintiff had judgment as prayed and this appeal followed.

There is no dispute as to the facts, the question here being confined to an interpretation of the articles of partnership. Four individuals were named both as general and as limited partners. The investment of each, both as general and as limit-

ed partners, was listed in dollars and cents. The interest of each in both capacities was also listed in appropriate percentages. Therein Camille Lissman was noted as holding 20% as general partner and 5% as limited partner.

The business consisted of the mining, processing, and marketing of sand, gravel and similar products under the name of Monterey Sand Co. located at Seaside. It was profitable from its inception. The net profit for the year 1950 was $90,493.67. Of this amount the court awarded plaintiff the sum of $12,491.33, representing her percentage as limited partner of the undrawn profits for that year.

The trial court in its judgment declared that the partnership agreement requires: "the distribution and payment to the estate of Camille Lissman, deceased, and its successor, in the role of a limited partner in said partnership business, of its full share of profits provided by the terms of said partnership agreement upon the determination of profits for each calendar year during the term of existence of said partnership, provided that after payment of such profits, the partnership assets are in excess of all liabilities of the partnership business, except liabilities to limited partners on account of their contributions and to general partners." This was in accord with the court's interpretation of the articles of partnership made in its findings of fact.

Appellants do not follow the usual practice of stating their grounds of appeal or of listing the errors upon which they rely. It seems to be their position that under the judgment the heirs of the limited partner are relieved of personal liability for the partnership debts and also that, if the widow is allowed to draw her profits annually, then they would be required to do the same. If this be so it is the fault of the articles of partnership and not of the judgment.

No applicable authorities are cited by either party and we have not found any. In support of the judgment the learned trial judge filed a written opinion clearly stating our views on the controversy. We herewith adopt that opinion as stating the reasons for our affirmance of the judgment.

"The Court has read the transcript of the testimony herein and considered with great interest the well written briefs of the parties hereto. It does seem strange that in the long history of partnerships there is no case 'squarely in point' with the issues here. The case of Wolcheck v. Wecher [Sup.], 66 N.Y.S.2d 384, does not set forth any of the terms of the partnership agreement, moreover it was only a memorandum opinion (such as this) denying a motion for a summary judgment and holding the cause should be heard on its merits.

"There is no reason why the judge of this trial court should endeavor to write an elaborate opinion in this case. This court is often reminded of an opinion of our Supreme Court where the Court said in substance that the decision of the lower court was correct but the reasons stated therefor were wrong. This is a good case in which by appeal our higher court could establish a fine working rule for the distribution of partnership profits in limited partnerships in particular.

[1, 2] "Suffice it to say here that after taking into consideration all of the citations in the respective briefs herein, the evidence, the law as to limited partnerships and the reason of its enactments and then considering the agreement of these partners taken as a whole and construing all of the clauses thereof together the Court is of the opinion that this agreement is clear and certain and it is not necessary to admit or consider parol evidence in the construction thereof and that to refuse the prayer of plaintiff's complaint would compel the plaintiff to contribute additional capital to the partnership contrary to the agreement. The logic and argument in plaintiff's brief could be repeated here.

"To grant this relief would not necessarily permit plaintiff 'to kill the goose that laid the golden egg.' The parties and their counsel are astute enough to solve their financial problems short of that calamity. Shylock demanded his pound of flesh but after obtaining judgment finding the consequences too severe, if he en-

forced it, relented. It would seem to the Court from the evidence that these parties can work out their problem short of financial disaster to them even though it may eventually result in dissolution or reorganization of the partnership."

Judgment affirmed.

DOOLING, J., and McCOMB, J., assigned, concur.



118 Cal.App.2d 864

BERGHOFF v. KOBLITZ.

Civ. 19436.

District Court of Appeal, Second District, Division 1, California.

July 1, 1953.

Rehearing Denied July 20, 1953.

Hearing Denied Aug. 27, 1953.

Tenant sued landlord for declaratory relief, cancellation of lease and return of money deposited. The landlord cross-complained for money damages. The Superior Court of Los Angeles County, William J. Palmer, J., rendered judgment for the tenant and the landlord appealed. The District Court of Appeal, Scott, J. pro tem., held that where landlord and tenant orally agreed that if tenant would find a person who would take lease as satisfactory rental for balance of term and who would put up security the landlord would make a new lease with such person and would release tenant and return tenant's security deposit, and tenant found such a satisfactory person to whom landlord leased premises on receiving satisfactory security, the lease was at an end and tenant was entitled to return of deposit.

Affirmed.

Landlord and Tenant ⇐184(2)

Where landlord and tenant orally agreed that if tenant would find a person who would take lease as satisfactory rental for balance of term and who would put up security the landlord would make a new lease with such person and would release tenant and return tenant's security deposit, and tenant found such a satisfactory person to whom landlord leased premises on receiving satisfactory security, the lease was at an end and tenant was entitled to return of deposit.

Sampson H. Miller, Los Angeles, for appellant.

John R. Sahanow, Hollywood, and Charles M. Groman, Los Angeles, by: John R. Sahanow, Hollywood, for respondent.

SCOTT, Justice pro tem.

Defendant and cross-complainant appeals from an adverse judgment in a case which grew out of a lease between the parties. Plaintiff brought suit for declaratory relief, cancellation of lease and return of money deposited. Cross-complainant sought money damages.

In December, 1946, defendant leased to plaintiff certain business real property described as 911–13–15 North La Cienega Boulevard, Los Angeles. It was a one story building containing eleven or twelve business offices (excepting a three room suite in the rear portion of the building leased to another tenant). The lease included certain furniture and curtains. Its term was for ten years commencing January 1, 1947, at a total rental of $80,000, payable at $666.67, per month in advance. As security for payment of rent and compliance by lessee with other provisions of the lease, the latter deposited with lessor a $10,000 United States bond, which was to be returned, less deductions, when their relationship ended.

The court found that plaintiff Berghoff had signed the lease and organized the plaintiff corporation which thereafter entered into possession and had paid the rent, although no formal assignment of the lease was made to the corporation. It further found that plaintiffs remained in possession until May 12, 1951, and "on that day both plaintiffs vacated and abandoned said premises and thereupon, before June 1, 1951, surrendered the same to defendant". Rent was paid up to the end of April, 1951. The court further

found that "on or before June 1, 1951, the defendant Lawrence B. Koblitz, accepted the surrender of said premises by the plaintiff and elected to and did terminate and cancel said lease," took over the premises and kept plaintiff out.

Finding number VI sets out that prior to May 12, 1951, lessee talked with lessor about getting a new and different tenant to take the place of lessee; that lessor agreed that if lessee could find someone who would take a lease at a satisfactory rental for the balance of the ten year period, and who would put up security, the lessor would make a new lease and would release lessee and return his deposit; that plaintiff lessee found such a new tenant, told lessor about it and the latter made direct contact with the new party and executed a new lease at a lower rental for the balance of the original ten year term, completely ignoring plaintiff lessee; that thereafter plaintiff lessee abandoned and surrendered the premises and asked for the return of his deposit, less certain deductions.

The trial court concluded that plaintiff was entitled to return of his deposit and gave judgment accordingly.

Defendant objects to returning the deposit, arguing that the lease has not been terminated and cancelled. He claims that the deficiency in rental for the balance of the term plus expenses will amount to more than the value of the bond deposited as security.

Emphasis is placed upon paragraph 13 of the lease which is as follows:

"13. In the event of any breach of this lease by lessee, then lessor besides other rights or remedies he may have, shall have the immediate right of re-entry and may remove all persons and property from the premises; such property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of, lessee. Should lessor elect to re-enter, as herein provided, or should he take possession pursuant to legal proceedings or pursuant to any notice provided for by law, he may either terminate this lease or he may from time to time, without terminating this lease, re-let said premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as lessor in his sole discretion may deem advisable with the right to make alterations and repairs to said premises. Rentals received by lessor from such re-letting shall be applied: first, to the payment of any indebtedness, other than rent, due hereunder from lessee to lessor; second, to the payment of rent due and unpaid hereunder; third, to the payment of any cost of such re-letting; and the residue, if any, shall be held by lessor and applied in payment of future rent as the same may become due and payable hereunder. Should such rentals received from such re-letting during any month be less than that agreed to be paid during that month by lessee hereunder, then lessee shall pay such deficiency to lessor. Such deficiency shall be calculated and paid monthly. Lessee shall also pay to lessor, as soon as ascertained, the costs and expenses incurred by lessor in such re-letting. No such re-entry or taking possession of said premises by lessor shall be construed as an election on his part to terminate this lease unless a written notice of such intention be given to lessee or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such re-letting without termination, lessor may at any time thereafter elect to terminate this lease for such previous breach. Should lessor at any time terminate this lease for any breach, in addition to any other remedy he may have, he may recover from lessee all damages he may incur by reason of such breach, including the cost of recovering the premises, and including the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this lease for the remainder of the stated term over the then reasonable rental value of the premises for the remainder of the stated term."

There is abundant evidence that lessee desired and intended that he should terminate his relationship with lessor, that this was communicated to lessor and that plaintiffs actually moved out on May 12, 1951.

Lessor states that he discovered lessee's abandonment of the premises on May 17, 1951. He also was told by lessee on May 21, that the latter had moved out. Lessor served on lessee (on May 23) a three days' notice to pay rent or quit and served similar notices on two subtenants of lessee, and on June 1, filed suit for unlawful detainer against lessee.

Plaintiff testified at the trial of the case as follows:

"I asked Mr. Koblitz to reduce the rent due to the fact that I could not lease the building at the rentals that were originally leased, and that was when I first took over the building in '47. Mr. Koblitz informed me all along that 'if you will get me another tenant that will take over your lease, and if that tenant is reliable and will put up a security, I will relieve you of your lease. And I will do more: I will lease it to them for less than you are getting it.'

"I asked him to reduce the rent to $500 from the $666, and he said, 'If you produce such a tenant I will let them have it for the $500.'

* * * * * *

"* * * I asked Mr. Koblitz again to reduce the rent so that I might be able to rent the building, which was practically vacant with the exception of two tenants. Mr. Koblitz gave me the same reason. He said, 'I will not reduce the rent for you, but if you can get me a good and reliable and responsible tenant I will reduce the rent.'

"At that time my son, who was present, asked Mr. Koblitz, 'If Dad has or will be able to get a new tenant, who will be responsible and will put up the security? Will Dad get his money back?'

"And he says, 'Yes. I will even go one better: I will rent to the new tenant for less than what your Dad is paying.'

"And that, of course, was not the first time that Mr. Koblitz told me that."

Plaintiff further testified that on May 12, he moved out of the premises because the new tenant whom he had secured was going to take the entire building over.

Plaintiff's son testified that he was present when plaintiff and defendant were discussing the matter of a new tenant and stated:

"So I asked him—I butted into the conversation and asked Mr. Koblitz if we did go ahead with the expense of advertising for a tenant would that mean that we would get our security back and our lease would be forgotten, and Mr. Koblitz said Yes, on condition that you get me a reasonable client, that is, one that is trustworthy and one who will put up good security. And then he said, 'I will also give you a selling pitch, something to help you sell the building: If you get such a person under such conditions, I will reduce the rent.' "

Defendant testified that the new tenant was "the result of efforts on the part of Mr. Berghoff".

When lessor served the notice to pay rent or quit on one of the subtenants he said to him: "Don't pay any attention to that. You can remain here as long as you please. The purpose of that is to get rid of the master lease".

During the same month of May defendant told another subtenant concerning payment of rent: "Make out the check to me for next month". The subtenant then testified, "He told us he was breaking the lease with Berghoff, and Berghoff wouldn't be there anymore."

This announced intention of lessor coupled with the parties' words and acts led the trial court to conclude that the lease was cancelled and terminated on or before June 1, 1951, even though the lease with the new tenant was dated a few weeks later. Subsequent conduct supported this determination. Alterations were made in the premises by lessor. The new lease with new tenant provided not only monthly rental (for an amount less than that paid by plaintiff, but in excess of $500) but also for a deposit for security; gave the new tenant the right to acquire title to all items of furniture and curtains, which right he had previously given plaintiff, and lessor agreed to indemnify the new tenant for loss because of any claim by plaintiff against the new lessee.

Having secured a new tenant and having a new lease and thus having received all

the benefits from the executed oral agreement with plaintiff, defendant nevertheless refused to complete his part of the bargain and declined to return to plaintiff the balance of the deposit. Plaintiff filed complaint in this case as above noted.

After this action was started by plaintiff, defendant filed a cross-complaint asking a money judgment for the difference in rent for the entire balance of the rental period with credit allowed for the unused value of the bond deposited as security. This may be regarded as a further indication by lessor, Sec. 3308, Civil Code, that he had terminated his lease with plaintiff.

In the notices to quit, above referred to, lessor added, "The undersigned expressly reserves all rights, including the right of forfeiture, inuring to lessor, contained in the lease agreement under which you occupy the herein described premises." Those words were not of sufficient force to overcome the effect of the other words and acts of the parties. In the view of the trial court they in no way enlarged or extended defendant's rights.

Defendant seeks relief on this appeal in reliance on the language of the lease as though the parties had not by agreement cancelled and terminated it. The determination of the trial court, as embraced within its findings, and explained in part by its memorandum of decision, is supported by the evidence in the case viewed in the light of established principles of law.

We observe that lessor did not need to serve a notice to pay rent or quit and to bring an action of unlawful detainer to acquire the right to occupancy of the premises which he had under the lease. His purpose in doing these further acts was to obtain exclusive possession and as he explained to the subtenant, "to get rid of the master lease". The new tenant whom plaintiff had procured was a substantial concern, and in order that lessor might deal freely and without regard for plaintiff, it was obviously to lessor's advantage to be completely free to act without consulting plaintiff. The trial court found upon sufficient evidence that he did so act.

We have considered the various cases upon which counsel rely as supporting their respective positions. In Yates v. Reid, 36 Cal.2d 383, 224 P.2d 8, the court indicated that when the conduct of the parties is inconsistent with the rights of the tenant under the lease, a surrender of the lease by operation of law may result. Citing Welcome v. Hess, 90 Cal. 507, 27 P. 369, and referring to De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453. A similar situation and ruling are found in Narcisi v. Reed, 107 Cal.App.2d 586, 237 P.2d 558.

In the case before us, reliance is placed on agreement of the parties by which the lease and the rights of both parties thereunder were at an end because of their own words and acts and not by operation of law. See Dorcich v. Time Oil Co., 103 Cal.App.2d 677, 230 P.2d 10.

In Dickinson v. Electric Corp., 10 Cal. App.2d 207, 210, 51 P.2d 205, 207, judgment for plaintiff lessor was affirmed. The comment is made that when a lessee has surrendered demised premises prior to the termination of the lease *"If the lessor does not desire to proceed further against the lessee, he may accept the surrender, treat the lease as terminated, and retake possession of the premises"*, or may pursue one of two other remedies, one of which was selected in that case and pursued to judgment. Factually, that case must be distinguished from the instant case because here we have an added factor in the express finding by the trial court that lessor had agreed that it would and it did follow the course indicated by the language in italics above, because plaintiff, the first lessee, got for his lessor a satisfactory new tenant who leased the premises at a lower rental and put up satisfactory security. When the oral agreement between the parties had been fully executed, the lease between them was at an end and plaintiff was entitled to the return of his deposit.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

118 Cal.App.2d 691

CURLAND v. LOS ANGELES COUNTY FAIR ASS'N et al.

Civ. 19426.

District Court of Appeal, Second District, Division 3, California.

June 25, 1953.

Action by patron of county fair for injuries sustained when he tripped and fell over pipe which protruded out of the ground. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered judgment on verdict for defendants, and plaintiff appealed. The District Court of Appeal, Vallée, J., held, inter alia, that the evidence on questions of negligence and contributory negligence sustained the verdict.

Affirmed.

1. Appeal and Error ⇐110

Appeals would not lie from verdict or from order denying new trial.

2. Appeal and Error ⇐1001(1)
Negligence ⇐136(9)

Where different inferences may reasonably be drawn from evidence, decision on questions of negligence and contributory negligence must be left to trier of facts, and conclusion of trier of fact will not be disturbed on review if some substantial evidence or reasonable inference lends support thereto.

3. Negligence ⇐32(2.3)

A person invited upon premises of another may recover from the owner for any injuries received owing to dangerous condition of premises known to owner and not known to person so invited, but owner is not bound to keep his premises absolutely safe.

4. Negligence ⇐32(2.3)

Responsibility of owner for safety of person invited upon premises is not absolute, and owner is only required to use ordinary care for safety of persons he invites to come upon the premises.

5. Negligence ⇐52

Where there is danger attending upon entry of premises, or upon work which person invited upon premises is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is owner's duty to give such person reasonable notice or warning of such danger, but owner is entitled to assume that such person will perceive that which would be obvious to him upon ordinary use of his own senses and is not required to give to such person notice or warning of obvious danger.

6. Agriculture ⇐5

A duty rested on patron of county fair to look where he was going and to observe that which was in plain sight in front of him, and whether danger posed by pipe protruding above ground was obvious to patron, and whether patron under circumstances made reasonable use of his faculties were questions of fact for the jury.

7. Negligence ⇐122(1)

The law presumes that a person possessing normal faculties of sight must have seen that which was in the range of his sight.

8. Agriculture ⇐5

It was duty of lessee of space used for "midway" at county fair to so place axle, which was partly buried in ground and which braced light standard, that it would not be likely to produce injury to those who, using reasonable care, might walk on the fairgrounds.

9. Agriculture ⇐5

In action by patron of county fair for injuries sustained when he tripped and fell over pipe which extended above ground, evidence on issues of negligence and contributory negligence supported verdict for defendants.

10. Agriculture ⇐5

In action by patron of county fair for injuries sustained when he tripped and fell over pipe which extended above ground, instruction, to effect that human experience justifies inference that when one looks in direction of object freely visible, he sees it, and where there is evidence to effect that one did look, but did not see that which was in plain sight, some part of the evidence is untrue or the person was negligently inattentive, was proper.

11. Trial ⇐260(8)

In action by patron of county fair for injuries sustained when he tripped and fell over pipe which extended above ground, requested instruction concerning duty owed patron was argumentative in part and not a statement of the law, and insofar as it stated the law correctly, subject matter was fully covered by instructions given, and refusal to give requested instruction was not error.

12. Agriculture ⇐5
Trial ⇐260(8)

In action by patron of county fair for injuries sustained when he tripped and fell over pipe which extended above ground, instruction that mere abstraction on part of patron, an invitee, did not necessarily constitute contributory negligence was a correct statement of the law, but its refusal was not error, in view of fact that subject matter was adequately covered by instructions given.

13. Trial ⇐260(8)

In action by patron of county fair for injuries sustained when he tripped and fell over pipe which extended above ground, requested instruction relating to care required of patron was properly refused, in view of fact that subject matter of such instruction was covered by instructions given.

Frank Desimone, Los Angeles, for appellant.

Reed & Kirtland and Robert C. Packard, Los Angeles, for respondent.

VALLÉE, Justice.

[1] Appeal by plaintiff from a verdict and a judgment for defendant and from an order denying a new trial in an action tried by a jury for damages for personal injuries. Since an appeal does not lie from a verdict or an order denying a new trial, these appeals will be dismissed.

Stated in the light most favorable to defendant-respondent, the facts are these:

On September 21, 1950, about 1:00 p. m., plaintiff, after purchasing a ticket, entered the grounds of the Los Angeles County Fair conducted by defendant. The "fun zone" was located about 60 feet from the gate where he entered. Plaintiff proceeded, in an "aisle-way," "with the rest of the people" who were entering the grounds at the time. The aisle in which plaintiff was walking was called the "midway." It was 25 feet wide, "an aisle-way which people walked through." As he was walking along and had gone about 50 or 60 feet, he tripped on a "pipe" which protruded about "7 or 10" inches above the ground. Immediately before he tripped, plaintiff was walking along, listening to the "barkers," "looking around at the general things, and just moving along with the crowd" looking at the different displays, games, fun things, and trinkets for sale. Plaintiff testified he was "not particularly interested in the fun zone, although I was going through it"; the crowd he was walking with was just a crowd the same as you walk down the street with; he did not have any particular recollection as to just where he was looking or where he was walking, other than that he was going down the aisle; "I was walking down the aisle-way and I was looking at everything there was to see at the fair in that general place, and at times I was looking at different things."

The "pipe" plaintiff tripped over was a Ford axle about one inch in diameter with a gear on top about three inches in diameter, which was driven into the ground. It was used as a wind brace for a light standard. The light standard was 30 feet high; the base was about 80 inches across; the axle was 40 inches from the center of the standard. The brace from the standard to the axle was a 2 x ¼ inches flat piece of iron which went up 22½ inches on the standard. Plaintiff did not see the axle nor the light standard before he fell; they were located in the fun zone. Neither of them protruded into the midway at any point.

The light standard, the braces, and the axle were installed prior to the opening of the fair by the party who had a lease of the fun zone from defendant. After they were installed and before the accident, they were inspected and approved by defendant.

Plaintiff's points for reversal are: 1) There is no substantial evidence to support the verdict. 2) The court erred in the giving and refusing of instructions.

[2] In support of his first point, plaintiff argues that the evidence established, as a matter of law, that defendant was negligent and that he was not contributively negligent. No question of law is presented. On the evidence, the case is purely one of fact. Where different inferences may reasonably be drawn from the evidence, the decision on the questions of negligence and contributory negligence must be left to the trier of fact. The conclusion of the jury will not be disturbed on review if some substantial evidence or reasonable inference lends support thereto. Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550.

[3–5] Plaintiff was an invitee of defendant. The rule applicable to the facts is stated in Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 624, 104 P.2d 26, 28, in which the court quoted from Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793:

"'A person so invited upon the premises of another may recover from such owner "for any injuries received owing to the dangerous condition of the premises known" to the owner and not known to the person so invited; but such owner "is not bound to keep his premises absolutely safe." 29 Cyc. 453. The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. 29 Cyc. 471, 474; 26 Cyc. 1213.'"

[6, 7] A duty rested on plaintiff to look where he was going and to observe that which was in plain sight in front of him. Whether the danger was obvious to plaintiff was a question of fact for the jury. Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 624, 104 P.2d 26; Revels v. Southern Cal. Edison Co., 113 Cal.App.2d 673, 678–689, 248 P.2d 986; Jones v. Bridges, 38 Cal.App.2d 341, 346, 101 P.2d 91. Whether a person, under the circumstances, made a reasonable use of his faculties is also a question for the jury. The law presumes that a person possessing the normal faculties of sight must have seen that which was in the range of his sight. Anderson v. Western Pacific R. R. Co., 17 Cal.App.2d 244, 250, 61 P.2d 1209.

[8, 9] It was the duty of defendant to so place the axle bracing the light standard that it would not be likely to produce injury to those who, using reasonable care, might walk on the fairgrounds. The axle on which plaintiff tripped was not in the midway. The jury may well have concluded that defendant was not negligent. If the axle, as is reasonably inferable from the evidence, was plainly visible and was so placed that contact with it might easily have been avoided, it would follow that the jury could have reasonably concluded defendant had exercised all the care required of it in the circumstances. If the jury found defendant was not negligent, it may well have concluded plaintiff was contributively negligent. Whether the axle was in such position that plaintiff could have observed it had he been exercising ordinary care, was a jury question. The testimony of plaintiff was vague and indefinite as to what he was doing and where he was looking at the time he tripped on the axle. The accident happened in broad daylight. The axle and the light standard were in plain sight. Plaintiff testified he did not see the axle or the light standard at all before he tripped; from which the jury may have reasonably inferred that he was not looking where he was going. A reasonable inference from the evidence is

that if plaintiff had exercised ordinary care he would have seen the axle and avoided it. The verdict is supported by substantial evidence.

[10] The court, at the request of defendant, gave this instruction:

"General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

Plaintiff assigns error. He says there was no evidence that the axle was in plain sight of plaintiff, nor was there any evidence that he was looking in the direction of the axle. There was no error. There was evidence that the axle was in plain sight of a person exercising ordinary care. The instruction did not assume that the axle was clearly visible, or that it was in plain sight of plaintiff, or that he was looking in the direction of the axle. The first sentence of the instruction stated a mere commonplace. The second sentence left it to the jury to decide whether either party was telling the truth, or whether plaintiff was negligently inattentive, or to draw no inference of any kind. La Branch v. Scott, 82 Cal.App.2d 1, 9–10, 185 P.2d 823.

[11] Plaintiff requested the court to give the following instruction:

"When Fair Grounds are opened to public for business, one who enters said Fair Grounds to purchase some commodity, service, or view exhibits does so at the implied, if not express, invitation of the operators of the Fair Grounds, and is called an invitee; upon these operators the law places the duty of exercising ordinary care so as not unnecessarily to expose the invitee to danger or accident and to that end, to keep in a reasonably safe condition the pathways, aisles, passageways, and general premises made available for the invitee's use, and which the latter is expressly or impliedly invited to use.

"In applying the rules of law that have been and will be stated by the court to the facts of this case, and in judging the conduct of the parties, you may consider the fact that the attention of persons who visit such public Fair Grounds ordinarily is attracted by the display of exhibits, concessions and wares offered for sale and may be more or less absorbed by the transaction which they have in mind. You may consider whether the defendant anticipated that fact with ordinary care in the exercise of the duty heretofore mentioned.

"The duty owed to the unsuspecting and ignorant-of-danger patron or invitee is properly to be considered in the light of anticipation by the operators that the patron's attention may be distracted elsewhere."

The request was denied. Error is assigned. There was no error. The instruction, in part, is argumentative and not a statement of the law. Insofar as it stated the law correctly, the subject matter was fully covered by instructions given.[1]

1. The following instructions were given:

"Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

"This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask: 'What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?' Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence." (Cal. Jury Instructions (Civil), No. 101–A.)

"One who goes upon the premises of another as a business visitor, at the express or implied invitation of the owner or occupant, and in connection with some mutual business interest with the occupant or with the latter's own business, is called in law an invitee. In paying the

[12] The court refused to give the following instruction proffered by plaintiff:

"You are instructed that mere abstraction on the part of the plaintiff, an invitee, does not necessarily constitute contributory negligence."

Error is assigned. While the instruction is a correct statement of the law and might well have been given, its refusal was not error. The subject matter was adequately covered by the instructions given.

[13] Plaintiff requested, and the court declined to give, this instruction:

"I instruct you that it is not contributory negligence to fail to look for danger when there is no reason to apprehend any danger. The only care required of plaintiff in this case was the care that an ordinary prudent person would use under similar circumstances."

The instruction was properly refused. The jury was instructed on negligence, contributory negligence, ordinary care, and the instruction quoted in the margin was given.[2] The subject was adequately covered.

The case was well and fairly tried. The jury was fully, fairly, and adequately instructed on all principles of law applicable to the evidence. We find no merit in any of the assignments of error.

The appeals from the verdict and from the order denying a new trial are dismissed; the judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

admission fee charged therefor and upon entering the fair grounds in question the plaintiff became and was an invitee of the defendant."

"Toward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee.

"But the responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger attending upon the entry, or upon being upon the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable by it in the exercise of ordinary care, it is its duty to give reasonable warning of such danger to the invitee. This duty under the circumstances stated herein extends not only to conditions created by the invitor, but to conditions created by others lawfully upon the premises with the invitor's permission or consent. The owner is not bound to discover defects which reasonable inspection would not disclose, and it is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. In brief, there is no duty to give the invitee notice of an obvious danger.

"In the absence of appearances that caution him, or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption.

"Each, the invitee and the invitor, so long as he is exercising ordinary care and no circumstance exists that causes him or would cause a reasonably prudent person in his position to think differently, has a right to assume that the other is or will be possessed of normal faculties of sight and hearing and will exercise ordinary care, and has the right to rely on that assumption."

2. "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care." (Cal. Jury Instructions (Civil), No. 138.)

119 Cal.App.2d 196

MATHEWS et al. v. MacARTHUR.

Civ. 15440.

District Court of Appeal, First District, Division 2, California.

July 13, 1953.

Hearing Denied Sept. 10, 1953.

Action by vendors for purchaser's breach of written contract of sale and exchange of realty. The Superior Court in and for the County of Alameda, A. J. Woolsey, J., entered judgment for vendors, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to sustain finding of purchaser's breach, absence of fraud, and vendors' refusal to consent to rescission of contract.

Judgment affirmed.

1. Vendor and Purchaser ⇐44, 329

In action by vendors against purchaser for purchaser's breach of written contract for sale and exchange of realty, evidence was sufficient to sustain finding of purchaser's breach, absence of fraud, and vendors' refusal to consent to rescission of contract.

2. Vendor and Purchaser ⇐329

Resale value of identical property is proper evidence of damages to vendor for breach of contract for sale and exchange of such property provided proper consideration of and adjustment for market subsequent to contract is given.

3. Vendor and Purchaser ⇐330

In action by vendors against purchaser for purchaser's breach of written contract for sale and exchange of realty, where, following breach, vendors expended $1,800 in repairing building on realty, price paid on resale reflected increase in value through such expenditure, and, therefore, such expenditure was properly deducted from resale price in determining vendor's damages.

Albert Picard, San Francisco, Raymond N. Baker, Hayward, for appellant.

Phillips, Avakian & Johnston, Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued for damages for defendant's breach of a written contract for the sale and exchange of real property. In a trial to the court plaintiffs had judgment for $4,349.48. The defendant rested on charges of fraud and misrepresentation precedent to the execution of the contract and on a special defense that plaintiffs had consented to a rescission of the contract.

[1] Findings favorable to plaintiffs were made on all these issues. The main burden of the appeal is the sufficiency of the evidence to support these findings, though that is not stated as one of the grounds relied on. It would serve no useful purpose to repeat the evidence here. Suffice it to say that the evidence produced by plaintiffs was sufficient to support the finding of defendant's breach, the absence of fraud, and the refusal of plaintiffs to consent to a rescission.

The real point at issue is whether the court applied the proper rule of damages in making the award when it allowed plaintiffs the difference between the contract value and the amount obtained by plaintiffs on a resale. Though the argument on this point is intermingled with discussions of insufficiency of the evidence that fact should not confuse the real issue whether evidence of the resale price is evidence of the damages caused by the breach.

[2] Appellant cites Royer v. Carter, 37 Cal.2d 544, 233 P.2d 539, as an "analogous" case supporting their theory that the computation of damages on the basis of the resale value was error. The decision does not support the theory. There the resale price was accepted without consideration of the admitted decline in the market. The true rule of the case, supported by the citation of Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935, is that the resale value of the identical property is proper evidence of the damages to the seller for the breach provided proper consideration and adjustment is given to the decline in the market subsequent to the contract.

[3] Appellant suggests without argument or citation of authority that it was error for the trial court to deduct from the resale price paid by Mrs. Russell the sum of $1,800 expended by respondents in repairs to the building subsequent to appel-

lant's contract. In estimating the damages caused by appellant's breach on the basis of the resale price it was proper to take into consideration that the price paid reflected an increase in the value through this expenditure for repairs and improvements. If appellant had completed the contract as agreed those repairs would have been a burden on him alone. No reason is given why they should not be deducted from the resale price.

Judgment affirmed.

DOOLING, J., concurs.



119 Cal.App.2d 23

PEOPLE v. ETIE et al.

Cr. 4944.

District Court of Appeal, Second District, Division 3, California.

July 3, 1953.

Defendant was convicted for forgery of fictitious name. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment, and defendant appealed. The District Court of Appeal, Wood, J., held that evidence warranted conviction for forgery of fictitious name in respect to checks in that defendant was an abettor and had knowledge of criminal purpose for which checks were to be used.

Affirmed.

1. Criminal Law ⇐59(5)

The word "aid" in statute providing that person who aids and abets in commission of crime is a principal means to assist and to supplement the efforts of another and does not imply guilty knowledge or felonious intent, and word "abet" includes knowledge of wrongful purpose of perpetrator and counsel and encouragement in the crime and implies consciousness of guilt in instigating, encouraging, promoting or aiding commission of crime. Pen. Code, § 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Abet" and "Aid".

2. Criminal Law ⇐59(5)

An aider and abettor in commission of crime is guilty only to extent of his knowledge or of natural and reasonable consequences of acts which he aided or encouraged. Pen.Code, § 31.

3. Criminal Law ⇐737(1)

In applying the rule that aider and abettor is guilty only to extent of his knowledge or of natural and reasonable consequences of act which he aided or encouraged, the natural and probable consequences of act and extent of accused's knowledge are questions of fact for jury. Pen.Code, § 31.

4. Forgery ⇐44(1)

Evidence warranted conviction for forgery of fictitious name in respect to checks in that defendant was an abettor and had knowledge of criminal purpose for which checks were to be used. Pen.Code, § 31.

Alexander L. Oster, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Dep. Atty. Gen., for respondent.

WOOD, Justice.

Defendant Etie and his three co-defendants were charged, in five counts, with forgery of fictitious name. It was also alleged in the amended information that Etie had been convicted of felonies four times previously. He admitted that he had been convicted three times as alleged. The charges against the other defendants were determined separately from the trial of Etie. Trial by jury was waived. Etie was adjudged guilty as charged in each of the five counts. His motion for a new trial was denied. Probation was granted and execution of sentence was suspended. He appeals from the judgment.

Defendant contends that the evidence was insufficient, as to each count, to support the judgment.

On February 8, 1952, defendant went to a printing shop in Los Angeles and presented to the printer a blank form of check which was as follows:

"Los Angeles, California————19——No.———
The Farmers and Merchants National Bank 16–1
1220
Pay To The
Order of ————————————$————
———————————————— Dollars
————————"

Attached to that form, when he so presented it, was a piece of paper upon which there was penciled printing, in part, as follows: "Aircraft Sales Corp." and "Demco Research & Manufacturing Corp." Below each of said names, just quoted, there were words and figures which purported to be the addresses and telephone numbers of those alleged corporations. He ordered the printing of 100 checks, similar in form to the blank check he presented to the printer, which checks were to bear, at the top thereof, the words "Aircraft Sales Corp." and the additional writing shown on the memorandum purporting to be the address and telephone number of that corporation. He also ordered that the name of said corporation be printed under the signature line of the checks. He also ordered the printing of another 100 checks in the same form as the 100 checks just referred to, except that said additional checks were to bear the words "Demco Research & Mfg. Corp." and the additional writing shown on the memorandum purporting to be the address and telephone number of that corporation. He also ordered the printing of 10 cards, purporting to be identification cards which were to bear, at the top thereof, the words "Aircraft Sales Corp."; and he ordered the printing of another 10 cards in the same form which were to bear the words "Demco Research & Mfg. Corp." The printing on those cards was to include a blank form for use in stating the name, sex, height, date of birth, and other information for identification purposes. When he was presenting the order for the printing he showed the printer a folder regarding "Philco televisions" and he also showed him his "television setup" and "maps laying out some kind of arrangement" for television. He told the printer that he needed letterheads, envelopes, cards "and so forth." The printer printed the checks and cards as ordered and delivered them to defendant when he called for them on the following day, February 9th. Defendant delivered the checks and cards to Jack Rouse at the Gates Hotel about noon on February 9th.

Norman Rouse and one D'Acquisto, who are co-defendants herein, and Jack Rouse (not a defendant herein) filled in the blanks on five of the printed check forms (except the signature blank). They wrote the fictitious names, "Ted E. Green" and "John T. Stone," therein as payees. D'Acquisto signed a fictitious name, "Carl Hudson," on the five checks as the drawer thereof. During the evening of February 9th, Norman Rouse and Jack Rouse, representing themselves to be the said payees, cashed the five checks at various stores. For the purposes of identification, while they were endeavoring to cash the checks, they presented to the store proprietors identification cards which were some of the printed identification cards that had been filled in with fictitious names and information. There was no checking account, or credit arrangement, at the Farmers and Merchants National Bank of Los Angeles for Aircraft Sales Corp. or Demco Research & Mfg. Corp.

On February 11, 1952, two police officers arrested Jack and Norman Rouse and Patricia Wilson (a co-defendant) in a room at the Gates Hotel. The officers found therein, in a suitcase belonging to Jack Rouse, blank checks bearing the names "Aircraft Sales Corp." and "Demco Research & Mfg. Corp." They also found in the room a check-writing device. Officer Baucum testified that he and Officer Stockwell had a conversation with Jack and Norman Rouse, D'Acquisto, and defendant Etie on February 26, 1952, at a police station; that the statements of said persons were made freely and voluntarily; that Jack Rouse said: he had "contacted" defendant Etie and D'Acquisto relative to obtaining the name of a printer who would print checks; they (Jack and Norman Rouse) had made an agreement with Etie to obtain 200 checks for $200; the form

for use in printing the checks, for the Aircraft Sales Corp. and the Demco Research & Mfg. Corp., was given to Etie who took it to a printer; Etie delivered the printed checks to Jack and Norman Rouse and D'Acquisto at the Gates Hotel about noon on February 9th; they (the Rouses and D'Acquisto) proceeded to write the checks and used a check-writer for the amounts; D'Acquisto signed all the checks, using the name Carl Hudson on the Aircraft checks and the name Wm. H. Welch on the Demco checks; Jack and Norman Rouse then (in the evening of February 9th) proceeded to cash the checks; Jack and Norman Rouse, while accompanied by Patricia Wilson, met Etie that evening in the parking lot of the Cockatoo Restaurant at Imperial and Hawthorne Boulevards; Etie then followed them to a place on Mansel Street just south of Imperial Boulevard; Jack Rouse gave Etie $200 in cash and several articles of food and some whiskey; Jack and Norman Rouse cashed the checks, and they intended to go to New Orleans with the proceeds. The officer also testified that, in said conversation, Etie said that: he had gone to the printer and made a "contact" with him to print the checks; the checks were delivered to him and he gave them to Jack and Norman Rouse in the hotel room at the Gates Hotel; he received $200 in cash, several fifths of whiskey and some groceries for delivering the checks; he also secured the identification cards from the printer. The officer testified further that when a statement was obtained, during that conversation, which implicated another defendant, the one who was implicated thereby was asked if the statement was true, and that person replied that it was true.

Defendant testified that Jack Rouse called him by telephone on February 7, 1952, and asked him to come to the Gates Hotel; defendant went to Rouse's room in the hotel on February 8th (Friday) and saw Jack and Norman Rouse there; defendant and Jack Rouse had become good friends in prison where they worked together on a newspaper and were cellmates; Jack Rouse told defendant that he had an interest in a gambling spot in Stockton, he planned to leave on Sunday, and he had a million things to do before Sunday; Rouse asked defendant if he would be interested in doing a favor for Rouse and also making a few dollars for himself; defendant replied in the affirmative, and Rouse said that he had to have some money "now" and that he had "this thing all arranged with another party but I understand that the printing cannot be done until next week, I have to leave Sunday"; Rouse also said that he had the copy for the printing of checks and "if you can get that out between now and Saturday night, I'll pay you $200.00"; defendant asked him what he was going to do with the checks, and he replied, "It is none of your business as far as this is concerned, I don't choose to tell you anything. I have offered you a straight business deal, if you can do it, fine; if you can't do it, let's just forget about the deal and if you can take this copy and deliver the printing to me by Saturday night, I can pay you $200.00, and let me know now, do you want to do that or do you not?"; defendant replied that he would do it; then Rouse handed him an envelope with several pieces of paper in it; he went to a printing shop where he had done a lot of business, and told the printer that the deal "is a rush and you print these checks up and have them ready tomorrow"; the printer said that he would finish the checks that night (Friday); defendant returned to the shop at noon the next day, received the printing and then delivered it to Jack Rouse at the hotel; Rouse told him that he did not have the $200, but he would give it to him that night at 9 o'clock at the Cockatoo Restaurant; defendant met him there and received the $200, some food and whiskey; he did not put any handwriting on any of the checks or identification cards; he did not see anyone place handwriting or typewriting on any of the checks or identification cards; he was not present when any check was cashed. Defendant testified further that in his first conversation with Rouse nothing was said about identification cards; the copy for the identification cards was in the envelope which Rouse handed to him but he did not look at the contents of the envelope until

he arrived at the printing shop; defendant assumed that the charge for printing the checks would be $30 or $35—he had allowed up to $50 for the job, but the printing of the identification cards was not included in that estimate; in 1934 and 1936 he was convicted of issuing checks without sufficient funds, and in 1936 and 1938 he was convicted of forgery.

[1–4] Section 31 of the Penal Code provides: "All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed." It is clear that defendant aided in the forgeries. The word "aid" means "to assist, 'to supplement the efforts of another.'" People v. Bond, 13 Cal.App. 175, 185, 109 P. 150, 155. "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." People v. Dole, 122 Cal. 486, 492, 55 P. 581, 584. "To 'abet' another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding the commission of such criminal offense." People v. Best, 43 Cal.App.2d 100, 105, 110 P.2d 504, 507. An aider and abettor is "guilty only to the extent (1) of his knowledge or (2) of the natural and reasonable consequences of the acts which he aided or encouraged." People v. Beltran, 94 Cal.App.2d 197, 205–206, 210 P.2d 238, 243. "Whether the act committed was the natural and probable consequence and the extent of the defendant's knowledge are questions of fact for the jury." People v. Beltran, supra, 94 Cal.App.2d at page 206, 210 P.2d at page 243. The evidence supports a finding that defendant was an abettor, and that he had knowledge of the criminal purpose for which the checks were to be used. He knew that Jack Rouse, who had been his cellmate in the penitentiary and who ordered the checks printed as a "rush" order, had to have money "now," that is, at the time he was agreeing to pay Etie $200 for 200 printed checks. Rouse refused to tell him what he was going to do with the checks. He knew that if Rouse did not have any money there was no urgent and legitimate need for printed checks or any checks. The offer to pay $1 per check for merely placing an order to print 200 checks was exorbitantly disproportionate to the reasonable value of such service. At the time when Rouse was in a rush to obtain printed checks bearing names, addresses and telephone numbers of a sales corporation and a manufacturing corporation in Los Angeles, and to obtain several identification cards bearing the names of the same corporations, he did not have any money or business other than an alleged interest in a gambling place in Stockton. Etie made false representations to the printer to the effect that the checks and identification cards were to be used by him in his alleged television business.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



118 Cal.App.2d 776

Ex parte SPANIER.

Cr. 5062.

District Court of Appeal, Second District, Division 1, California.

June 29, 1953.

Proceeding in the matter of an application for a writ of habeas corpus. The District Court of Appeal held that where petitioner had pleaded guilty to misdemeanor of contributing to delinquency of a minor, and trial court had committed petitioner to State Hospital as being a sexual psychopath after consideration of written reports of psychiatrists appointed by court to examine petitioner, and petitioner had not appealed from judgment of conviction, petitioner was not entitled to bail as a matter of right in view of statute providing that accused is entitled to bail as matter of right after conviction for a misdemeanor only when appeal has been taken from such judgment of conviction.

Petition denied.

Bail ⇐42

Where petitioner had pleaded guilty to misdemeanor of contributing to delinquency of a minor, and trial court had committed petitioner to State Hospital as being a sexual psychopath after consideration of written reports of psychiatrists appointed by court to examine petitioner, and petitioner did not appeal from judgment of conviction, petitioner was not entitled to bail as matter of right in view of statute providing that an accused is entitled to bail as matter of right after conviction of misdemeanor only when appeal has been taken from such judgment of conviction. Pen.Code, § 1272; Welfare and Institutions Code, § 5512.

William W. Larsen, Los Angeles, for petitioner.

PER CURIAM.

This is a petition for a writ of habeas corpus. Petitioner pleaded guilty in the superior court to the offense of contributing to the delinquency of a minor, a misdemeanor. Thereafter, the court duly appointed psychiatrists to examine him, and after consideration of the written reports of two psychiatrists the court committed petitioner to the State Hospital at Norwalk, California, for the ninety-day period of examination provided for by the terms of section 5512 of the Welfare and Institutions Code. Upon the expiration of said ninety days and the return of petitioner to the superior court, it was determined that he was a sexual psychopath, and thereupon the court recommitted him as such to the State Hospital at Norwalk.

Within five days thereafter petitioner gave notice in writing, demanding retrial of the issue of sexual psychopathy before a jury, and a jury trial is now set before said superior court for July 6, 1953.

Petitioner's counsel requested that bail be fixed and that petitioner be allowed his liberty on bail pending the jury trial on said issue, but the trial court refused to set bail.

In his petition for a writ of habeas corpus petitioner seeks to be released on bail.

Nowhere in the petition is it alleged that petitioner has taken an appeal from the judgment of conviction of the aforesaid misdemeanor charged.

Section 1272 of the Penal Code provides that an accused is entitled to bail as a matter of right after conviction of a misdemeanor, only when an appeal has been taken from such judgment of conviction.

The petition for a writ of habeas corpus is denied.



119 Cal.App.2d 82

PEOPLE v. DE NAVA.

Cr. 5014.

District Court of Appeal, Second District, Division 2, California.

July 7, 1953.

Criminal prosecution for burglary. The Superior Court of Ventura County, Walter J. Fourt, J., entered a judgment of guilty, and the defendant appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding of guilty.

Affirmed.

1. Criminal Law ⇐1144(13)

On defendant's appeal from judgment of conviction, evidence was viewed in light most favorable to the People.

2. Burglary ⇐41(1)

Evidence which warranted inference that defendant entered store with intent to commit grand or petty larceny was sufficient to sustain burglary conviction. Pen.Code, § 459.

Oswald A. Hunt, Oxnard, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Dep. Atty. Gen., and Roy A. Gustafson, Dist. Atty., of Ventura County and Donald L. Benton, Dep. Dist. Atty., for respondent.

McCOMB, Justice.

From a judgment of guilty of burglary after trial before the court without a jury, defendant appeals.

The sole proposition urged by defendant for reversal of the judgment is that *the evidence is insufficient to sustain the conviction.*

[1] This contention is devoid of merit. Viewing the evidence in the light most favorable to the people (respondent) and pursuant to the rules set forth in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, the record discloses:

About noon on November 21, 1952, defendant in the company of two codefendants entered the men's section of the Great Eastern Department Store in the city of Ventura. One of defendant's companions was carrying a "booster" box which consisted of a brown wrapped package about 14 inches long and 10 inches square. It had a door at one end, although it looked solid and was tied with cord as if for mailing. However, the door hinged inward so that articles could be placed in the box and the door could be pushed closed leaving no sign that the box had been opened.

The manager of the men's department was the only person in the section at the time. One of the men asked him about a sport coat and while he was showing it defendant and his other companion went to the back of the store behind a high rack out of the manager's sight. When defendant and his companion returned, all three men left the store without making a purchase.

At about 12:40 p. m. the same day the three men were apprehended; defendant and one of his companions in an automobile as they were leaving the vicinity of the store, and the other man a short distance from the automobile. The booster box was lying on the front seat by defendant who was the driver of the car. Inside the booster box were found two new pairs of men's pants. In the glove compartment of the car were found five new pairs of men's hose.

The manager of the Great Eastern Department Store testified that the sox had his store tag on them; the pants were "Michael Sterns" brand and that his store was the only store in the town that carried them; the pants matched the description of those that had been checked in that morning or the evening before and were lying on the counter; no sales had been made from the group checked in and that when he checked the pile of trousers that had been received he found a shortage in quantity; the sox bore the Great Eastern Department Store tag and had not been sold to defendant or either of his companions; that all of the merchandise in his opinion came from his store.

Clearly the trial judge was justified in drawing the inference from the foregoing evidence that defendant had entered the store with the intent to commit grand or petty larceny and was thus guilty of burglary pursuant to the provisions of section 459 of the Penal Code.

[2] Under established rules there is no question that the circumstances proved are sufficient to sustain the conviction. People v. Bradford, 95 Cal.App.2d 372, 379 [5], 213 P.2d 37.

Affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 790

WILLIAMS v. LANDELS et al.

Civ. 15469.

District Court of Appeal, First District, Division 2, California.

June 30, 1953.

In action by surviving incorporator against, inter alia, residuary legatees of estate of deceased incorporator for specific performance of agreement between incorporators allegedly guaranteeing plaintiff's right to be director of company, the Superior Court, City and County of San Francisco, William C. Sweigert, J., granted a motion for change of venue, and plaintiff appealed. The District

Court of Appeal, McComb, Judge assigned, held that allegation that defendants were "successors" of deceased incorporator constituted mere conclusion of law and, being contrary to allegation that contract contained provision against assignment of rights thereunder, could not, for venue purposes, serve as predicate for finding that defendants had contracted to perform obligation in county.

Affirmed.

1. Venue ⇐21

Right to have action tried in county other than that of defendant's residence is exceptional and defendant may not be deprived of right to trial in county of his residence unless plaintiff brings case clearly within statutory exception. Code Civ. Proc. § 395(1).

2. Pleading ⇐8(13), 111.44

In action by surviving incorporator against, inter alia, residuary legatees of estate of deceased incorporator for specific performance of agreement between incorporators allegedly guaranteeing plaintiff's right to be director of company, allegation that defendants were "successors" of deceased incorporator constituted mere conclusion of law and, being contrary to allegation that contract contained provision against assignment of rights thereunder, could not, for venue purposes, serve as predicate for finding that defendants had contracted to perform obligation in county. Code Civ.Proc. § 395(1).

3. Venue ⇐21

Proceedings brought for relief of dissatisfied minority stockholder is one in equity, and being equitable in nature is a personal action triable in county of defendant's residence. Code Civ.Proc. § 395 (1).

Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht and Irving Rovens, San Francisco, for appellant.

Stanley A. Weigel and Moira D. Ford, San Francisco, for respondents.

McCOMB, Justice (Assigned).

Plaintiff appeals from an order granting a motion for a change of venue from the Superior Court of the State of California in and for the County of San Francisco to the Superior Court in and for the County of Santa Clara, in an action for specific enforcement of a contract.

Facts: The amended complaint alleged that on September 11, 1925, plaintiff and W. A. Wallace, now deceased, as parties of the first part, entered into an agreement in the City of San Francisco with W. R. Ames also deceased, to organize the Williams-Wallace Company under the laws of the State of California to engage in the business of manufacturing sheet metal and other metal articles. The agreement provided that the capital stock should be $100,000, divided into 1000 shares; that the articles of incorporation should provide for a board of five directors and should fix the principal place of business as San Francisco. It was further agreed that the parties of the first part should each be a director of the company and that the other three directors should be nominees of the party of the second part. In consideration of the agreement of the party of the second part to finance the company, the parties of the first part agreed to devote their entire time and best efforts to the company so long as the same should be financed by the party of the second part. It was also provided that the "party of the second part promises and agrees that so long as either of the parties of the first part remains with said company and devotes his entire time and attention and best efforts to said business, the party of the second part will sell to him at par all, or any part, of twenty per cent (20%) of the issued capital stock of said company at a price found by deducting from the par value of said shares all dividends paid thereon." The agreement also contained this: "It is understood and agreed that none of the rights arising out of this contract in favor of any party shall be assignable; and that none of the parties thereto shall assign any right arising out of or under this contract."

It was further alleged that W. R. Ames died in 1926 and that his residuary estate was distributed to his widow, the defendant Harriet Ames, and defendant Edward D. Landels. Decedent Ames' will provided

that the trustees were to hold the property for certain uses, one of which was to continue the management and control of any business which decedent directly or indirectly owned or had an interest in at the time of his death.

Mr. Wallace left the employ of the Williams company in 1945. In 1946, defendant Alan Kinkead, a son-in-law of defendant Harriet Ames, was employed by the company, elected to the board of directors and a vice-president. On April 1, 1946, plaintiff resigned as president of the company and left its employ but retained his position as director. Mr. Wallace was subsequently re-employed by the company and elected to the board of directors, which position he occupied until his death in 1950.

Thereafter, defendants caused certain treasury stock to be sold so that they gained more than 80% control of the company, whereupon they reduced the board of directors to three in number and plaintiff, not having sufficient stock to elect himself a director, was eliminated from the board.

Plaintiff alleges that defendants have agreed that they will not buy his stock unless they can purchase it for a small fraction of its true value and that they have excluded him from the management of the company, thus violating the contract which he had entered into with Mr. Ames. The prayer of the amended complaint asks that defendants be required to elect plaintiff a director of the company or that defendants be required to purchase plaintiff's stock at its fair and reasonable value.

Question: Was the City and County of San Francisco the proper county for the trial of the action for the reason that the contract was entered into in such county?

[1] *No.* The right to have an action tried in a county other than that of defendant's residence is exceptional and defendant may not be deprived of the right to a trial in the county of his residence unless plaintiff brings a case clearly within a statutory exception. (Kaluzok v. Brisson, 27 Cal.2d 760, 763(4), 167 P.2d 481, 163 A.L.R. 308.)

Plaintiff relies upon Section 395(1) of the Code of Civil Procedure, which reads in part as follows: "In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * *When a defendant has contracted to perform an obligation* in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation * * *." (Italics added.) It is to be noted that the foregoing section provides that the county "in which the contract in fact was entered into" is the proper county for the trial of the action "When a defendant has contracted to perform an obligation in a particular county". In the present case the amended complaint fails to disclose that defendants or any of them entered into a contract with plaintiff to perform any obligation in any county. Therefore, the foregoing section is inapplicable.

[2] Neither is Turner v. Simpson, 91 Cal.App.2d 590, 205 P.2d 423, here in point for in such case, which involved a suit for the breach of a contract for the sale of shares of stock, defendant had entered into a contract with plaintiff in the city and county of San Francisco to perform an obligation. This situation does not obtain in the instant case. The allegation in the amended complaint that defendants are the "successors" of the deceased contracting party constitutes a mere conclusion of law which is contrary to the very allegation of the pleading itself wherein it is alleged that the contract specifically contained a provision against any of the parties assigning their right or rights under the contract. (cf. Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 309(5), 262 P. 452.)

[3] If plantiff is entitled to any relief against defendants it is as a dissatisfied

minority stockholder, which is a proceeding in equity, and being equitable in nature is a personal action triable in the county of defendant's residence. (Martinez v. Martinez, 99 Cal.App.2d 425, 428(2, 3), 221 P.2d 986.)

The trial court's ruling is correct.

Affirmed.

NOURSE, P. J., and DOOLING, J., concur.



119 Cal.App.2d 21

Petition of CORBETT et al.

CORBETT et al. v. PETROLEUM MAINTENANCE CO. et al.

Civ. 19456.

District Court of Appeal, Second District, Division 3, California.

July 3, 1953.

Proceeding instituted on behalf of union against company for an order directing arbitration. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered order directing arbitration and the company gave notice of appeal. The District Court of Appeal, Shinn, P. J., held that order directing arbitration was not appealable.

Appeal dismissed.

1. Appeal and Error ⇐83

The provision of Code of Civil Procedure allowing appeal from order confirming, modifying, correcting or vacating arbitration award or from judgment entered on award does not authorize appeal from order directing arbitration. Code Civ.Proc. §§ 1280 et seq., 1293.

2. Appeal and Error ⇐792

Where District Court of Appeal was without jurisdiction to entertain purported appeal from order directing arbitration, such court would dismiss purported appeal upon court's own motion. Code Civ.Proc. §§ 1280 et seq., 1293.

Swaffield, Madden & McCarry, Long Beach, for appellants.

Wirin, Rissman & Okrand, A. L. Wirin and Fred Okrand, Los Angeles, for respondents.

Livingston, Leeker & Feldman, Lawrence Livingston, and Jesse Feldman, San Francisco, and Isabella Grant, Encino, as Amici Curiae on behalf of appellants.

SHINN, Presiding Justice.

In a proceeding instituted on behalf of Oil Workers International Union Local 128 against Petroleum Maintenance Company for an order directing arbitration pursuant to sections 1280 et seq., Code of Civil Procedure, the court directed the company to proceed under the arbitration provisions of its collective bargaining agreement with the union. The company gave notice of appeal, briefs have been filed and the matter stands submitted. The sole ground of the appeal is that the arbitration provisions of the agreement relate solely to the question of performance of the agreement, the alleged violation consisted of the discharge of an employee, the agreement is silent as to any restriction upon the employer's right to discharge and, therefore, the matter of the discharge of the employee is not within the scope of the agreed arbitration procedure.

[1] Although no question has been raised as to the appealability of the order directing arbitration we are of the opinion that we have no jurisdiction of the purported appeal.

Section 1293 of the Code of Civil Procedure allows an appeal from "an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action." In Jardine-Matheson & Co., Ltd., v. Pacific Orient Co., 100 Cal.App. 572, 280 P. 697, an appeal from an order directing arbitration was dismissed for the reason that section 1293 is controlling, and that an order directing arbitration is not among the orders enumerated in the section from which an appeal is allowed. The reasoning of the opinion of the court leaves nothing to be said on the subject. It was held in Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668, that an order staying proceedings

in an action and directing arbitration was not a judgment from which an appeal would lie under section 963, Code of Civil Procedure, where the order did not direct the payment of money or the performance of any act by or against the complaining party.

[2] Being without jurisdiction to entertain the purported appeal we must dismiss it upon our own motion. Howard v. Howard, 70 Cal.App.2d 731, 161 P.2d 681; 4 Cal.Jur.2d p. 337.

The appeal is dismissed.

WOOD and VALLÉE, JJ., concur.



118 Cal.App.2d 806

DORAN v. BURKE.

Civ. 15516.

District Court of Appeal, First District, Division 2, California.

June 30, 1953.

Action, tried to court, for alleged malpractice. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment favorable to defendant, and plaintiff appealed. The District Court of Appeal, McComb, J. (Assigned), held, inter alia, that where there was nothing in record contradicting recital in judgment that case came on regularly for trial, plaintiff's contention that judgment was void because record failed to show that either memoranda to set cause for trial was filed or that a motion for same purpose was made, was not sustainable.

Judgment affirmed.

1. Appeal and Error ⇐907(3)

Where record before District Court of Appeal consisted of judgment roll, notice of trial of action with affidavit of service thereof, plaintiff's notice of appeal from judgment, plaintiff's request for estimate of cost of preparing clerk's transcript and court's certificate with respect to transcript, appeal was for all intents and purposes an appeal on judgment roll alone.

2. Appeal and Error ⇐907(3)

When an appeal is to be determined on judgment roll alone, all intendments will be made in support of judgment and all proceedings necessary to its validity will be presumed to have been regularly taken.

3. Appeal and Error ⇐907(3)

On appeal which was in effect on judgment roll alone, where plaintiff failed to furnish record which showed that proper proceedings for setting cause for trial were not taken, presumption was that case was duly and regularly set for trial. Code Civ. Proc. § 1963, subd. 15.

4. Judgment ⇐525

Recitals in a judgment are presumed to be true and correct unless contradicted by other parts of the record. Code Civ.Proc. § 1963, subd. 15.

5. Appeal and Error ⇐909(1)

Where there was nothing in record contradicting recital in judgment that case came on regularly for trial, plaintiff's contention on appeal that judgment was void for reason that record failed to show that either memoranda to set cause for trial was filed or that motion for same purpose was made, was not sustainable. Code Civ.Proc. § 1963, subd. 15.

6. Jury ⇐28(9)

Where after receiving notice of trial, plaintiff failed to appear at time and place of trial, plaintiff waived right to jury trial. Code Civ.Proc. § 631.

John P. Doran, San Francisco, for appellant.

Thomas P. O'Brien and Andrew F. Burke, San Francisco, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury

in an action to recover damages for alleged malpractice, plaintiff appeals.[1]

[1] The record before this court consists of: (1) the judgment roll; (2) a notice of trial of the action with affidavit of service thereof; (3) plaintiff's notice of appeal from the judgment; (4) plaintiff's request for an estimate of the cost of preparing a Clerk's Transcript and (5) the court's certificate with respect to the transcript. It is therefore for all intents and purposes an appeal on the judgment roll alone.

Plaintiff relies for reversal of the judgment on this proposition: That the judgment is void for the reason that the record fails to show that either a memoranda to set the cause for trial was filed or that a motion for the same purpose was ever made.

[2, 3] This proposition is untenable for two reasons:

First: When an appeal is to be determined on the judgment roll alone, all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken. (Utz v. Aureguy, 109 Cal. App.2d 803, 806 [2], 241 P.2d 639; see also cases cited in 6 West's California Digest (1951) p. 317, Appeal & Error ⇐907(3).) In the present case this rule is applicable for the reason that plaintiff has failed to furnish this court with a record which shows that the proper proceedings for setting the cause for trial were not taken. Hence, the presumption is that the case was duly and regularly set for trial. (Code Civ. Proc. § 1963(15); cf. Spahn v. Spahn, 70 Cal.App.2d 791, 800 [5–6], 162 P.2d 53.)

[4, 5] *Second*: The judgment recites, "The above entitled action came on *regularly* this day for trial." Recitals in a judgment are presumed to be true and correct unless contradicted by other parts of the record. (Woods v. Hyde, 64 Cal.App. 433, 436 [2], 222 P. 168.) In the instant case there is nothing in the record contradicting the recital in the judgment that the case came on *regularly* for trial. Hence, the foregoing rule is applicable and the judgment is not void on its face as contended by plaintiff.

[6] There is no merit in plaintiff's suggestion that he was deprived of the right to a jury trial because the record discloses that after receiving notice of trial he failed to appear at the time and place of trial. Therefore, he waived his right to a jury trial. (Code of Civ.Proc. § 631 [2].)

Affirmed.

NOURSE, P. J., and DOOLING, J., concur.



TOSHIKUNI TAENAKA v. STATE BOARD OF EQUALIZATION et al.*

Civ. 19524.

District Court of Appeal, Second District, Division 2, California.

July 1, 1953.

Rehearing Denied July 24, 1953.

Hearing Granted Aug. 27, 1953.

Mandamus proceeding brought to require State Board of Equalization to restore an off-sale liquor license to the petitioner. The Superior Court, Los Angeles County, granted the relief sought, and the Board appealed. The District Court of Appeal, Fox, J., held that decision of State Board of Equalization that public welfare and morals would be jeopardized by granting of an off-sale liquor

1. Although appellant's opening brief recites that the appeal is from: (a) the judgment; (b) an order consolidating causes for trial and (c) an order refusing to correct clerk's transcript; at the oral argument plaintiff specifically waived any appeal from either the order consolidating the causes for trial or the order refusing to correct the clerk's transcript.

2. Section 631 of the Code of Civil Procedure reads in part as follows: "Trial by jury may be waived by the several parties to an issue of fact in manner following: 1. By failing to appear at the trial".

* Subsequent opinion 268 P.2d 472.

license because of proximity of establishment to schools and churches was not unreasonable, and held that denial of such license was not arbitrary, notwithstanding fact that other liquor licensees were operating in the same vicinity, since Board could have concluded that one more licensee would be too many in such vicinity.

Reversed.

1. Intoxicating Liquors ⇐74

In mandamus proceeding brought to require restoration of off-sale liquor license, evidence would not sustain trial court's finding that petitioner had been forced to return license issued to him, and established, to contrary, that license had been voluntarily surrendered. Government Code, § 11517(c).

2. Intoxicating Liquors ⇐69

The State Board of Equalization, in exercising its power to deny, in its discretion, any liquor license, if it should determine for good cause that granting of such would be contrary to public welfare or morals, should base its decision on sufficient evidence and should not act arbitrarily in determining what is contrary to public welfare or morals. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

3. Intoxicating Liquors ⇐59(2)

Although immediate proximity to a school is not a statutory ground for denial of an off-sale liquor license, as it is for denial of an on-sale liquor license, nevertheless proximity of licensed premises to a school may supply an adequate basis for denial of license as being inimical to public morals and welfare. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

4. Intoxicating Liquors ⇐59(2)

Decision of State Board of Equalization that public welfare and morals would be jeopardized by granting of an off-sale liquor license for premises because of its proximity to schools and churches was not unreasonable, and denial of such license was not arbitrary, notwithstanding fact that other liquor licensees were operating in same vicinity, since Board could have concluded that one more licensee would be too many in such vicinity. St.1951, p. 3434, § 7.1.

5. Intoxicating Liquors ⇐69

Question of whether granting of particular liquor license would be inimical to public morals and welfare does not depend upon who, or how many, object to or approve granting of license, but rather upon actual conditions in particular area. Gen. Laws, Act 3796, § 13; Const. art. 20, § 22.

6. Intoxicating Liquors ⇐58

Statute providing for reinstatement of licenses to persons of Japanese ancestry is remedial and must be liberally construed, but this does not mean that State Board of Equalization must adopt new or more lenient standards for applicants thereunder. St.1951, p. 3434, § 7.1; Gen.Laws, Act 3796, § 38f.

Edmund G. Brown, Atty. Gen., and Alexander Googooian, Dep. Atty. Gen., for appellants.

James K. Mitsumori, Los Angeles, for respondent.

FOX, Justice.

This is an appeal from a judgment granting a peremptory writ of mandate requiring the defendants to restore to petitioner his off-sale liquor license and annulling the decision of the State Board of Equalization denying petitioner's application for such license.

Petitioner is a citizen of the United States of Japanese ancestry. Since 1938 he has owned the commercial property at 2024–6 East 103d Street in the city of Los Angeles. In August, 1941, he was licensed by the Board to operate a retail liquor store on those premises and was so engaged on December 7, 1941. In May, 1942, the Board cancelled petitioner's license on the ground that the holding of, and doing business under, such license was against the public welfare by reason of his Japanese ancestry. Subsequently Taenaka leased his property to Robert Martin, who subleased it to Sam Youseff, to whom the Board issued a similar license. In April, 1947, Youseff's license was transferred to Martin, who operated a liquor store on the Taenaka property until June when, with the Board's approval, he transferred his license to other

premises across the street and about 100 feet from Taenaka's property.

In 1951 the Legislature amended the Alcoholic Beverage Control Act by adding section 7.1[1] providing for the reinstatement of licenses to persons of Japanese ancestry. In September, Taenaka filed an application, pursuant to this remedial legislation, for an off-sale general license (the same as he had previously held) for his formerly licensed premises.

At a Board meeting on November 15, 1951, counsel for Taenaka represented to the Board that his client was faced with an immediate recall to active military duty and that there were no objections to the issuance of a liquor license to him by the people in the immediate locality. Relying on these representations, the Board overruled the adverse recommendation of the District Liquor Control Administrator which was based on the proximity of Taenaka's property to churches and a school, and ordered that an off-sale general liquor license be issued to him on condition that no protests had been filed. None had been filed but on November 26 protests were filed by representatives of one of the churches and the Parent-Teachers Association on the ground that the property in question was too close to a public school and the churches in the neighborhood and consequently the licensing of his premises was against public welfare and morals.

Thereafter, on December 13, 1951, at a meeting of the Board, there was a discussion between Mr. Bonelli of the Board, Reverend Hicks, a protestant, and Taenaka's counsel relative to the filing of these protests after the issuance to petitioner of his license. It was pointed out that Taenaka had a license at that time solely by reason of the representations of his counsel. It was suggested that Taenaka should not exercise the privileges of his license until there was a hearing on the protests. Thereupon Taenaka's attorney advised the Board that "by reason of my representations, I definitely will go along with the Board in the recommendation of whatever it sees fit to do in recommending to Taenaka that he move or get out of business or do whatever he should do." Mr. Bonelli then stated to counsel that "in order to strengthen your approach in discussing the matter with your client, and for the purpose of remedying what is apparently a mistake" he would move that "the State Liquor Administrator immediately request of the licensee that the license be returned for safe keeping to the custody of the State Administrator, or in the event he is unwilling to follow that procedure that a complaint for revocation be immediately filed and served on the theory that there was fraud or mistake in [its] procurement * * *." This motion was passed unanimously. Taenaka's attorney advised him to return the license, which he did on January 10, 1952. At the hearing Taenaka testified that he did so "under the instructions" of his attorney.

On January 14, 1952, a hearing on Taenaka's application was conducted by a hearing officer for the Board. It was there developed that Taenaka's premises were approximately 250 feet from a grade school, about 100 feet from a church which had moved into the area shortly before November 15, 1951, and which was in process of reconstruction but which had not yet opened for services, and approximately 400 feet from another church. The P.T.A. and church protests were withdrawn. The sole remaining protestant was Reverend Hicks,

1. Section 7.1, Stats.1951, Ch. 1457, p. 3434, reads:

"Any individual, who held a license under this act on December 7, 1941, and whose license was thereafter revoked because of the Japanese ancestry of the licensee, or surrendered, or was permitted to expire by such Japanese, may at any time within six months after the effective date of this section file an application for a similar license, and the board shall issue such a license upon the payment of the current fee therefor. The provisions of Section 38f shall not apply to licenses issued to such persons. No license shall be issued pursuant to this section to a person who is not qualified to hold a license at the time of filing his application hereunder, and the issuance of such a license shall be subject to the approval of the board and other provisions of this act. * * *"

minister of an evangelical church located in excess of 1,000 feet from Taenaka's property. The proposed decision of the hearing officer was not adopted, the Board electing to decide the matter. Government Code, sec. 11517(c). The Board denied petitioner's application but gave him leave to amend his application for the issuance of an off-sale general license for premises other than those here in question.

In granting the peremptory writ the court found that the Board forced petitioner to return the license, and concluded that the evidence did not support the Board's finding and decision that the granting of a license to petitioner was against public welfare and morals. The Board challenges both determinations.

[1] We find no evidentiary support of the court's finding that petitioner was forced to return the license. The clear effect of Mr. Bonelli's motion was to request Taenaka to return the license and then have a hearing on the protests that had been filed; if, however, this procedure was not acceptable, then, in light of the representations made on his behalf which resulted in its issuance, the Board was authorized to bring an action to revoke the license on the ground that it had been procured by fraud or mistake. Thus the Board offered Taenaka's counsel two alternatives: one, to have Taenaka surrender the license; or, two, to allow Taenaka to keep the license but with the understanding that an action would be brought for its revocation. Taenaka's counsel pursued the first alternative and recommended to Taenaka that he return the license. This Taenaka did "under the instructions" of his attorney according to his own testimony. It is undoubtedly true that the request of the Board to return the license induced Taenaka, on the advice of his counsel, to return it, but "there must be more to a claim of coercion than mere causation. * * *" Weil v. Weil, 37 Cal.2d 770, 782, 236 P.2d 159, 165. Merely because the Board suggested the procedure adopted by petitioner does not mean he was forced to do what he did, viz., surrender the license. In this connection it should be noted that the procedure suggested by the Board and accepted by Taenaka was necessitated by the representations of his counsel as to the quiescent attitude of the people in the area and the imminence of Taenaka's recall to active military duty. But for these representations the license would not have been granted initially. In deciding whether to return the license petitioner and his attorney had to consider the probable effect of these representations in an action to revoke the license. This required an exercise of their judgment.

It should also be pointed out that the procedure suggested by the Board protected Taenaka's application rights under section 7.1 of the Alcoholic Beverage Control Act, for if his license had been revoked by court action on the ground of fraud or mistake his rights under that remedial section would have been foreclosed. This, too, was a matter which petitioner had to consider in determining which of the proposed alternatives he would follow.

It is thus plain from the action of the Board, the statements of Taenaka's counsel to the Board, and Taenaka's testimony, that he was not forced to surrender the license but that its return was his own voluntary decision, made in the light of all the facts and circumstances, assisted, of course, as he stated, by his counsel's advice.

[2–4] The evidence before the Board was sufficient to support its finding and decision that the granting of an off-sale liquor license to petitioner for the particular premises was against public welfare and morals. In passing on this question it must be remembered that the Board has the power "in its discretion, to deny * * * any specific liquor license if it shall determine for good cause that the granting * * * of such license would be contrary to public welfare or morals." California Constitution, Art. XX, sec. 22. This " 'necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.' " Weiss v. State Bd. of Equalization, 40 Cal.2d 772, 775, 256 P.2d 1, 2; Stoumen v. Reilly, 37 Cal.2d 713, 717, 234 P.2d 969. By the terms of section 13 of the

Alcoholic Beverage Control Act, 2 Deering's Calif. Gen. Laws, Act 3796, the Board is "specifically authorized to refuse the issuance of on-sale retail licenses for premises located within the immediate vicinity of churches, * * * [and] schools * * *." There is, however, no such express provision with respect to off-sale licenses. Nevertheless, as pointed out in the Weiss case, 256 P.2d at page 3, "proximity of the licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare." Stronger justification for the Board's decision is found where, as here, not only a school but two churches are situated in the affected area.

The question then is, Did the Board act arbitrarily in denying the application for the license on the ground of the proximity of the premises to a school and two churches? We think not. It was not unreasonable for the Board to conclude that public welfare and morals would be jeopardized by the granting of an off-sale license at premises which were approximately 100 feet from a church; 250 feet from a school and 400 feet from another church. Weiss v. State Board of Equalization, supra.

It is argued, however, that there is another liquor license for premises in the immediate vicinity, and that to deny a license for petitioner's premises therefore constitutes arbitrary action on the part of the Board. That question was considered in the Weiss case and ruled on adversely to petitioner's position. It was there pointed out that "plaintiffs' argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application." 256 P.2d at page 3. Such an argument is not only illogical but ignores the Board's primary responsibility, viz., the protection of public morals and welfare. It was pointed out by the court, 256 P.2d at page 4, that the Board was not acting arbitrarily even if it changed its position "because it may have concluded that another license would be too many in the vicinity of the school." Similarly, here the Board could reasonably have concluded that another license would have been too many in that area, and particularly so since another church was in process of being established there.

[5] Petitioner emphasizes the fact that the P.T.A. and the church withdrew their protests leaving Rev. Hicks, whose church was 1,000 feet distant, as the sole protestant. The reason for the withdrawal of the two protests does not appear. However, the question of whether the granting of a particular liquor license would be inimical to public morals and welfare does not depend upon who or how many object to or approve the granting of the license, but rather upon the actual conditions in the particular area. Here the Board had been furnished reliable information as to the location of the school, the two churches, the fact that there was another licensee just across the street, and the character of the community. With this complete picture before it, it was the Board's duty to determine whether the granting of the requested license was contrary to the public welfare or morals regardless of protests or petitions of approval.

[6] Finally, it is argued that section 7.1 is remedial and must be liberally construed. This is undoubtedly true, but it does not mean that the Board must adopt new or more lenient standards for applicants thereunder. The statute does not require that the license be reinstated for the same premises. By the express terms of the section "the issuance of such a license shall be subject to the approval of the board and other provisions of this act." It is thus made unmistakably clear that the Board has discretion, except in certain specified particulars not here in controversy in granting or denying a license under this section; also, that the other provisions of the Alcoholic Beverage Control Act are applicable except section 38f which is expressly excluded. It is thus apparent that whether the granting of a license will be inimical to public welfare and morals is a paramount consideration for the Board whether the application is under this special section or one of the other sections. No principle of

liberal construction of even remedial legislation can deprive the Board of the right and duty to protect the public welfare and morals in the issuance of liquor licenses. While it would have been desirable for the Board to grant a license for the premises here in question since petitioner owned the property yet in considering such applications no amount of desirability can out-weigh the importance of protecting public welfare and morals.

In this connection, however, it should be noted that in denying Taenaka's application the Board expressly provided that he have leave to amend his application for the issuance of a license for other premises. Thus his opportunity to have his license reinstated was not cut off by the expiration of the six months' period provided in section 7.1. In making this provision the Board was obviously trying to carry out the purpose and intent of the section and assist petitioner but at the same time protect public welfare and morals.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.



118 Cal.App.2d 770

LEWIS et al. v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19705.

District Court of Appeal, Second District, Division 1, California.

June 29, 1953.

Rehearing Denied July 23, 1953.

Hearing Denied Aug. 27, 1953.

Proceeding for writ of mandate requiring Superior Court to quash subpoena duces tecum and to vacate order enforcing same. The District Court of Appeal, Scott, J. pro tem., held that where two affidavits for subpoena duces tecum each alleged on information and belief that a defendant had listed documents and objects under his control, affidavits were insufficient.

Ordered that peremptory writ of mandate issue.

1. Discovery ⇐55

As a condition precedent to issuance of subpoena duces tecum before trial, an affidavit must be presented to trial court showing facts set forth in statute as prerequisite to issuance of such order. Code Civ.Proc. § 1985.

2. Discovery ⇐55

Affidavit alleging facts necessary for issuance of subpoena duces tecum, but only on information and belief, without setting forth supporting facts, is not sufficient to sustain order for issuance of subpoena duces tecum. Code Civ.Proc. § 1985.

3. Discovery ⇐55

Where two affidavits for subpoena duces tecum each alleged on information and belief that a defendant had listed documents and objects under his control, such affidavits were insufficient. Code Civ.Proc. § 1985.

4. Mandamus ⇐53

Where two affidavits for subpoena duces tecum each alleged on information and belief that a defendant had listed documents and objects under his custody and control, defendants were entitled to writ of mandate commanding trial court to quash subpoena duces tecum and vacate order enforcing same. Code Civ.Proc. § 1985.

Richard A. Perkins, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Milton S. Tyre, Los Angeles, for real parties in interest.

SCOTT, Justice pro tem.

Petitioners apply for a writ of mandate requiring respondent Superior Court to quash a subpoena duces tecum issued by it and to vacate the order enforcing the same.

An action was commenced by George C. Knapp, as business representative and Waunita Long, as secretary of United Shoe Workers of America, Local 122, C.I.O. as plaintiffs. They appear in these proceedings as the real parties in interest. Among other defendants are petitioners Lewis and Levitan individually and as co-partners trading as California Footwear Co. The complaint is described as one for injunction, declaratory relief, specific performance and damages.

On the same day that the complaint was filed, two affidavits for subpoena duces tecum and orders for issuance of the same were filed. As to each named defendant the essential averments of the affidavit were as follows:

"Affiant is informed and believes, and upon that ground alleges, that (naming defendant Lewis in one affidavit and defendant Levitan in the other) has in his custody and under his control the following named documents and objects:

"All written leases, all written partnership agreements and all other written contracts made by and between or on behalf of Jack Lewis and Joseph Levitan and California Footwear Co., or either of them, with Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them; all financial books, records, accounts, receipts, ledgers and financial statements of Jack Lewis and Joseph Levitan and California Footwear Co., or any of them, and particularly including, but not limited to, accounts or ledgers showing all payments made by Jack Lewis and Joseph Levitan and California Footwear Co., or any of them, to Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them, and/or any of their employees, and receipts by Jack Lewis and Joseph Levitan and California Footwear Co., or any of them, from Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them, or any of their employees; all statements, invoices and other written documents setting forth the amounts and costs of any and all merchandise, inventory, raw materials, findings, leather, machinery, equipment, labels and packing cases purchased by Jack Lewis, Joseph Levitan and California Footwear Co., or any of them, for themselves or any of them, or for sale, rental or lease to, or purchase by, or use of Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them; all cancelled checks of Jack Lewis, Joseph Levitan and California Footwear Co., or any of them, showing payments to Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them, and/or any of their employees; copies of all promissory notes or written evidence of indebtedness upon which Jack Lewis, Joseph Levitan and California Footwear Co., or any of them, appear as accommodation maker or makers, endorser or endorsers, surety or sureties, or guarantor or guarantors or comaker or comakers; all bank or other money lending institutions' letters of credit, or copies thereof, extending credit to Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them, on account of Jack Lewis, Joseph Levitan and California Footwear Co., or any of them. All of the aforesaid documents and objects are for the period commencing December 1, 1952 through April 21, 1953.

"Said documents and objects above named are material to the disposition of this case in that an important issue in the case is the extent of formal and substantive relationships between Jack Lewis, Joseph Levitan and California Footwear Co., or any of them, and Maurice Fellman, Ruth Fellman and Trina Shoe Company, or any of them, as to control, financing, labor policy, purchasing of materials, marketing of products and in other respects; and these documents and objects will produce evidence material and relevant to these matters."

The subpoenas duces tecum were issued as ordered. Petitioner Lewis responded by appearing at the time and place set for taking of his deposition but declined to answer questions on the advice of counsel and declined to produce documents. He was directed by the notary to appear before respondent court. Upon his doing so the minutes of that court recite the following:

"Nature of Proceedings:

"Notary's certification re refusal to answer questions in deposition and to produce documents requested.

"* * *

"Defendant's motion to quash summons and return of service.

"Defendant Lewis is ordered to answer the questions in question and to produce the documents requested of him. He is ordered to appear at 650 So. Grand on May 25, 1953 at 10 A.M. for the purpose of answering the questions. * * *"

Petitioners challenge the adequacy of the affidavits filed in support of the applications for the issuance of subpoenas duces tecum on the ground that they are based on information and belief. They also declare that petitioners will be greatly damaged if the directive contained in the subpoena duces tecum is enforced. They state as follows:

"The books and records of petitioners, the production of which is desired, contain numerous trade secrets and other confidential matters such as names of customers and suppliers, prices, discounts, terms, financial resources, etc., the disclosure of which would tend to do petitioners great harm and cause them irreparable injury. Said labor organization has contractual relationships with several of petitioners' competitors with whom said labor organization is on friendly terms, whereas said labor organization has a dispute with petitioners. Petitioners are informed and believe and therefore allege that if said trade secrets and other confidential information are disclosed to said labor organization it will communicate them to petitioners' competitors, to petitioners' prejudice. Petitioners further allege on information and belief that the disclosure of said trade secrets and other confidential information to said labor organization would enable it to harass, vex, annoy, and coerce petitioners' customers in order to compel petitioners by means of secondary economic pressure to accede to the demands of said labor organization and to forego their legal defenses to the proceedings brought against them by said labor organization."

A reading of the affidavits shows that they are insufficient and that the trial court must be precluded from further proceedings based upon them.

[1–3] "As a condition precedent to the issuance of a *subpoena duces tecum* before trial, an affidavit must be presented to the trial court showing the facts set forth in section 1985 of the Code of Civil Procedure, which are prerequisite to the issuance of such an order. The allegations in such an affidavit are insufficient, if they are based solely upon the information and belief of the affiant and there are no facts alleged to indicate the basis of affiant's information and belief. [Citing cases.]" Smith-Golden, Inc. v. Superior Court, 41 Cal.App.2d 512, 514, 107 P.2d 299.

In McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 396, 159 P.2d 944, 950, the court discusses the right of a party to have an inspection of papers and documents in the hands of a party to the action or a third person such as that provided for in Sec. 1000, Code of Civil Procedure, and says:

"A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried."

It then states that the principles discussed by it apply with equal force to an attempt by *subpoena duces tecum* to inspect papers and documents in the hands of the opposing party.

It is suggested that the relief sought by petitioners should be denied on the authority of Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 171 P.2d 21, 166 A.L.R. 701. The petitioners in that case sought a writ of prohibition which the court held, 28 Cal.2d at page 487, 171 P.2d at page 25, "cannot be used to prevent the enforcement of a subpoena duces tecum on the ground that the affidavit is defective."

The case of Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259, is also relied upon in opposition to petitioners' prayer in this case. In that case an order had been made under Sec. 1000,

Code of Civil Procedure, and a writ of mandate was denied. However, the parties to that litigation stood in the relation of trustor and trustee, and the court said, 11 Cal.2d at page 460, 81 P.2d at page 156, "When such a situation appears, the ordinary strictness of the rule relating to the right of inspection is greatly relaxed. The courts have repeatedly declared that in such circumstances, almost 'as a matter of course' the trustor or the beneficiary has a right to a full and complete inspection of all books and records with relation to the trust."

The case of Maclay Rancho Co. v. Superior Court, 81 Cal.App. 471, 254 P. 287, cited by the real parties in interest in no way fortifies their resistance in this proceeding. It was a petition for a writ of mandate to compel the trial court to issue an order under Sec. 1000, Code of Civil Procedure, to permit the inspection of certain documents, and it was held that the refusal of the trial court did not amount to an abuse of discretion.

[4] Petitioners in this proceeding have not asked to be relieved of the effect of the trial court's order directing the defendant "to answer the questions in question" and "to appear at 650 So. Grand (in some city not named but presumably the city of Los Angeles) on May 25, 1953 at 10 a. m. for the purpose of answering the questions". They ask a writ of mandate commanding the trial court to quash the subpoena duces tecum and vacate the order enforcing the same. To this relief they are entitled under the above authorities.

Petitioners question the jurisdiction of the trial court, as a state court, to proceed in the case, which is brought under the state law. Specific reference is made to section 923, Labor Code. The claim is made that certain proceedings are now pending before the National Labor Relations Board involving these same parties and petitioners are engaged in interstate commerce and that federal statutes control them in the controversy. We deem it unnecessary to analyze and evaluate the pleadings and the issues raised by them to decide this question of jurisdiction. Amended pleadings and new issues may be present when this dispute is eventually considered if it is later raised. Petitioners herein have not asked that the respondent Superior Court be restrained from exercising any power but have asked that it be ordered to do the specific judicial acts above noted. Since petitioners are entitled, on the record before us, to a favorable ruling on the precise matter which they ask us to now decide, we shall assume without deciding that respondent court has jurisdiction to make the order in compliance with the writ of mandate in this case.

It is ordered that the peremptory writ of mandate issue as prayed.

WHITE, P. J., and DORAN, J., concur.



118 Cal.App.2d 700

PEOPLE v. SUPERIOR COURT IN AND FOR MARIN COUNTY.

PEOPLE v. LESLIE.

Civ. 15439.

Cr. 2821.

District Court of Appeal, First District, Division 2, California.

June 26, 1953.

By mandamus and appeal the People attacked a probation order of the Superior Court, Marin County. The District Court of Appeal, Dooling, J., held that mandamus would not lie since the order was appealable; and, with regard to appeal, held that under Penal Code section providing that probation may not be granted to any defendant convicted of crime of escape from a "state prison", defendant pleading guilty to charge of escape from a prison forestry camp was erroneously placed on probation.

Writ discharged, and order appealed from reversed.

1. Statutes ⇐212.6

Where courts have construed meaning of any particular word, or expression, and

Legislature subsequently undertakes to use same word, or expression, in same connection, presumption is almost irresistible that it uses word, or expression, in precise and technical sense which has been placed thereon by courts.

2. Mandamus ⇐4(3)

An order granting probation after judgment is appealable by People, and therefore writ of mandate is not a proper remedy. Pen.Code, § 1238, subd. 5.

3. Criminal Law ⇐1001

Under Penal Code section providing that probation may not be granted to any defendant convicted of crime of escape from a "state prison", defendant pleading guilty to charge of escape from a prison forestry camp was erroneously placed on probation. Pen.Code, §§ 1203, 4530, 4531.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Charles E. McClung, Deputy Atty. Gen., for the People.

Steiner, Goldstein & Brann, Philip Steiner, San Francisco, for defendant-respondent.

DOOLING, Justice.

The people present the same question both by petition for writ of mandate in Civil No. 15439 and by appeal from the order granting defendant Leslie probation in Crim.No. 2821.

On November 2, 1951 Leslie pleaded guilty to a charge of escape from a prison forestry camp in violation of Penal Code, Sec. 4531. At the time of his escape Leslie was under commitment to the state prison following a conviction of felony. Sec. 1203, Pen.Code, provides that probation may not be granted "to any defendant convicted of the crime of * * * escape from a state prison * * * unless the court shall be satisfied that he has never been * * * convicted of a felony in this State * * *."

[1–3] Over objection of the people that the above-quoted portion of sec. 1203 prohibited the granting of probation in this case the trial court after sentencing the defendant suspended the sentence and placed the defendant on probation for five years. The sole question presented is whether a defendant convicted of escape under sec. 4531, Pen.Code, has been convicted of "escape from a state prison" as that term is used in sec. 1203.

Sec. 4530, Pen.Code, read at the time of defendant's escape: "Every prisoner confined in a State prison who escapes or attempts to escape therefrom, is punishable by imprisonment in a State prison for a term of not less than one year; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison."

Sec. 4531, under which defendant was convicted, reads:

> "Every prisoner committed to a State prison who escapes or attempts to escape while being conveyed to or from such prison or any other State prison, or any prison road camp, prison forestry camp, or other prison camp or prison farm or any other place while under the custody of prison officials, officers or employees; or who escapes or attempts to escape from any prison road camp, prison forestry camp, or other prison camp or prison farm or other place while under the custody of prison officials, officers or employees; or who escapes or attempts to escape while at work outside or away from prison under custody of prison officials, officers, or employees is punishable by imprisonment in a State prison for a term of not less than one year and on conviction thereof the term of imprisonment therefor shall commence from the time such prisoner would otherwise have been discharged from said prison."

Defendant takes the position that only those escapes covered by sec. 4530 are "escapes from a state prison" within the meaning of Pen.Code, sec. 1203, and that all other escapes covered by sec. 4531 are not "escapes from a state prison" as that term is used in sec. 1203. Were it

not for the statutory and judicial history this argument might be more persuasive.

Secs. 4530 and 4531 are based upon the previous secs. 105 and 106, Pen.Code, for which they were substituted by the legislature in 1941. As originally adopted in 1872, sec. 105 covered escapes from a state prison and sec. 106 covered attempts to escape from a state prison. At the same time sec. 787, Pen.Code, provided: "The jurisdiction of a criminal action for escaping from prison is in any county of the state."

In 1921 sec. 106 was amended to provide, Stats.1921, p. 77: "Every prisoner committed to a state prison for a term less than for life, who escapes or attempts to escape while being conveyed to or from or while confined within such prison or while at work outside such prison under the surveillance of prison guards is guilty of a felony * * *."

Thus for the first time was imported into sec. 106 the provision expressly providing for the case of escapes of prisoners *committed* to a state prison as distinct from the provision of sec. 105 dealing with escapes of prisoners *confined* in a state prison. Shortly thereafter the Supreme Court was called upon to decide whether the provision of sec. 787, Pen.Code, above quoted, fixing jurisdiction in any county of the state "of a criminal action for escaping from prison", included the type of escapes covered by the 1921 amendment to sec. 106 quoted above. In Bradford v. Glenn, 188 Cal. 350, 205 P. 449, the court disposed of this question in the following language:

> "We are of the opinion that a person serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein, as well when at work outside under the surveillance of prison guards as when confined within its walls, so that if he escapes when outside he escapes from a prison, within the meaning of section 787."

The decision was cited and followed in a series of decisions of the District Court of Appeal in 1924: People v. Vanderburg, 67 Cal.App. 217, 227 P. 621; People v. Upton, 67 Cal.App. 445, 228 P. 50; People v. Johnson, 67 Cal.App. 680, 228 P. 357; People v. Warren, 68 Cal.App. 803, 230 P. 1114.

The legislature first introduced the language "escape from a state prison" into sec. 1203, Pen.Code in 1931. Stats.1931, pp. 1633–1634. At that time the words "escaping from prison" as used in sec. 787, Pen.Code, had repeatedly been given a judicial interpretation as including all escapes from custody of prisoners committed to a state prison which were provided for in sec. 106 by the 1921 amendment. "It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the Legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts." City of Long Beach v. Payne, 3 Cal.2d 184, 191, 44 P.2d 305, 308; Carroll v. California Horse Racing Board, 16 Cal.2d 164, 168, 105 P.2d 110; Union Oil Associates v. Johnson, 2 Cal.2d 727, 734–735, 43 P.2d 291, 98 A.L.R. 1499; In re Nowak, 184 Cal. 701, 705–706, 195 P. 402. In view of the judicial construction previously placed on the words "escaping from prison" the presumption that the legislature intended the words "escape from a state prison" in sec. 1203 to include all escapes provided for in secs. 105 and 106 (now secs. 4530 and 4531) seems inescapable.

Sec. 4530 was amended in 1951 to add the sentence: "No additional probational report shall be required with respect to such offense." Whatever may have been the purpose of the 1951 legislature in so amending sec. 4530 it can have little weight in construing the phrase "escape from a state prison" as used by previous legislatures in earlier sessions, commencing in 1931.

We are satisfied that the order granting probation after judgment is appealable by the people. Pen.Code, sec. 1238, subd. 5; In re Sargen, 135 Cal.App. 402, 27 P.2d 407. Thus the writ of mandate is not the proper remedy.

The alternative writ of mandate is discharged and the order appealed from is reversed.

NOURSE, P. J., and GOODELL, J., concur.



119 Cal.App.2d 106

LEARY v. BAKER et al.

Civ. 19151.

District Court of Appeal, Second District, Division 2, California.

July 8, 1953.

Rehearing Denied July 24, 1953.

Hearing Denied Sept. 4, 1953.

Action by seller of beauty parlor against buyers thereof, to recover balance due upon promissory note secured by chattel mortgage, given in part payment of purchase price. Defendants filed cross-complaint seeking cancellation of note, on ground of fraud, and damages. The Superior Court, Los Angeles County, Robert Clifton, J., gave judgment for defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that evidence sustained findings that defendants entered into contract to purchase the business, and gave note pursuant to such contract, relying upon false representations of plaintiff that the business was a profitable one and that operators who had been working for plaintiff would stay and work for defendants on same basis upon which they were then employed.

Affirmed.

Moore, P. J., dissented.

1. Sales ⇐52(7)

In action by seller against buyers to recover balance due upon promissory note secured by chattel mortgage given in part payment of purchase price of beauty parlor, wherein buyers cross-complained for cancellation of note, on ground of fraud, and for damages, evidence sustained findings that buyers contracted to purchase business and gave note pursuant to such contract in reliance upon false representations made by seller that the business was a profitable one and that seller's operators would stay and work for defendants on same basis upon which they were then employed.

2. Appeal and Error ⇐1011(1)

Determination of any conflicts in the evidence is for the trier of fact.

3. Fraud ⇐12

Statement by seller of beauty parlor to buyers, that the business was a profitable one, and that operators employed in business would remain and work for buyers on same basis upon which they were then employed, were statements of existing fact, and not mere statements of opinion.

4. Sales ⇐50

In counter-action by buyers of beauty parlor against seller, for cancellation of purchase money note on ground of fraud, and for damages, seller could not successfully contend that any misrepresentations were waived by buyers because they made an independent investigation of the business, where seller testified that books of business had not been made available to buyers when they requested to see them.

5. Contracts ⇐94(1)

A single material misrepresentation knowingly made with intent to influence another into entering into a contract will, if believed and relied upon by the other afford a complete ground for rescission, and it is unnecessary that there be a multitude of misrepresentations.

George M. Pierson, Los Angeles, for appellant.

Allan M. Moore, Beverly Hills, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant in a trial before the court without a jury in an action to recover the balance due upon a promissory note secured by a chattel mortgage after legal repossession and sale of the mortgaged property, plaintiff appeals.

Facts: July, 1950, plaintiff owned a beauty parlor in Beverly Hills known as Fletch-

ers Beauty Salon which she sold to defendants for $5,500. Defendants paid $1335 in cash and executed a note for $4,000, plus $210 advance rent.

Defendants took over the business on or about August 15, 1950 and closed it on October 1, 1950. Two weeks after closing the business they served upon plaintiff a notice of rescission on the ground of alleged fraud.

Plaintiff instituted the present action to collect the balance due on the note executed by defendants to which defendants filed a cross-complaint seeking cancellation of the note on the ground of fraud and damages, it being alleged that defendants had entered into the contract to purchase the business in reliance upon the fraudulent representations of plaintiff that (a) the business was a going, profitable and terrific business, and (b) two operators employed in the business would stay and work on the same basis they had worked when they were employed by plaintiff. The trial court gave judgment in favor of defendants for the sum of $2,410.

Question: *Was there substantial evidence to sustain the trial court's findings that defendants entered into the contract to purchase plaintiff's business and gave her a note pursuant to such contract relying upon the representations made by plaintiff that (a) the business was a "going, profitable and terrific business," and (b) that the operators who had been working for plaintiff would stay and work for defendants on the same basis upon which they were then employed?*

Yes. Defendants gave direct testimony that plaintiff made representations to them as set forth in the questioned findings, and that such representations were false and known by plaintiff to be false.* Defendants further stated they would not have purchased the business and executed the promissory note in question had they not believed such representations were true and relied thereon.

[1, 2] Clearly such evidence sustained the questioned findings of fact, it being for the trier of fact to determine any conflicts in the evidence, which conflicts in the present case the trial judge determined in favor of defendants.

[3] The statement that the business was a profitable one was without question a statement of an existing fact. The further statement that the two operators employed in the business would remain and work on the same basis as they had while they were employed by plaintiff is likewise clearly a statement of an existing fact which would continue in the future. These were not mere statements of opinion. The trial court found, supported by substantial evidence, that the foregoing representations had in fact been made.

[4] There is no merit in plaintiff's contention that any misrepresentations were waived by defendants because they made an independent investigation of the business. The record is to the contrary, plaintiff having testified that the books of the business had not been made available to defendants when they requested to see them. Plaintiff's testimony was as follows:

"Q. Now, do you recall the defendants asking you to show your books pertaining to the beauty salon, the business? A. Um-hum.

"Q. And isn't it true that you told them that the books were not available because they were in the hands of your accountant and they were not made up? Do you re-

* One of the defendants testified as follows:

"Q. Was there anything discussed as to contacting the operators? A. Well, we said that we would like to naturally meet them, and we would like to come there and see them during the day. And she thought the best thing is not to see them. She had handled everything with them and she didn't want it known in the trade that the business was being sold; it isn't good for business, she explained.

"Q. And did Mrs. Leary mention anything else in connection with the operators, other than you have testified to here? A. *Well the main thing was that they would stay with us and carry on the business, because the business wasn't worth anything without operators.*"

member saying that? A. That's very true; that's true."

It is true that a statement pertaining to the business and showing a loss was displayed to defendants but at the time it was shown them plaintiff said, "Well, you know I had a girl, a receptionist in here, and there was an awful lot of fiddling going on, and I wasn't in the business too much. That's why this statement shows at a loss. That's why it wasn't fair to even show you this, *because I am not showing you the proper figures.*"

The record also discloses that plaintiff told defendants the business was operating at a profit, enough for her to draw $125 a week out of it.

[5] It is settled that a single material misrepresentation knowingly made with intent to influence another into entering into a contract will, if believed and relied upon by the other, affords a complete ground for rescission. It is not necessary that there be a multitude of misrepresentations. (Davis v. Butler, 154 Cal. 623, 626, 98 P. 1047; cf. Miller v. Gusta, 103 Cal.App. 32, 38[4], 283 P. 946.)

Under the foregoing findings and the evidence in support thereof the rule of law just stated in applicable and the judgment in favor of defendants must be affirmed.

No useful purpose would be served by setting forth additional testimony of which there is ample in the record which would support the questioned findings.

Affirmed.

FOX, J., concurs.

MOORE, Presiding Justice (dissenting).

I dissent. The statements made on July 18, 1950, by Mrs. Leary to induce the purchase of her business as testified by Mrs. Ross are as follows: That her business was a solid, terrific concern; she was drawing $125 per week out of it; she had brought into the business some operators who had brought with them a great following, a great volume of business which had really built up the business; the operators are getting 75 per cent and are using their own supplies; they will stay with you and carry on the business.

If no more had been said and respondents had done nothing but rely upon the representations, their recovery would be the logical conclusion from the findings that such statements had been the sole inducement to make the purchase. But such was not the fact. As appellant completed her sales talk, Mrs. Ross said she and Mr. Baker would like to see some figures on all she had to say; would like to see some books, some figures which appellant promised to get. Thereafter, the latter gave respondents a financial statement of the business and the three had a meeting "up in Hollywood Boulevard." Mrs. Leary showed some figures which respondents "felt they didn't pertain to the business that she was trying to sell us at the time. The figures were at a loss and we really didn't even discuss them too much. We told them: 'Well this is not the right thing,' and she said: 'Well, I'll try and get the other figures from the accountant as soon as he has them.'" Thereupon, appellant showed them her financial statement of her business which respondents did not "take too much notice of * * * because it wasn't what she was talking about when she was selling us the business * * * this is at a loss; the business she was selling us was making a profit." She made excuses for the financial statement, saying it did not contain the proper figures. Mrs. Ross took notice of the loss of $3000 by the business as reflected in the financial statement, showed it to Union Bank when she attempted to borrow money to complete the payments to Mrs. Leary, but the bank refused to make a loan although Mr. Baker was one of its customers. That financial statement was the only document respondents ever had before purchasing the business. Despite the losses there indicated, respondents thought that by reason of Mr. Baker's experience in the line they could make a go of it.

The transaction was not consummated until August 15. In the meantime, both Mrs. Ross and Mr. Baker—a man experienced in operating such businesses as that of Mrs. Leary—proceeded to make investigations of the enterprise and of appellant's representations. Not only did they learn from her financial statement that her busi-

ness had been losing money, but they learned also that it had no standing with the bank. The investigations they commenced would have led them into a full knowledge of all facts appertaining to Mrs. Leary's operations. But they abandoned their undertaking in the very heat of battle. They did not rely upon the statements of Mrs. Leary. It was twenty seven days from the first interview until the purchase was completed during which they either completed their investigations or abandoned them on their own motion. Therefore, they did not rely upon appellant's statements.

Under such circumstances one who claims to have been deceived by his adversary "cannot be allowed to later claim that he acted upon the representations, even though he voluntarily abandoned his investigation before it was completed." Hefferan v. Freebairn, 34 Cal.2d 715, 720, 214 P.2d 386, 389. The facts for which respondents searched were not of a technical nature. Whether the business was a moneymaker could have been ascertained by a glimpse at her cash book showing receipts and disbursements. While the financial statement showed losses and no gains, one demand upon appellant would have brought forth the complete record of the operations or an admission that she had kept no books showing the amount of profits she had earned.

Likewise, it is true that after Mrs. Leary told them she had imported some operators who would stay and help them run the business, they asked her to allow them to interview the operators; they "would like to come there and see them during the day." When she gave them the same excuse that "the best thing is not to see them," respondents cheerfully gave up their quest to interview the employees.

It is a rule of wide renown that a party may not complain of misrepresentations regarding matters (1) which he has investigated or (2) when he is afforded the means of investigation and commences to make inquiries which, if efficiently prosecuted, would have resulted in proving the falsity of the representations; or (3) when the representation is in regard to generalities, equally within the knowledge of the parties, or (4) when the knowledge is equally within the reach of both parties." Dow v. Swain, 125 Cal. 674, 681, 58 P. 271, Under the first and second rules, respondents are not entitled to prevail and the authority cited is still the law of California. In the broad field of industry, trade and commerce, men must have some freedom of action. When a vendor deals at arm's length with his prospective vendee and the latter does not rely upon the vendor's representations with respect to a commodity offered for sale or exchange, but investigates to his satisfaction, he has thereby anticipated and arbitrated his own grievances and the courts are powerless to afford him a remedy.

The judgment should be reversed.



119 Cal.App.2d 46

PEOPLE v. BAXTER.

Cr. 4971.

District Court of Appeal, Second District, Division 1, California.

July 6, 1953.

Prosecution for violation of section of vehicle code regarding driving a motor vehicle while driver's license is suspended. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., entered order dismissing information, and the state appealed. The District Court of Appeal, White, P. J., held that where defendant pleaded guilty and not guilty by reason of former jeopardy, and court ordered action dismissed on ground that such prosecution was, in interests of justice, untenable and a violation of defendant's constitutional rights, such order was not appealable.

Appeal dismissed.

1. Indictment and Information ⇐139

Where defendant pleaded guilty and not guilty by reason of former jeopardy in prosecution for violation of statute regarding driving when license is suspended, defendant could not thereafter have made

motion to set aside information, in view of fact that defendant had already entered pleas to charge. Pen.Code, § 995; Vehicle Code, § 332.

2. Criminal Law ⇐1024(2)

Where defendant entered plea of guilty and paid fine in prosecution for driving without having license in defendant's possession, thereafter defendant pleaded guilty and not guilty by reason of former jeopardy in second prosecution, predicated on same act of driving a motor vehicle, for violation of statute regarding driving when license is suspended, and Superior Court ordered dismissal of prosecution on ground that it was, in interests of justice, untenable and a violation of defendant's constitutional rights, such order was not appealable. Pen.Code, § 1385; Vehicle Code, §§ 274(b), 332.

3. Criminal Law ⇐1024(1)

Where defendant pleaded not guilty by reason of former jeopardy in prosecution for violation of statute regarding driving when license is suspended, and Superior Court ordered action dismissed on ground that such prosecution was, in interests of justice, untenable and a violation of defendant's constitutional rights, appeal by people to District Court of Appeal could not be predicated on statute permitting appeal from judgment or order of an inferior court, in a criminal case, to the superior court of the county. Pen.Code, §§ 1385, 1466; Vehicle Code, § 332.

4. Indictment and Information ⇐144

In adopting section of Penal Code providing that court may on own motion or on application of prosecuting attorney, and in furtherance of interests of justice, order an action dismissed, legislature intended such statute to apply to so-called high grade misdemeanors, of which the Superior Court alone has jurisdiction. Pen.Code, §§ 1385, 1387.

5. Criminal Law ⇐1024(2)

It was not legislative intent to permit the people to appeal from an order of dismissal of a misdemeanor case made in the Superior Court. Pen.Code, §§ 1385, 1387.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., and H. C. Grundell, Dist. Atty. San Luis Obispo County, and K. T. Hoegstedt, Asst. Dist. Atty., San Luis Obispo County, San Luis Obispo, for appellant.

George Finucane, Arroyo Grande, for respondent.

WHITE, Presiding Justice.

On May 29, 1952, defendant Elsie Alzina Baxter was cited for a violation of section 274(b) of the Vehicle Code of the State of California, a misdemeanor, by a traffic officer of the California Highway Patrol. On June 3, 1952 the defendant pleaded guilty to a violation of the foregoing section of the Vehicle Code in the Justice Court of Arroyo Grande-Pismo Beach Judicial District, and thereafter paid a fine in the sum of $15 as a penalty for such violation.

Subsequently, a complaint was filed against the defendant for a violation of section 332 of the Vehicle Code, a misdemeanor. After preliminary examination in the justice court, defendant was held to answer to the superior court. On November 15, 1952, an information was filed and the defendant upon being arraigned, entered two pleas: first, the defendant pleaded not guilty, and secondly, not guilty by reason of former jeopardy.

It was stipulated that the act of driving the motor vehicle which was the basis for the citation under section 274(b) of the Vehicle Code, was the same act of driving the motor vehicle upon which the charge of violating section 332 of the same code was based.

Defendant's plea of once in jeopardy was predicated upon the conceded fact that on June 3, 1952, she pleaded guilty in the Justice Court of the Arroyo Grande-Pismo Beach District for a violation of section 274(b) of the Vehicle Code, and on June 10 paid a fine as aforesaid.

Section 274(b) of the Vehicle Code, to a violation of which defendant pleaded guilty, provides:

"The licensee shall have such license in his immediate possession at all times when driving a motor vehicle upon a highway and when so driving shall display the same upon demand of a member of the California Highway Patrol or any peace or traffic officer enforcing the provisions of this code."

Section 332 of the Vehicle Code, upon which the information was filed in the Superior Court, reads:

"Any person who drives a motor vehicle upon a highway at any time when his operator's or chauffeur's license or driving privilege is suspended or revoked or when a license or permit to drive a motor vehicle has been refused and no license has been issued to him under the provisions of this code, and the person so driving has knowledge of either such fact, is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or by fine of not more than one thousand dollars ($1,000) or both."

Because of the issue presented upon this appeal it becomes necessary to set forth the proceedings as they occurred in the court below.

After entry of the foregoing pleas, the cause was continued to December 1, 1952, "for setting". On the last-mentioned date the matter was again continued to December 8, 1952.

It appears that between December 1 and 8 briefs were filed by the respective parties, and on the last-named date, when the cause was called, the court entered the following order: "Oral and documentary evidence is introduced, matter submitted and the information is ordered dismissed pursuant to the defendant's plea of once in jeopardy."

On December 15, 1952, the people, through the District Attorney of San Luis Obispo County, filed written notice of appeal, "from the order of the said Superior Court setting aside the information in the above-entitled cause and entered the 8th day of December, 1952."

[1] Respondent moves that the appeal be dismissed for the reason that an order made by the trial court dismissing an information on its own motion, in the interests of justice, is not an appealable order.

Section 1238 of the Penal Code authorizes an appeal by the people only,

"1. From an order setting aside the indictment, information, or complaint;

"2. From a judgment for the defendant on a demurrer to the indictment, accusation or information;

"3. From an order granting a new trial;

"4. From an order arresting judgment;

"5. From an order made after judgment, affecting the substantial rights of the people".

From the present state of the record in the case at bar, it is at once apparent that the only theory upon which the people can predicate an appeal to this court is that the trial court made an order "setting aside the * * * information".

The authority for such action by the trial court is found in section 995 of the Penal Code, which provides in part as follows:

"The indictment or information must be set aside by the court in which the defendant is arraigned, *upon his motion,* in either of the following cases:

* * * * * *

"If it be an information:

"1. That before the filing thereof the defendant had not been legally committed by a magistrate.

"2. That the defendant had been committed without reasonable or probable cause." (Emphasis added.)

From the record herein it is at once manifest that respondent made no motion to set aside the information. Indeed she was in no position to make such a motion since she had already entered pleas to the charge contained therein.

[2] In terminating the action the court stated, "I am simply holding, and I hold now that, having so elected, a further prosecution on the violation of Section 332 is,

in the interests of justice, untenable and a violation of the defendant's constitutional rights, and is an oppressive prosecution, and the motion will be granted." But no motion was made.

Therefore, it appears to us that the only conclusion to be arrived at is that the court was proceeding under section 1385 of the Penal Code, which provides:

> "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

While the minute order entered on December 8, as it appears in the clerk's transcript, contains the statement that, "Oral and documentary evidence is introduced, matter submitted, and the information is ordered dismissed pursuant to the defendant's plea of once in jeopardy", it is conceded, and indeed, the record reveals that no witnesses were sworn and no documentary evidence was in fact presented.

According to his own statement, the trial judge, apparently acting in accordance with section 1385 of the Penal Code, ordered the action dismissed "in the interests of justice" and did set forth in an order entered upon the minutes, the reason for such dismissal.

Concluding as we have, that the order was made under the power granted by section 1385 of the Penal Code, the order in question is in its nature and character one from which the people cannot appeal. Certainly it is not one of the enumerated cases in which a right of appeal is given by section 1238 of the Penal Code, and there is no other statutory provision giving such right. People v. More, 71 Cal. 546, 547, 12 P. 631; People v. Romero, 13 Cal.App.2d 667, 670, 57 P.2d 557; People v. Morris, 115 Cal.App.2d 585, 252 P.2d 681.

[3] It is urged by appellant that the offense herein charged was a misdemeanor; that the action of the trial court terminated any further prosecution of the case (Penal Code, section 1387); that in misdemeanor cases, generally, where a dismissal by the trial court operates to prevent further prosecution of the matter the right of appeal is preserved to the people by section 1466 of the Penal Code, which provides as follows:

> "An appeal may be taken from a judgment or order of an inferior court, in a criminal case, to the superior court of the county in which such inferior court is located, in the following cases:
>
> "1. By the people:
>
> "(a) From an order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy; * *."

Appellant urges that it is undoubtedly the intent of the Legislature to permit an appeal by the people in those cases where jeopardy has not attached and the action of the trial court prevents further prosecution of the action by the people.

[4, 5] However, the answer to this contention is that such right of appeal by the people is explicitly authorized only in those misdemeanor cases of which a court inferior to the superior court has jurisdiction. It must be assumed that in adopting section 1385 of the Penal Code the Legislature had in mind so-called high grade misdemeanors, of which the superior court alone had jurisdiction because, in section 1387 it is provided that an order for the dismissal of a misdemeanor in the superior court is a bar to any other prosecution for the same offense unless such order is explicitly made for the purpose of amending the complaint in such action. Had the lawmakers intended to permit an appeal by the people in such cases, they could readily have so provided. That they did not, strengthens the assumption that it was not the legislative intent to permit the people to appeal from an order of dismissal of a misdemeanor case made in the superior court, as the people are permitted to do from a like order or judgment made or entered in the inferior courts prior to the time jeopardy has attached.

Since the appeal must be dismissed, and the action of the trial court herein terminates any further prosecution of the case, no purpose would be served by a discussion

or consideration of the question of whether successive prosecutions under Vehicle Code sections 274(b) and 332 amount to double jeopardy.

The appeal is dismissed.

DORAN, J., and SCOTT, J. pro tem., concur.



119 Cal.App.2d 18

In re CLELAND'S ESTATE.

CLELAND v. CLELAND.

Civ. 19280.

District Court of Appeal, Second District, Division 3, California.

July 3, 1953.

Hearing Denied Aug. 27, 1953.

Proceeding in the matter of the estate of deceased, wherein petition was filed for family allowance. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered an order granting the petitioner a family allowance and the contestant appealed. The District Court of Appeal, Vallée, J., held that divorce decree which husband obtained during his lifetime in state of Chihuahua, Mexico, and which did not contain declaration of execution which law of Chihuahua required decree to contain in order to dissolve marriage relation, was not final decree of divorce, and hence wife who was party to decree and not subsequent wife was the surviving widow entitled under California law to family allowance on death of husband.

Affirmed.

1. Judgment ⇐831

Under statute relating to foreign judgments, judgment of court of foreign country can never have any greater force than that given it by laws of country where pronounced, from which it derives its full force. Code Civ.Proc. § 1915.

2. Judgment ⇐831

The California courts will give decree of court of state of Chihuahua, Mexico, only such effect as decree had by the laws of Chihuahua. Code Civ.Proc. § 1915.

3. Executors and Administrators ⇐188
Divorce ⇐326

Divorce decree which husband obtained during his lifetime in state of Chihuahua, Mexico, and which did not contain declaration of execution which law of Chihuahua required decree to contain in order to dissolve marriage relation was not final decree of divorce, and hence wife who was party to decree and not subsequent wife was the surviving widow entitled under California law to family allowance on death of husband. Code Civ.Proc. § 1915.

4. Appeal and Error ⇐719(1)

Reviewing court is not required to assume vexatious burden of searching record to ascertain whether trial judge made erroneous ruling or whether party properly preserved point in trial court or whether he sufficiently apprised trial judge of nature and purpose of evidence he sought to introduce. Rules on Appeal, rule 15(a).

Riedman & Silverberg, Long Beach, for appellant.

Bruce Mason and Clark Heggenes, Long Beach, for respondent.

VALLÉE, Justice.

Appeal by Helen Cleland from an order granting Florence Cleland a family allowance. Whether there is any substantial evidence to support a finding that Florence Cleland is the widow of George Cleland is the question.

The material facts are these:

1. February 3, 1919—George and Florence were married in San Bernardino, California. They lived together until April, 1931.

2. April 26, 1931—George deserted and abandoned Florence.

3. May 23, 1936—George obtained a decree of divorce from Florence in Juarez, state of Chihuahua, Republic of Mexico. The decree did not contain a formal "declaration of execution."

4. May 25, 1936—George married Helen in Mexico.

5. George and Helen lived together as man and wife until George's death.

6. January 17, 1951—George died.

The court found: the law of the state of Chihuahua required that a decree of divorce be "declared executed"; if such a decree did not contain a formal "declaration of execution" it was not a final decree; the decree obtained by George did not contain a "declaration of execution" and was not a final decree; it was and is void; except for that decree, no decree dissolving the marriage of George and Florence has been rendered or entered by any court; the marriage of George and Helen was and is void. The court concluded that Florence is the surviving widow of George.

Helen assails the findings that under the laws of Chihuahua a final decree of divorce must contain a formal "declaration of execution" and that her marriage to George was void.

Florence did not appear in the action in Chihuahua. Dr. William B. Stern, foreign law librarian of the law library of the County of Los Angeles, qualified as an expert on the laws of the state of Chihuahua. His testimony, epitomized, was as follows:

The law of Chihuahua, at the time in question, provided: The judge, before whom the cause was heard, announced his decision, and rendered his decree; immediately after the decree was rendered it was communicated to the parties present; if a party was not present, it was posted; such communication and posting constituted service of the decree; the parties had twenty-four hours after such service in which to appeal; after the time for appeal had elapsed, if no appeal was taken, the court was required to declare in the decree that the divorce was executed, in order that the decree be effective; the decree did not become final until the court had declared it executed; a decree of divorce did not become executed by operation of law; the judge must have ordered it executed. The decree obtained by George recited that it was served on him personally and that it was posted. It was published as the law required. It did not and does not contain a declaration that the divorce was executed. The judge did not declare the divorce executed. The decree was not and is not final.

[1, 2] Section 1915 of the Code of Civil Procedure provides that "A *final* judgment of any * * * tribunal of a foreign country having jurisdiction, *according to the laws of such country,* to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." (Italics added.) Under our statute the judgment of a court of a foreign country can never have any greater force than that given it by the laws of the country where pronounced, from which it derives its full force. The decree of the court of the state of Chihuahua should be given only such effect as it had by the laws of that state. Cf. Gilmer v. Spitalny, 84 Cal.App.2d 39, 189 P.2d 744.

[3] It appears from the evidence that under the law of the state of Chihuahua, as it existed at the time George obtained the decree, the court granted a sort of interlocutory decree of divorce which was appealable. There was no final decree of divorce until the court's adjudication had taken such form as to become effective as a final judgment, which did not occur until the court declared the judgment executed. The interlocutory decree was distinguished from the final decree in that it was not final or a conclusive determination of the status of the parties. The rendition of the interlocutory decree did not dissolve the marriage relation, and the parties thereto remained husband and wife until the marriage had been dissolved by a declaration, in the decree, that the divorce was executed. The evidence of Dr. Stern that we have narrated, amply supports the finding that the Chihuahua decree was not final.

Since the Chihuahua decree was not final, the trial court correctly concluded that George did not obtain a divorce from Florence and that she is his surviving widow. Cf. In re Estate of Pusey, 180 Cal. 368, 181 P. 648; In re Estate of Hancock, 156 Cal. 804, 106 P. 58.

[4] Helen asserts the court erred in not admitting evidence to show that Florence is

estopped to assert that she (Helen) is not the surviving widow of George. Counsel say, "At the time of the trial, there was an objection made to the introduction of any evidence on the ground of the pleading in the case." No reference to the record is given in support of this statement. Rules on Appeal, rule 15(a). It is not the province of a reviewing court to assume the vexatious burden of searching the record to ascertain whether the trial judge made an erroneous ruling, or whether a party properly preserved a point in the trial court, or whether he sufficiently apprised the trial judge of the nature and purpose of the evidence he sought to introduce. However, a cursory examination of the reporter's transcript fails to reveal that any evidence was excluded on the ground "of the pleading in the case."

Our conclusion makes it unnecessary to consider other points made by Florence in support of the order.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



119 Cal.App.2d 75

CHEYNEY v. CITY OF LOS ANGELES.

Civ. 19455.

District Court of Appeal, Second District, Division 2, California.

July 7, 1953.

Personal injury action. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., granted defendant's motion for nonsuit and the plaintiff appealed. The District Court of Appeal, McComb, J., held that where plaintiff proceeded down strange stairway which was maintained by city and which led to beach, in impenetrable darkness with awareness of danger, plaintiff was not exercising care of ordinarily prudent person and was guilty of contributory negligence which barred her recovery from city for injuries sustained when she took the last step and fell into the sand.

Affirmed.

1. Appeal and Error ⇐927(3)

On plaintiff's appeal from order granting defendant's motion for a nonsuit, evidence was viewed in light most favorable to plaintiff.

2. Municipal Corporations ⇐851

Plaintiff could not recover from city for injuries allegedly sustained when plaintiff, who was descending stairway which was under supervision of city and which led into beach, fell into sand as she took the last step, where city had no actual knowledge of alleged defect and alleged defect was not so conspicuous or notorious and had not existed for such length of time that city should have had constructive notice of defect. Government Code, § 53051(a).

3. Municipal Corporations ⇐847

A city sued for personal injuries allegedly sustained as result of dangerous or defective condition of property of city may be charged with constructive notice of such condition if the condition has existed for a sufficient length of time and if sufficiently conspicuous or notorious to give rise to inference that city has knowledge thereof. Government Code, § 53051(a).

4. Negligence ⇐67, 80

An invitee on premises who, being unfamiliar therewith, and proceeding into place of impenetrable darkness, falls and is injured, does not as a matter of law exercise ordinary care for his own safety and hence any injury received is a result of his own contributory negligence for which he may not recover.

5. Municipal Corporations ⇐855

Where plaintiff proceeded down strange stairway which was maintained by city and which led to beach, in impenetrable darkness with awareness of danger, plaintiff was not exercising care of ordinarily prudent person and was guilty of contributory negligence which barred her recovery from city for injuries sustained when she took the last step and fell into the sand. Government Code, § 53051(a).

Claude L. Welch, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and William Marshall Morgan, Dep. City Atty., Los Angeles, for respondent.

McCOMB, Justice.

From an order granting defendant's motion for a nonsuit in an action to recover damages for personal injuries, plaintiff appeals.

[1] Viewing the evidence in the light most favorable to plaintiff (appellant), the essential facts are these:

On September 3, 1950, plaintiff in company with her husband and several other persons went for an automobile ride. At about 11:30 p. m. they stopped in a parking lot at a beach which was under the supervision of defendant city. At the time there was no one on the beach, it was dark and there were no lights or fires.

Near the place where they stopped was a stairway leading from the parking lot to the sand. The stairway had 23 steps with a handrail extending to the last few steps. The last step was 29 inches from the sand according to measurements made September 5, 1950.

Plaintiff, after standing a few minutes in the parking lot, decided to go onto the sand. She walked down the stairway in a normal fashion holding onto the handrail until she reached the last few steps. She then moved to the center of the stairway and proceeded more slowly, taking one step at a time. During all this time she had looked at the steps ahead of her though they appeared dim and shadowy, darker at the bottom than at the top. There was no artificial light shining upon them. At the last step plaintiff could see "just darkness." She took another step, fell into the sand and was injured.

Plaintiff was aware that the action of the waves and tides were at this time eroding the beaches along the coast of Southern California.

The supervisor of this beach area had an office some 700 to 800 feet north of this stairway and could see the stairway from his office. It was his duty to watch all portions of the beach to protect the safety of recreation seekers and to inspect and keep in repair this stairway. He had no knowledge that the sand level was at any time below the level of the bottom step of the stairway. The waves and tides had varied the sand level as much as 5 feet from time to time and such change could take place within 24 hours.

The trial court granted defendant's motion for a nonsuit on two grounds: (1) that as a matter of law plaintiff had not proved facts sufficient for the jury to find defendant had notice or knowledge of an alleged dangerous or defective condition and (2) that as a matter of law plaintiff was guilty of contributory negligence.

[2] *Questions:* First: *Did the trial court err in finding that there was no substantial evidence from which the jury could have inferred that defendant had notice or knowledge of the alleged dangerous and defective condition of the stairway?*

No. There is no evidence that the city had actual knowledge of the alleged dangerous or defective condition. Therefore any notice it had must have been constructive. Section 53051 of the Government Code reads in part as follows: "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition." The uncontradicted evidence here shows that defendant did not have knowledge of the alleged defective condition.

[3] It is likewise settled that before a defendant municipality may be charged with constructive notice it must have existed for a sufficient length of time and be sufficiently conspicuous or notorious to give rise to the inference that defendant has knowledge thereof. (Nicholson v. City of Los Angeles, 5 Cal.2d 361, 364[3], 54 P.2d 725; Howard v. City of Fresno, 22 Cal. App.2d 41, 44[1], 70 P.2d 502.)

In the instant case there is no evidence that the alleged defective condition was

either conspicuous or notorious or as to how long it had existed.

Maddern v. City and County of San Francisco, 74 Cal.App.2d 742, 169 P.2d 425, Baker v. Board of Trustees, 133 Cal. App. 243, 23 P.2d 1071, and Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773, relied on by plaintiff, are each factually different from the instant case. A mere reading of these cases makes it evident that they are not here applicable.

Second: *Did the trial court err in holding that plaintiff was contributorily negligent as a matter of law?*

[4] *No.* An invitee on premises who, being unfamiliar therewith, and proceeding into a place of impenetrable darkness, falls and is injured, does not as a matter of law exercise ordinary care for his own safety and hence any injury received is a result of his own contributory negligence for which he may not recover. (Robinson v. King, 113 Cal.App.2d 455, 457[2], 248 P.2d 477; Bruce v. Risley, 15 Cal.App.2d 659, 664, 59 P.2d 847.)

[5] Applying the foregoing rules to the facts of the case at bar it is evident that plaintiff was contributorily negligent. She had never been on this stairway before or in the vicinity thereof. Likewise it had been two or three years since she had been at this point on the beach. She testified that all she could see was darkness; that the light was dim and shadowy; that it was dimmer at the bottom than at the top, and that the lighting conditions were not at all good. She was evidently aware of the danger of proceeding when she stated that she went cautiously down those steps which had no handrail at the bottom of the stairway; that she altered the manner in which she was walking by taking one step at a time instead of stepping one after the other as she had done previously. Likewise she testified that she was afraid of stepping off the side of the stairway and so moved to the middle.

All these facts indicate plaintiff was aware of the danger of proceeding in the impenetrable darkness. Therefore under the rule above stated she was not exercising the care an ordinarily prudent person should in proceeding into the darkness and was guilty of contributory negligence as a matter of law, with the result she is barred from any recovery for her unfortunate injury.

Affirmed.

MOORE, P. J., and FOX, J., concur.



118 Cal.App.2d 851

In re BEEBEE'S ESTATE.

RICHARDSON et al. v. BEEBEE et al.

Civ. 15557.

District Court of Appeal, First District, Division 1, California.

July 1, 1953.

Rehearing Denied July 31, 1953.

Hearing Denied Aug. 27, 1953.

Proceedings were brought to revoke probate of certain will and codicil and for the probate of letter as the last will. The Superior Court of the State of California, in and for the City and County of San Francisco, entered order revoking probate and admitting to probate the letter of deceased as her will, and an appeal was taken. The District Court of Appeal, Bray, J., held that letter was not on its face a will and that evidence was insufficient to establish intent of deceased that it be her will.

Order reversed.

Fred B. Wood, J., dissented.

1. Appeal and Error ⇐1008(3)

If there was conflict in evidence bearing on question of deceased's intent to alleged will in form of letter, or in reasonable inferences to be drawn therefrom, District Court of Appeal was bound by trial court's determination of conflict, but if there was no evidence on subject, determination whether letter constituted a will was to be made solely from the letter, or if there was no conflict in evidence and inferences therefrom, District Court of Appeal was not

bound by trial court's interpretation and could make its own interpretation.

2. Wills ⇐435

Courts will not make a will for a decedent who has failed to do so for himself.

3. Wills ⇐448

The law favors testacy rather than intestacy.

4. Wills ⇐87

Courts will give such construction to instruments bearing character of wills as is necessary to carry out testamentary intent.

5. Wills ⇐72

Courts will examine facts and circumstances surrounding execution of alleged will, to end that intent of maker may be discovered.

6. Appeal and Error ⇐1008(3)

Where date appearing on alleged will in form of letter was in dispute, District Court of Appeal on appeal could determine the date itself by examining the letter.

7. Wills ⇐110

Where disputed date in will appeared as the figure one and the figure three with a straight heavy vertical line drawn through the figure three, correct date of alleged will would be deemed the 11th.

8. Wills ⇐72

Before a document will be admitted to probate as last will of a deceased, it must satisfactorily appear that the deceased intended the very paper itself to make a disposition of his property.

9. Wills ⇐93

Determination that deceased left letter intending it to operate as a will could not be based entirely on surmise of what certain attorney may have said to deceased, where such surmise was based on assumption that such attorney advised contrary to his previous advice and contrary to the advice which an attorney would ordinarily give.

10. Evidence ⇐597

Mere speculation cannot be allowed to do duty for probative facts.

11. Wills ⇐84

Letter written by deceased to manager of estate planning division of trust company stating that deceased wished to revoke all former wills and codicils because of changed conditions, and that she wished to leave her entire estate to her son without reservation, and signed by deceased, but containing an additional paragraph stating that deceased was 89 years old and going blind, and that she was not able to get down to the trust company, and requesting manager to do whatever was necessary under the circumstances, whether by codicil or new will, and followed by second signature of deceased, was not a will when considered alone without evidence.

12. Wills ⇐130

Alleged holographic will should be read and considered in its entirety in passing on its validity.

13. Appeal and Error ⇐996, 1010(1)

Though findings of trial court will not be disturbed on appeal, if record discloses substantial evidence to support them, such rule has no pertinency where evidence without conflict clearly establishes impropriety of inferences drawn by trial court from uncontroverted facts.

14. Wills ⇐72

In order to establish document as will, it must satisfactorily appear from document that deceased intended by the very document itself to make a disposition of his property.

15. Wills ⇐130

Where there exists a previously made and unrevoked will of testator, later holographic instrument claimed to be a will should be so phrased that there can be no doubt from its language that intention of testator was to make further testamentary provisions.

16. Wills ⇐93

In proceeding to revoke probate of will and codicil and to admit letter of deceased to probate as the last will of the deceased, evidence was insufficient to establish that deceased intended letter to be her last will.

17. Wills ⇐72

If testator does not intend instrument in question to take effect as his will, but intends it to take effect only when additional formalities are completed, it will not be given effect.

18. Wills ⇐84

Instructions for a will to be drawn and executed in the future will not amount to a will, although they would be a valid will as far as execution is concerned if testator had so intended.

19. Wills ⇐93

Proponents of alleged will written in letter form had burden to prove that deceased intended the document to be her will.

20. Wills ⇐96

In order to justify probate of alleged will written in form of letter, fact that deceased intended the document to be her last will was required to clearly appear.

Marvin C. Hix, San Francisco, for appellants.

Harry N. Grover and John F. O'Sullivan, San Francisco, Weinmann, Rode, Burnhill & Moffitt, Oakland, for respondents.

BRAY, Justice.

Appellants appeal from an order revoking the probate of a certain will and codicil and admitting to probate as the last will of decedent a certain writing in letter form.[1]

Question.

Basically, does the evidence support the finding that this letter was intended by decedent to be her will?

Record.

Sarah Agusta Beebee died June 16, 1950. Thereafter a document dated April 26, 1944, and one dated July 8, 1947 (the latter holographic in character) were admitted to probate as the last will and testament and codicil of said decedent. Subsequently, a petition for revocation of probate of said will and codicil and probate of the letter in question was filed by Robert A. Beebee. Ralph A. Beebee, Jr., petitioned separately for the revocation of probate of the will and codicil. Appellants filed objections to both petitions. The court found that the letter was intended to be and was the last will of decedent, admitted it to probate, and revoked the probate of the prior will and codicil.

Evidence.

There is no conflict in the testimony, the claimed conflict being in the inferences to be drawn therefrom and in the construction of the letter. Decedent was a woman 89 years of age, growing blind, and while in good health, was not strong. She had one son, Ralph A. Beebee, who predeceased her by two days, and two grandsons, Ralph A. Beebee, Jr., the child of Ralph Sr. and his first wife, and Robert A. Beebee, a minor, the son of Ralph Sr. and his second wife, who after her divorce remarried and is Mrs. Irene Meniktos. Ralph Jr. disappeared around 1930, was never afterwards heard of by decedent, and was disinherited. Decedent had deposited with the Wells Fargo Bank and Union Trust Co., the executor and trustee under the will and codicil originally admitted to probate, a will made in 1940. On April 26, 1944, Mr. Falconer, one of the attorneys for the bank, drew a will for decedent which she executed. This will left a piano to her grandson Robert, and the rest of her furniture to her son Ralph Sr. The rest of her estate was to be converted into cash, an endowment policy for $500 on Robert's life to be purchased, and the balance used to procure a life annuity for Ralph Sr. In the event of his death, prior to the purchase of the annuity, the estate was to go to Bertha Richardson, Ralph Sr.'s wife by his first marriage, Evelyn Jacobs, a protegee, Elizabeth B. Snell, Lillian James Larson and Josephine Woolf, intimate friends. This will was deposited with the bank. From time to time the trust department sent out notices to decedent, as well as others, to look over their present wills to see if they desired to make changes. On July 3, 1947, decedent drew a codicil dated that day, which read, "I, Sarah A. Beebee, bequeath to my grandson, Ralph Augustus Beebee, $10.00." It was signed by her. This she sent Mr. Falconer in a letter in which she asked if it could be legally attached to her

1. Hereafter for convenience referred to as "letter."

will, and if not what she could do to make it legal. July 7th Mr. Falconer wrote her to the effect that the proposed codicil was legal but suggested that in view of the reasons she had given in her letter for limiting her grandson Ralph Jr. to only $10, she sign a codicil which contained a "non-contest clause," form of which he enclosed. He suggested that if she could not come to his office she copy the form in her own handwriting. This she did, dated it July 8th, and sent it to be, and it was, deposited with the bank. According to Mrs. Snell, a close friend of decedent, when decedent had anything to write that was important, she would first write a draft of it, then rewrite it, sometimes making minor changes. She would keep the first draft as a copy. She also told Mrs. Snell many times, even as late as within two weeks of her death, that she would be afraid to make a will without an attorney's advice. Prior to 1950 Ralph Sr., having been divorced from his second wife, returned to live with decedent in the home which she owned. In March, 1950, Ralph Sr. was engaged in the contracting business and needed money. Decedent had given him all she could to help him, and through him, had put her property up for sale so as to get more money for him. The sale did not go through. About March 14th, Mr. Scott received the following letter (exhibit 1):

"No. 1318–43rd Ave San Francisco Mar 11th 1950

Wells Fargo Bank and Union Trust Company

Market at Montgomery St. San Francisco

Mr. Robert T. Scott

Manager Estate Planning Division

Dear Mr. Scott:

Conditions have changed making it desirable that I revoke all former wills and codicils made by me, and wish to leave my entire estate to my son, Ralph Agustus Beebee without reservations. I am 89 years old, Helpless and growing blind. Please help me either to add a new codicil or to make a new will

Sarah Agusta Beebee

dated Mar 11th 1950"

On that day Scott phoned decedent. She stated that she wanted someone from the bank to come out as it was difficult for her to get downtown because of her condition. Scott told her the bank could not help her, that what she needed was an attorney, that the bank's records showed Mr. Falconer to be her attorney, and suggested she either phone him or some other attorney, or, if she desired, Scott would send the letter to Falconer and have him phone her. At her request he phoned Falconer. Scott said Falconer called her. Falconer testified that he is not sure whether or not he had any telephone conversation with decedent. He has no recollection of one. She did not come to his office.

She died approximately three months after the date of exhibit 1 (the letter above quoted). On the day of her death, one of the bank's employees found among other papers at her home petitioner's exhibit 2, which he delivered to the bank. This reads:

"No 1318–43rd Ave

San Francisco, California March 13th 1950

Wells Fargo Bank & Union Trust Co.

Market at Montgomery St, San Francisco

Mr. Robert T. Scott

Manager Estate Planning Division

Dear Mr. Scott

I wish to revoke all former wills & codicils to wills made by me as conditions no longer no longer exist, as at that time I wish to leave my entire Estate to my Son Ralph Agustus Beebee without reservation.

Sarah Agusta Beebee

I am eighty nine years old and growing blind, and not able to get down town to the bank. So please do what is necessary under the circumstances, whether by codicile or a new will.

Sincerely

Sarah A Beebee"

It is conceded that the date as originally written was "13th." Decedent then wrote over the figure 3 either a line or the figure 1. This is the document the court has now admitted to probate.

Is Exhibit 2 A Will?

Respondents contend that the correct date of Exhibit 2 is March 18th. They further contend that after decedent heard from Scott in reply to her letter of March 11th, and also from Falconer, decedent wrote exhibit 2, first mistaking the date for March 13th and then by drawing a line through it, changing the date to the 18th; that in writing the document she intended the part above her first signature to be her will. The court so found both as to date and intent.

Appellants contend that the correct date of exhibit 2 is March 11th, that it is the first draft of exhibit 1, and that there is no evidence that decedent ever intended exhibit 2 to be a will.

[1] It might be well to determine the scope of our review in a case of this kind. If there is a conflict in the evidence bearing on the question of decedent's intent as to exhibit 2, or in the reasonable inferences to be drawn therefrom, we are bound by the trial court's determination of that conflict. But if there is no evidence on the subject, and the determination of whether exhibit 2 constitutes a will is to be made solely from that instrument, or if there is no conflict in the evidence and the inferences therefrom, we are not bound by the trial court's interpretation and can make our own interpretation. Estate of Platt, 21 Cal.2d 343, 131 P.2d 825.

[2–5] "While it is true that courts will not make a will for a decedent who has failed to do so for himself, it is also true that the law favors testacy rather than intestacy, and will give such construction to instruments bearing the character of wills as is necessary to carry out testamentary intent. They will also examine facts and circumstances surrounding its execution, to the end that the intent of the maker of the paper may be discovered." Estate of Spitzer, 196 Cal. 301, 305–306, 237 P. 739, 741.

If exhibit 2 is dated the 11th there is no evidence or reasonable inference therefrom that decedent intended it as a will. She had drawn two formal wills and one codicil. (This codicil was complete in itself and was not in the form of a letter.) She was in the habit of writing out a rough draft of any important paper and then rewriting and correcting it, and keeping the original as a copy. She stated that she would not attempt to make a will without a lawyer's advice. Her letter sent with the codicil and the substance of exhibits 1 and 2 confirm this. She kept her testamentary papers at the bank. Exhibit 1 is a condensation of exhibit 2. Although she was becoming blind, her careful habit in writing a finished product makes it doubtful that she would leave as a final form a document containing the repetitious "no longer no longer." The form of the writing itself is that of a letter. It is addressed to the bank and concludes "Sincerely."

But, say respondents, the fact that it bears the date of the 18th is shown in two ways (1) by the fact that she must have been advised by Attorney Falconer about that time, and (2) by an examination of the figure itself. As to the first contention, there is nothing in the evidence to support the assumption that Falconer would have advised her to write another letter to Scott or to draw her will in letter form. Nor is there anything in the evidence to explain the fact that if she wanted this to be her will, she would not have mailed it to the bank to whom it was directed. Its very form is almost conclusive proof that she was not acting after an attorney's advice. There is no explanation as to why, assuming she was acting on the 18th, and assuming that after talking to Falconer she felt advised to make the will in letter form, she would desire to repeat what she had said in her previous letter, that she was 89 years old and then again ask the bank to do what was necessary either by codicil or new will. Under the respondents' theory she had already been told by Falconer what was necessary to be done.

[6, 7] This brings us to a consideration of the determination of the date from an examination of the figure itself. This under the doctrine of Estate of Platt, supra, 21 Cal.2d 343, 131 P.2d 825, we are entitled to do by an examination of the instrument itself. See also 4 Cal.Jur.2d 484. The line which is drawn through the 3 in 13th is a

straight one, and is much heavier than in any figure or other portion of her handwriting. It appears that the line may have been gone over a second time. Moreover, it is much wider at the top than at the bottom and runs beyond the lower portion of the 3. In examining the 3 and the 8 made by her in the address "1318" it does not appear probable that to change a 3 into an 8 decedent would have attempted it by a straight line. We conclude that the correct date is the 11th.

[8] Again, assuming that it was written on the 18th there is still no evidence to support the theory that she left it with her papers intending it to take effect as a will. Reading it as a whole it is evident that she expected something more to be done before it would become a will. "* * * before a document will be admitted to probate as the last will and testament of a decedent, it must satisfactorily appear that the maker of the instrument intended *by the very paper itself* to make a disposition of his property * * *." Estate of Kisling, 68 Cal.App.2d 163, 156 P.2d 57, 59.

[9, 10] Actually, the determination that decedent left exhibit 2 intending it to operate as a will is based entirely upon the surmise of what Attorney Falconer may have said to her. Such surmise, too, is based on the assumption that he advised contrary to his previous advice and contrary to the advice which an attorney would ordinarily give. Mere speculation cannot be allowed to do duty for probative facts. Gray v. Southern Pacific Co., 23 Cal.2d 632, 645, 145 P.2d 561.

[11–13] Construing the instrument alone it shows it was not intended to be testamentary. While if the portion above the first signature were all there was to the document, it could be considered as testamentary in spite of the fact that it is in letter form,[2] the balance of the document shows that at most it is a letter to the bank telling them how she wished to change her will but intending that the preparation of a codicil or new will was necessary before such intent could be effected. To construe exhibit 2 as a will, the entire latter portion of it must be completely disregarded. "* * * the instrument should be read and considered in its entirety in passing upon its validity." Estate of Bower, 11 Cal.2d 180, 78 P.2d 1012, 1014. Applicable here is the rule set forth in Estate of Tarrant, 38 Cal.2d 42, 51, 237 P.2d 505, 509, 28 A.L.R.2d 419: "While it is true that 'the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them,' * * * such rule has no pertinency where the evidence without conflict clearly establishes the impropriety of the inferences drawn by the court from the uncontroverted facts."

[14–16] In Estate of Spencer, supra, 87 Cal.App.2d 591, 197 P.2d 351, appears a well-reasoned analysis of a number of California cases, in some of which letters or portions of them claimed to constitute wills, were held to be testamentary in character, while in others they were held not to be such. The court quoted from Estate of Wunderle, 30 Cal.2d 274, 280, 281, 181 P.2d 874, 878: "* * * it must satisfactorily appear from the document offered * * * that the decedent intended, by the very paper itself, to make a disposition of his property * * *." In White v. Deering, 38 Cal.App. 433, 436, 177 P. 516, Estate of Logan, 29 Cal.App.2d 60, 64, 84 P.2d 245, and Estate of Spencer, supra, 87 Cal.App.2d 591, 598, 197 P.2d 351, there was applied the rule that where there exists a previously made and unrevoked will of the testator, the later holographic instrument claimed to be a will should be so phrased that there can be no doubt from its language that the intention of the testator was thus to make further testamentary provisions. Applying that rule in our case, the evidence instead of removing doubt that such was the decedent's intention makes conclusive the doubt which arises from the form of the instrument.

In Estate of Grobe, 96 Cal.App.2d 70, 214 P.2d 535, a letter from the decedent to his attorney starting "'I wish to annul the Will * * *. I wish to have you draw up an-

2. See Estate of Pagel, 52 Cal.App.2d 38, 125 P.2d 853, and see cases discussed in Estate of Spencer, 87 Cal.App.2d 591, 197 P.2d 351.

other Will' " making his niece beneficiary, was held not to constitute a will. In Estate of Moore, 102 Cal.App.2d 672, 228 P.2d 66, the trial court was reversed in holding that the following writing found in the pocket of a coat of decedent hanging in a closet, " 'July 4, 1948 Mother Here is my ring. I leave you this and all that is mine. Mike is provided for. Dont grieve for me. I love you. I'll leave a Will. (Signed) Mary Ellen' " was not a will because "it shows that some other writing yet to be made would be her will." 102 Cal.App.2d at page 675, 228 P.2d at page 68. This is true of exhibit 2 in our case. The following language from the Moore case answers one of the arguments made here, 102 Cal.App.2d at page 674, 228 P.2d at page 67: "Respondent argues that the intent clearly expressed in the undated document found near the body of decedent 'fortifies and corroborates' the intent expressed in the document offered for probate. It does fortify and corroborate the manner in which the decedent desired to leave her property but does not show that she intended to have that very paper itself operate as a Will."

[17, 18] "If a testator does not intend the instrument in question to take effect as his will, but intends it to take effect only when additional formalities are completed, it will not be given effect. For this reason, instructions for a will to be drawn and executed in the future will not amount to a will, although they would be a valid will as far as execution is concerned if testator had so intended." 1 Page on Wills, 3d Ed., p. 131.

In Estate of Sargavak, 35 Cal.2d 93, 216 P.2d 850, 21 A.L.R.2d 307, appear a number of cases in which documents appearing on their faces to be testamentary in character were held not to be such for the reason that the evidence showed that they were not so intended by the maker. The court said, 35 Cal.2d at page 96, 216 P.2d at page 851: "It bears emphasis that we are here concerned not with the meaning of the instrument, but with the intention with which it was executed."

Estate of Salmonski, 38 Cal.2d 199, 238 P.2d 966, cited by respondents, is not in point. There no appeal was taken from the court's order finding that the letter in question was testamentary in character and admitting it as a codicil to a former will. The only question before the court was the interpretation of its provisions reading it together with the will. It held that the words "last wish" were mandatory in the codicil. In our case, were exhibit 2 as a whole testamentary in character the words "wish" as there used would be considered mandatory. See also Estate of Wood, 36 Cal. 75. Estate of Smilie, 99 Cal.App.2d 794, 222 P.2d 692, differs from our case in that there the letter which the court held to be testamentary contains no statement or even intimation that it is to be followed by some further action, while exhibit 2 here shows on its face that it was not considered final by decedent. In both Hewes v. Hewes, 110 Miss. 826, 71 So. 4, and Wells v. Lewis, 190 Ky. 626, 228 S.W. 3, cited by respondents, the facts and the letters are completely dissimilar to the facts and letter in our case.

[19, 20] The burden was on respondents as proponents of the alleged will to prove that decedent intended exhibit 2 to be her will. Estate of Relph, 192 Cal. 451, 458, 221 P. 361. Such fact must clearly appear. Estate of Spencer, supra, 87 Cal.App.2d 591, 594, 197 P.2d 351. It does not so appear and there is no substantial evidence to support the court's findings that it did.

In view of our decision it is unnecessary to consider appellants' contention that the court failed to find on all issues.

The order is reversed.

PETERS, P. J., concurs.

FRED B. WOOD, Justice.

I am unable to concur.

It appears to me that the finding of testacy is supported by substantial evidence, including the inferences which reasonably may be drawn from that evidence.

The instrument in question was entirely written, dated, and subscribed by the hand of the decedent. It was found among her papers. Its wording is indicative of a testamentary intent. The disposition it makes comports with the disposition she intended as narrated in her letter of March 11th to Mr. Scott. What more do we need?

Some confusion has arisen, stemming in part, it would seem, from the manner in which decedent indicated the date of this instrument.[1] Apparently she dated it March "13th" and then drew a diagonal line through the "3" with the intention of converting it into a "1" or an "8." The trial judge says "8." I am not prepared to differ with him. The diagonal stroke through the "3" does not make an artistically finished and polished "8," yet it looks like a fair attempt, made by an elderly, feeble, nearly blind person. Also, this view of the altered date line receives support from other circumstances in the case.

Mr. Scott, to whom she wrote under date of March 11th, says he received her letter March 14th and that day phoned her that the bank could not perform the legal service of drafting a will or codicil for her; that she should get a lawyer; if she desired, he would turn her letter over to a lawyer; she so desired; accordingly, he did turn it over to a lawyer, Mr. Falconer, who had in 1947 advised her concerning the writing of an olographic codicil; and Mr. Falconer phoned her. Mr. Falconer has no independent recollection of having phoned but Mr. Scott has a definite recollection in that regard. Also, the questioned document contains some internal evidence of the reception of legal advice by the author of it. Her legal adviser, with her letter of March 11th in front of him, could readily have used it as a convenient vehicle when instructing her, transposing the words "Conditions have changed"; omitting the words "making it desirable that I revoke," substituting therefor the words "I wish to revoke"; and omitting the sentences "I am 89 years old, Helpless and growing blind. Please help me either to add a new codicil or to make a new will."

The addendum which she then or later wrote at the bottom of the same sheet of paper certainly was no revocation of the will (if it was a will) written on the upper portion. Nor did the addendum necessarily convert that will (if it was a will) into a mere request to draft for her a new will or a codicil to an old will. The words "please do what is necessary under the circumstances, whether by codicile or a new will," reasonably may be interpreted in their context, as a request to Mr. Scott to do the indicated drafting if he felt the will she had just written was not legally sufficient in every respect. Concerning the significance of the repetitious statement "no longer no longer," who in writing a brief or opinion has not committed similar inadvertent errors, errors which upon occasion have persisted through several editings, to be discovered only upon reading page proof, sometimes not until after the filing of the document?

Also, the trial judge well may have attached some significance to the fact that Mr. Scott did not hear from the decedent after their conversation on the 14th of March. If she felt secure in having written a will, she would not necessarily have an urge to communicate further. The question has been asked: Why did she not mail this letter which contained this purported will? Need we speculate? She readily could change her mind about seeking further advice.

As it happened, her son and intended sole beneficiary died on the following 14th of June. She died two days later. Her grandson Robert, with whom she was on friendly terms, testified that following his father's death his grandmother told him, as he sat there at her bedside, she was going to make a new will and leave everything to him, save for bequests to his older brother Ralph, who was absent in Korea. That statement was quite consistent with her having made a will since March 11th, a will which left everything to her son, now deceased.

The evidence which conflicts with this evidence and these inferences was either rejected or given little weight by the trial judge, who saw and heard the witnesses. Decedent's expressed reluctance to make a will without an attorney's advice is of no significance if Mr. Falconer phoned and ad-

1. The date which a testator writes into an olographic will need not be the very day upon which he penned the will. That question becomes significant, however, when other circumstances make it important to ascertain when, or about when, he did put pen to paper.

vised her. The trial judge had good ground for concluding that he did. The habit of writing a first draft of a letter, then revising it and mailing the revision, keeping the first draft as a copy, need not prevail over significant evidence of what the deceased probably did upon this particular occasion. We are not always and upon all occasions mere creatures of habit, even at eighty-nine.

Finally, my examination of the record convinces me that the trial judge decided all the issues presented to him in this proceeding.

I would affirm the order.

Rehearing denied; FRED B. WOOD, J., dissenting.

Hearing denied; CARTER, J., dissenting.



119 Cal.App.2d 51

GURST et ux. v. SAN DIEGO TRANSIT SYSTEM et al.

Civ. 4513.

District Court of Appeal, Fourth District, California.

July 6, 1953.

Personal injury action. The Superior Court, San Diego County, Dean Sherry, J., rendered judgment of dismissal for want of prosecution and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that dismissal was not abuse of discretion in view of plaintiffs' long absence from California during which time they made no effort to keep in touch with or contact their attorney and made no inquiry concerning status of case.

Affirmed.

1. Dismissal and Nonsuit ⇐60(1)

Trial court's power to dismiss action for failure of plaintiff to prosecute with diligence is inherent power which exists independent of statutory provisions, and section of Code of Civil Procedure providing that court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial and other related sections must be read in light of existence of such inherent power. Code Civ.Proc. § 583.

2. Appeal and Error ⇐948, 962

Trial court's dismissal of action for failure to prosecute diligently should not be disturbed except upon a showing of clear abuse of discretion, and it is incumbent upon appellant to show that there has been such an abuse. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇐60(2)

The duty rests upon plaintiff at every stage of proceeding to use due diligence to expedite case to final determination, as respects dismissal for want of prosecution. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(2)

Where plaintiffs during absence of about one year and ten months from California made no effort to keep in touch with or contact their attorney and made no inquiry concerning status of case, dismissal of case for want of prosecution more than two and one-half years after commencement of action was not abuse of discretion. Code Civ.Proc. §§ 583, 1190.

Vernon F. Bennett, San Diego, for appellants.

Lindley, Lazar & Scales and John H. Barrett, San Diego, for respondent.

MUSSELL, Justice.

This appeal involves the propriety of the trial court's dismissal of a personal injury action pursuant to a motion made by the San Diego Transit System on the ground that plaintiffs had failed for more than two years since the action was filed to bring it to trial. The complaint was filed on June 7, 1949, and the judgment of dismissal for want of prosecution was rendered by the trial court on January 21, 1952. Plaintiffs appeal from the judgment of dismissal on the ground that the trial court abused its discretion in dismissing the action.

It is alleged in the complaint that plaintiff Doretha K. Gurst, while riding as a passenger on a bus operated by defendant San Diego Transit System, on January 29, 1949,

sustained injuries by reason of the negligence of the defendants. The answer contains a general denial, allegations of contributory negligence and a further defense that the accident referred to in plaintiffs' complaint was solely and proximately caused by the negligence, carelessness and violation of law of the driver of another vehicle upon the public highway at said time and place.

The record shows the following proceedings: The complaint was filed on June 7, 1949, and the answer on June 23, 1949. On that day, with leave of court, defendant transit company filed a cross-complaint against Claude L. Holton, the owner of the automobile involved in the collision. On June 30, 1949, plaintiffs filed a demurrer to the answer of defendant transit system. This demurrer was overruled and on August 10, 1949, cross-defendant Holton filed a cross-complaint for damages against defendant transit system and also an answer to the company's cross-complaint. On August 15, 1949, defendant transit system filed its answer to the Holton cross-complaint and the case was at issue on this date. On March 9, 1950, pursuant to Section 1030 of the Code of Civil Procedure and upon the ground that plaintiffs resided outside of the State of California, defendant transit system filed a notice requiring security for costs. Apparently, on December 10, 1951, plaintiffs deposited the sum of $300.00 cash as security for costs and a motion of defendant transit system to dismiss the action for failure on the part of plaintiffs to file a cost bond was denied by the trial court. The case was then set for trial on January 21, 1952. On January 3, 1952, defendant transit system filed a motion to dismiss the action on the grounds that plaintiffs had failed for more than two years since the action was filed to bring it to trial and that the said delay in bringing the matter to trial had resulted in prejudice to the rights and interests of the defendant.

This motion was supported by the affidavit of counsel for defendant from which it appears that the case was at issue on August 15, 1949; that no memorandum of setting was filed thereafter by plaintiffs; that the deposition of plaintiff Doretha Gurst was taken on December 5, 1949; that in February, 1950, information was received by defendant that plaintiffs had departed from California and were residing in Arkansas; that on March 9, 1950, a notice requiring security for costs was filed by defendant on the ground that plaintiffs were nonresidents; that no further action was taken in the case until March 13, 1951, when a memorandum of setting was filed by cross-defendants (Holtons); that defendant's motion to dismiss the action for failure to give security for costs was denied without prejudice to the defendant's right to file a motion to dismiss the action for want of prosecution upon a showing by the defendant of prejudice resulting from the delay in bringing the action to trial; that several of the witnesses to the accident whose testimony was important were then absent from the jurisdiction; that such absence and the expense necessarily involved to defendant in presenting and preparing the case constituted prejudice to the rights and interests of defendant resulting from plaintiffs' delay in bringing the action to trial.

In opposition to the motion, plaintiff Doretha Gurst filed an affidavit stating that shortly before February, 1950, it became necessary for her, because of lack of funds, to leave San Diego and go to Arkansas to reside temporarily with her husband; that she knew that her case had been placed on the civil active trial list and expected that she would receive word from her attorney with reference to the trial date; that notwithstanding the fact that her attorney wrote her repeatedly with reference to said case in care of another person, she never received said letters and knew nothing about the progress of said case until November 17, 1951, when she finally received a letter from her attorney.

Counsel for plaintiffs also filed an affidavit in which he stated, among other matters, that he wrote letters to plaintiff Doretha Gurst, at the only address which he had, to advise her of the status of the action but that he received no reply to such letters; that he also wrote letters to various other persons in an attempt to get in touch with plaintiffs; that finally, on November 5, 1951, he wrote a letter to the father-in-law

of plaintiff Doretha Gurst and on November 15, 1951, received a telegram from plaintiffs that they would be in San Diego on December 5th; that under the provisions of Section 1030 of the Code of Civil Procedure plaintiffs were prevented from proceeding with the trial of said action from March 7, 1950, to December 10, 1951.

It also appears from a supplemental affidavit of counsel for defendant that the trial court, on January 7, 1952, at the hearing on the motion to dismiss, requested counsel to ascertain if there were available in San Diego witnesses to the accident who could testify to substantially the same facts as it was expected the absent witnesses would have related; that affiant conducted an investigation, revealing that seven witnesses were absent; that these vital witnesses were no longer available within the jurisdiction and their absence constituted severe prejudice to the rights of the defendant San Diego Transit System.

The motion to dismiss for want of prosecution was based on the records and files in said action and on said affidavits. The sole question involved on this appeal is whether the trial court abused its discretion in dismissing the action under the facts shown. We conclude that this question must be answered in the negative.

[1] The rule is well settled that the power of a trial court to dismiss an action for failure on the part of the plaintiff to prosecute it with diligence is an inherent power which exists independent of statutory provisions and that the provisions of Section 583 of the Code of Civil Procedure and of other related sections must be read in the light of the existence of such inherent power. Simonini v. Jay Dee Leather Products Co., 85 Cal.App.2d 265, 268, 193 P.2d 53; Steen v. City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937.

[2] Section 583 of the Code of Civil Procedure provides that the court may in its discretion dismiss any action for want of prosecution * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial. It is also the rule that the action of the trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of a clear abuse of discretion and it is incumbent upon the appellant to show that there has been such an abuse. Simonini v. Jay Dee Leather Co., supra, 85 Cal.App.2d at page 268, 193 P.2d 53.

In Jepsen v. Sherry, 99 Cal.App.2d 119, 220 P.2d 819, 820, this court held that the two years mentioned in the statute (Secs. 583 and 1190 of the Code of Civil Procedure) is not an arbitrary limit followed in all cases, but was intended as a general guide in determining whether or not a " 'want of prosecution' " appears and, if so, whether the power should be used in view of the entire situation; that this discretion is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving rather than defeating the ends of substantial justice; and that each case must be decided upon its own peculiar features and facts.

In Hillsdale Builders Supply Co. v. Eichler, 109 Cal.App.2d 117, 118, 240 P.2d 343, 344, it was held that "The cases are uniform in holding that when the trial court dismisses an action under this section [C.C.P. 583] the 'discretion' mentioned therein is the discretion of that court, and not of a reviewing court. It is equally true that the action of the trial court will not be disturbed except on a showing of a manifest abuse of such discretion." (Citing cases.)

[3, 4] In the instant case the motion to dismiss for want of prosecution was filed more than two years and six months after the action was commenced and it is apparent that the principal excuse set forth for the delay in bringing the matter to trial was that the plaintiffs left California in February, 1950, and did not return until December 10, 1951. During their absence from California plaintiffs made no effort to keep in touch with or contact their attorney and made no inquiry concerning the status of the case. There is substantial evidence to support the trial court's statement in the memorandum decision that the affidavits filed on behalf of the defendant show without contradiction that said material witnesses for the defendant were available and could have been produced had the case been

reasonably set for trial, but that such witnesses have disappeared and defendant cannot locate them. The duty rested upon the plaintiffs at every stage of the proceedings to use due diligence to expedite the case to a final determination. Raggio v. Southern Pacific Co., 181 Cal. 472, 475, 185 P. 171. The record shows that plaintiffs did not attempt to bring the case to trial after it was at issue on August 15, 1949. They have failed to show a clear abuse of discretion on the part of the trial court and under the rules stated herein, its action in dismissing the case cannot be here disturbed.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



118 Cal.App.2d 808

BARNES v. DOBBINS.

Civ. 19507.

District Court of Appeal, Second District, Division 3, California.

June 30, 1953.

Rehearing Denied July 15, 1953.

Hearing Denied Aug. 27, 1953.

Action was brought attacking validity of agreement which plaintiff entered into with defendant, on ground that she was induced to enter into it by alleged fraudulent representations of defendant. The Superior Court of Los Angeles County entered judgment adverse to plaintiff and entered an order denying motion for a new trial, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that judgment in prior action in federal District Court was not res judicata.

Judgment reversed, and attempted appeal from order denying motion for new trial dismissed.

1. Judgment ⇐829(3)

Where there were numerous rulings of federal District Court in prior action that plaintiff had not pleaded fraud in the procuring by defendant of agreement from plaintiff, and those rulings were acquiesced in by plaintiff, judgment was not res judicata in subsequent action by plaintiff against same defendant in state court attacking validity of same agreement, and on ground that it was procured by alleged fraud of defendant.

2. Judgment ⇐729

A judgment is not conclusive with respect to matters which court rendering judgment expressly or impliedly excludes from its determination or consideration, as in case of issues, adjudication of which it holds to be unnecessary, or which it holds to be not involved in the case.

Florence Lowe Barnes, in propria persona.

Ekdale, Shallenberger & Toner, Arch E. Ekdale, Gordon P. Shallenberger, George E. Toner, San Pedro, for respondent.

SHINN, Presiding Justice.

In this action plaintiff attacked the validity of an agreement which she entered into with defendant Dobbins January 3, 1945, claiming she was induced to enter into it by fraudulent representations of the defendant, and she sought damages in a large amount. By answer defendant alleged that the validity of the agreement had been established by judgment of the District Court of the United States, Southern District of California, Northern Division, rendered July 30, 1951, in an action brought against him by the present plaintiff. Although this judgment was not final at the time of the filing of the answer, it was urged as a ground for abatement of the present action. By supplemental answer it was alleged that the judgment had become final and it was pleaded in bar, and the answer also pleaded other defenses. We shall presently see that the judgment was reversed on appeal to the Circuit Court of Appeal, taken by Dobbins, 204 F.2d 546, but this reversal does not affect the conclusions we have reached.

The defense of former adjudication was tried under the provisions of § 579, Code of Civil Procedure, and was sustained. Plaintiff's motion for new trial was denied and she appeals. In both actions plaintiff appeared in propria persona and she has no counsel on the appeal. At the trial there was placed in evidence the transcript of the record on the appeal to the Circuit Court of Appeals. It contains all the proceedings, including the evidence, in the former trial, and all matters for consideration in a disposition of the present appeal. It also shows that there was in evidence an agreement between plaintiff and defendant of January 3, 1945, which plaintiff pleads in her present complaint.

In the first cause of action of the present complaint it was alleged that defendant Dobbins represented to plaintiff that certain real property situated in California had a market value of $105,600, and that purchasers were readily available at that price; that the property in reality was worth only $10,000; plaintiff had been damaged in the sum of $95,600; continuously since the agreement (attached as an exhibit) was made, defendant had been absent from the state. In the second cause of action it was alleged that plaintiff owned 2½ shares of Landbar Hotel Company which was operated by defendant; defendant falsely and fraudulently represented to plaintiff that said stock had no value; the stock had an actual value of $30,000, and said corporation had in cash and in bank at said time the sum of $120,000; by reason of the false and fraudulent representations plaintiff had been damaged in the sum of $30,000. Damages were sought in the sum of $125,000. A copy of the agreement dated January 3, 1945, was attached to the complaint as an exhibit; it provided that Dobbins would convey to plaintiff Casa la Roca (a portion of a lot in the county of Los Angeles); Rodela del Sol (the property described in the complaint as having been represented to be of the value of $105,600); Kelley note of $6,000, secured by a deed of trust, with an unpaid balance of $3,936,07; lots 26 and 27 Addition No. 4, Oneonta Park, Los Angeles County; $22,500 par value United States bonds; 150 shares North Penn R. R. Stock; 240 shares Title Insurance & Trust Company, Los Angeles, stock; 32 shares Union National Bank of Pasadena, warranted by Dobbins to be worth $1,600; three-year note of Horace M. Dobbins in the amount of $17,779.93; cash in the amount of $35,000; 60-day note of Horace M. Dobbins in the amount of $5,000. Florence Lowe Barnes agreed to transfer to Dobbins 2½ shares of stock of Landbar Hotel Company, Inc., an undivided one-fourth interest in and to certain real property and improvements situated in Philadelphia, being her interest in the property upon which the Broadwood Hotel building was located. Apparently there was an indebtedness of $14,000 against the property Mrs. Barnes was to convey, and it was provided that if she did not pay that indebtedness it would be deducted from the $35,000 Dobbins was to pay in cash. This agreement was performed by the parties.

The action which was decided in the United States District Court had been initiated in Kern County and had been removed to the Federal court upon the motion of Dobbins. The complaint in that action alleged that Mrs. Barnes was beneficiary of a 25 per cent interest in a trust created by her grandfather, Richard J. Dobbins, the value of which trust was $500,000; plaintiff had recently discovered that her share of income from the trust in 1940 was $18,750; defendant made a return as a fiduciary for income tax purposes showing plaintiff's share of income to be $18,750; defendant had paid to her as 1940 income only $3,600, for which plaintiff filed a return with the Collector of Internal Revenue; the government assessed additional taxes against her of $2,124 and penalties of $2,000; defendant has been harassed thereby, to her damage in the sum of $5,000. It was then alleged that defendant had failed to make an accounting of the trust, and upon information and belief that he had wrongfully paid himself excessive amounts for managing the trust.

The complaint in the former action also contained the following allegations: "VIII. That the Broadwood Hotel in Philadelphia,

Pennsylvania, is part of the corpus of said Trust. That in or about January, 1945, plaintiff sold to defendant, her interest in the real property consisting of the said hotel and the land on which it was located. That at the time of said sale, defendant fraudulently concealed from plaintiff that there was the approximate sum of $120,000.00 in cash in the hotel, of which one-fourth belonged to plaintiff. That plaintiff has therefore been further damaged in the sum of $30,000.00." The prayer was for an accounting and that plaintiff have judgment against defendant for the following sums: $2,000, representing penalties imposed by the Federal government; $30,000, representing plaintiff's interest in said hotel; $5,000 general damages for mental anguish and suffering sustained by plaintiff; for costs of suit and general relief.

The three claims asserted by plaintiff in her complaint in the former action were disposed of as follows. As to the demand for an accounting it was determined that the accounts of Dobbins as trustee had been finally settled by order of the Orphans' Court of Montgomery County, Pennsylvania; as to the claim for an unpaid balance as 1940 income it was determined that there was due Barnes from Dobbins $15,152.15, for which she was given judgment; as to the claim that plaintiff was the owner of one-fourth of $120,000 in the hands of the Landbar Hotel corporation, it was determined that she had sold to Dobbins her hotel stock, which carried with it all her interest in the company assets.

The crucial question, and the only one here is whether in the former action plaintiff pleaded and the court determined any question as to the validity of the agreement of January, 1945. The trial court in the present action held that by paragraph VIII of her complaint, quoted above, plaintiff placed in issue the validity of that agreement, claiming that it had been procured from her by fraud, and in sustaining the plea of res judicata the court determined that the validity of the agreement had been established by the former judgment. These conclusions, as we shall see, were in error.

Paragraph VIII of the former complaint, quoted above, is ambiguous. Defendant contends that it was an attack upon the validity of the agreement upon the ground of fraud. The transcript of the record on appeal in the former action shows conclusively that it was not so construed by the parties or by the court during the trial. It was developed in the evidence that plaintiff, pursuant to her agreement, had transferred to defendant 2½ shares of stock in the hotel corporation, and a one-fourth interest in the real property upon which the hotel was located. Whenever this phase of the case was mentioned plaintiff insisted that the corporation had cash on hand at the time she sold her stock, that one-fourth of it belonged to her, and that the transfer of the stock did not convey her one-fourth interest in this money. Throughout the case she persisted in her theory, as she put it, that if one sells a business it does not carry with it "your cash drawer." Patiently and repeatedly the court explained that when she sold her stock it carried with it all interest she had in the corporate assets, saying: "I am going to have to hold when you transferred that stock you transferred all the assets of the corporation—regardless of whether it was money in the bank, good will, pillow cases, stock at the bar, whatever it was, you transferred all your interest in the corporation to the defendant by this transfer. Consequently I am going to have to hold, as far as the $120,000.00 is concerned, that went with the stock," and further, "I don't know what your problem is on the other litigation. The only thing I am trying to determine in this case, and the thing I am limiting you to in this case, is whether or not you are entitled to any return of the income the Internal Revenue Agent says you received in 1940." The court told plaintiff that she had not alleged fraud, and plaintiff expressed no dissent. The court stated as set out below.[1]

1. "One of the things she sets up here is that she was beat out of certain money because of the sale of the hotel property in Pennsylvania. She said there was approximately $120,000.00 cash in the hotel.

"We have before the Court at this time a contract of sale. There is no dispute

As a consequence of these rulings plaintiff offered no evidence as to any sum of money the corporation may have had on hand at the time of the agreement, nor did she offer any evidence of any concealment or deception on the part of Dobbins. Understanding that she had not pleaded fraud in the procurement of the agreement, she did not seek leave to amend her complaint nor abandon her theory that she was seeking only money which she claimed had not passed to defendant in that transaction. Many other statements in the colloquies that took place confirm the understanding prevailing throughout the trial that plaintiff's complaint was not an attack upon the validity of the agreement upon the ground of fraud. The court made findings with relation to the allegations of paragraph VIII of the complaint.[2]

One of the conclusions of law was: "That the contract of January 3, 1945, between the plaintiff and defendant, for the purchase and sale of the Broadwood Hotel and the property located thereon, and the stock of the Landbar Hotel Company is valid, and has been fully executed by all parties." This conclusion was not responsive to the facts found. It was also foreign to the issues as limited by the rulings of the court that the validity of the agreement was not in issue. The judgment did not declare that the agreement was valid.

Plaintiff did not appeal from the former judgment. It was reversed on the appeal of Dobbins upon the ground that he had received no money for plaintiff's account that had not been paid to her, and the additional ground that his accounting as trustee had been finally settled by order of the Pennsyl-

that the contract of sale was entered into between Mrs. Barnes and Mr. Dobbins for the sale of the hotel property. She does not deny that she made the contract. All she says is, 'There was $120,000.00 in the hotel that I didn't know anything about.' She hasn't alleged in any way that the contract was obtained by duress, menace or fraud. She hasn't said the defendant in any way made any fraudulent misrepresentations to her. This issue could easily have been eliminated from this case if Mrs. Barnes had been represented by counsel; but inasmuch as she wasn't, the matter is before the Court.

"I am going to have to hold there is no evidence in this case, no pleadings in this case, to sustain a finding that there has been any misrepresentation, fraud or undue influence relative to Mrs. Barnes' contract, and that she is bound by that contract.

"Consequently, the only issue before the Court, as far as I am concerned, and I think the only issue before the Court as to which any relevant evidence can be introduced, is the issue as to whether or not the defendant paid to Mrs. Barnes the amount of money and the amount of income which the Revenue Agent found she was entitled to, and which was affirmed, evidently, by the Tax Court.
* * *

"You also say in your complaint that at the time the hotel was sold that the hotel had $120,000.00 in cash. Well, as I said before, I don't think that is an issue before this Court. I don't think you even plead it, so it couldn't be an issue before this Court.

"Mrs. Barnes: We never got to it, Judge."

2. "XV. That the allegations of paragraph VIII of the plaintiff's Complaint are all untrue except that on January 3, 1945, plaintiff sold to the defendant her interest in the real property therein described."

"VII. That on January 3, 1945, the plaintiff, Florence Lowe Barnes, entered into an agreement, whereby she agreed to sell to the defendant, all of her stock in the Landbar Hotel Company, a hotel operating company, operating the Broadwood Hotel, Philadelphia, Pennsylvania, and further agreed to sell to the defendant her one-fourth (¼) undivided interest in and to the buildings and the land upon which the Broadwood Hotel stood; that there is no evidence that said agreement was obtained by duress, menace, fraud or misrepresentation; the Court further finds that the terms of said agreement were executed, and that the plaintiff, Florence Lowe Barnes, conveyed to the defendant, Horace Dobbins, all of her right, title and interest in and to the stock of the Landbar Hotel Company, and the land and buildings known as the Broadwood Hotel."

"VIII. That the agreement of January 3, 1945, referred to in Finding VII, and subsequent conveyances, carrying out the terms thereof, conveyed all of the plaintiff's interest in the assets and liabilities of the Landbar Hotel Company, including cash on hand, if any."

vania court. The judgment was reversed with instructions to enter judgment for the defendant. No other matters were considered on the appeal.

[1] We do not find any basis in the record for the determination of the trial court that any of the issues here pleaded were adjudicated in the former action. The numerous rulings of the court that plaintiff had not pleaded fraud in the procuring of the agreement, or otherwise challenged its validity, acquiesced in as they were by plaintiff, must be deemed conclusive as to the scope of the issues in the former action. It was because of such rulings plaintiff did not offer any evidence in support of the allegations of paragraph VIII of her complaint. Although the court found that the allegations of that paragraph were untrue, except for the allegation that the agreement had been entered into, this finding was to be read with the further finding that plaintiff had sold her stock in the hotel corporation and that this effected a conveyance of all her interest in the corporation assets. Thus it was merely found that plaintiff retained no interest in any cash that the corporation may have had on hand at the time of the agreement. There was no finding that the corporation had or had not cash on hand. None of the charges of fraud pleaded in the complaint in the present action was pleaded, tried or determined in the former action.

[2] If authority for our conclusions be of interest, it will be found in Freeman on Judgments, Fifth Ed., Vol. 2, § 704, p. 1485: "A judgment is not conclusive with respect to matters which the court rendering the judgment expressly or impliedly excludes from its determination or consideration, as in case of issues the adjudication of which it holds to be unnecessary, or which it holds to be not involved in the case."

The judgment is reversed. The attempted appeal from the order denying motion for new trial is dismissed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

119 Cal.App.2d 56

REFINITE SALES CO. v. FRED R. BRIGHT CO. et al.

Civ. 4519.

District Court of Appeal, Fourth District, California.

July 6, 1953.

Action to recover for claimed sale of a water conditioning unit to defendant partnership which individual defendant alleged consisted of individual defendant as limited partner and of such defendant's since deceased son as general partner. The Superior Court of Imperial County rendered a judgment granting a nonsuit and the plaintiff appealed. The District Court of Appeal, Griffin, J., held that whether a general partnership was shown and whether individual defendant was liable as a general partner were questions for jury under evidence.

Judgment reversed.

1. Partnership ⇐375

In action for claimed sale of a water conditioning unit to defendant partnership which individual defendant alleged consisted of individual defendant as limited partner and of such defendant's since deceased son as general partner, wherein it was alleged that secretary of partnership who signed agreement of purchase was not authorized to bind partnership, evidence was sufficient for submission to jury of question of ratification of signature of secretary and contract from its inception.

2. Partnership ⇐217(1)

Prima facie a contract when signed by an individual is presumed to be paper of individual partner whose name is signed to it, and burden of proof is upon holder to show affirmatively that signature was intended for signature of partnership.

3. Partnership ⇐125

Under statute, every partner is agent of partnership for purpose of its business, but an act of a partner which is not apparently for carrying on of business of partnership in usual way does not bind partnership unless authorized by other partners. Corporations Code, § 15009.

4. Appeal and Error ⇐927(3), 989

Where defendant was granted a nonsuit and jury was discharged, District Court of Appeal on appeal was required to consider only evidence most favorable to plaintiff's cause of action and to indulge in every favorable inference fairly deducible and every favorable presumption fairly arising therefrom, and to give to plaintiff benefit of every piece of evidence which tended to sustain averment of complaint.

5. Trial ⇐139(1)

To justify submission of question of fact to jury there must be proof of substantial character that fact is as alleged.

6. Partnership ⇐20

Law will not countenance contrivance for giving parties whole advantage of a partnership without subjecting them to its liabilities, and form of agreement between partners is immaterial if transaction is in fact a joint adventure for mutual profit.

7. Partnership ⇐375

In action to recover for claimed sale of a water conditioning unit to defendant partnership which individual defendant alleged consisted of individual defendant as limited partner and of such defendant's since deceased son as general partner, whether a general partnership was shown and whether individual defendant was liable as a general partner were questions for jury under evidence.

8. Partnership ⇐375

In action to recover for claimed sale of a water conditioning unit to defendant partnership which individual defendant alleged consisted of individual defendant as limited partner and of such defendant's since deceased son as general partner, evidence did not establish that individual defendant was limited partner and had complied with statutory requirements in respect to limited partnership. Corporations Code, §§ 15501 et seq.

9. Evidence ⇐591

Where an individual defendant was called as witness for plaintiff under statute authorizing party to examine adverse party, plaintiff was not bound by such defendant's testimony that such defendant was a limited partner in partnership rather than a general partner as asserted by plaintiff. Code Civ.Proc. § 2055.

Joseph A. Kean, Los Angeles, for appellant.

Horton & Knox, El Centro, for respondents.

GRIFFIN, Justice.

Plaintiff brought this action against defendants Fred R. Bright Company, a copartnership, Mrs. Rose L. Bright, a copartner doing business as Fred R. Bright Company, and Mrs. Rose L. Bright, to recover for the claimed sale of a water conditioning unit delivered by plaintiff and installed on a ranch individually owned by Mrs. Bright. The complaint alleges generally in one cause of action that on December 16, 1946, an account was stated in the sum of $10,800, between plaintiff and Fred R. Bright Company, a copartnership. A second cause of action sets up a claim in the same amount based on an open book account for goods, wares and merchandise furnished the copartnership on November 30, 1946. The next count sets up a written conditional sales contract between plaintiff and "Fred R. Bright", dated July 11, 1946, wherein Bright agreed to purchase from plaintiff the described unit for $10,800 installed upon the property of Mrs. Bright. Title to the equipment was reserved in plaintiff until all payments were made. It was signed by plaintiff company and "Fred R. Bright, by Mae Hernandez, Sec." Rose L. Bright's liability is predicated upon the claim that she and Fred R. Bright were, at the time, doing business as Fred R. Bright Company, a copartnership.

It is Mrs. Bright's contention that Fred, her son, now deceased, was a general partner and she was a limited partner, and that the business of the company was to grow, harvest, ship, and sell vegetable products; that the purchase of the unit was not a partnership obligation but an individual obligation of Fred; and that there was no evidence to the contrary justifying a judgment against her. The trial

court agreed with her in this respect, granted a nonsuit, and a jury empaneled to try the cause was discharged.

A recitation of the facts produced by plaintiff is therefore necessary. Mrs. Bright, who resided in Beverly Hills, inherited from her husband ranch acreage near an irrigation ditch close to the town of El Centro. Her son Fred, over his mother's apparent objections, decided to build an eight-room home, swimming pool, etc., on the property. He built such a home with an additional room for his mother, but she refused to reside on the property. On August 1, 1945, Fred and his mother entered into a partnership agreement for the purpose of carrying on a general produce business of growing, shipping, and selling canteloupes, lettuce and carrots. She testified under section 2055 of the Code of Civil Procedure, that she was a "limited" partner and her son was a general partner; that they had "such a limited partnership agreement"; that he was authorized to sign contracts for the partnership in conducting the business only; that she had very little to say about the business but she told him to be very careful and not spend business money for personal things; that she was not interested in building the house on her property; that she asked her son why he did not build on one of his own farms and he said: "Well, this one will be mine some day, anyway", and he preferred to build on it; that her land was being farmed by the partnership and made her living, and that she wanted it to remain a farm; that she never had anything to do with plaintiff corporation; that she objected, constantly, to her son building on her property; that they first maintained a bank account and both she and Fred were authorized to draw upon it for their business as well as personal expenditures, and that their personal expenditures would thereafter be charged off against them through a drawing account allotted to each partner; that she subsequently learned that checks were being drawn by Fred on the company's account in payment of construction work on the house, but she supposed they were being charged to his personal account on the books of the company; that she later found out that the business was suffering financially and she was advised to require that two signatures be necessary before checks could be drawn on the account; that this was done about October, 1946, about the time the house contract was completed; that she took no part in the partnership until December 26, 1946, when Fred was killed; that there was a shed construction account set up on the company ledger and charged to her personally although the shed was used by the partnership; that a similar account was set up for the house construction and charged to Fred R. Bright personally; and that an account was set up on the books for "entertainment of buyers from New York" and Fred drew on it for that purpose.

The auditor for the company testified that the "Ranch House Construction" account showed entries beginning January 31, 1946, and ending June 30, 1946, and these items were paid by checks drawn on the company; that under Fred R. Bright's drawing account there is nothing indicated in reference to house construction; that such expenditures made prior to December 26, 1946, were, after his death, thrown into a capital account; and that the shed construction was not charged to the partnership.

An agent for plaintiff, who sold the equipment, testified that in May, 1946, in the office of the defendant company, Bright said he required equipment for such a project because of his requirement to entertain buyers from out of town, and that he could write the expense of installation of this equipment off on his income tax, through the company; that Fred R. Bright desired bids on such a project; that he furnished an estimate; that defendant Mrs. Bright was present on one occasion when she made reference to the fact that she did not think she could drink the water which came out of the irrigation ditch, and he told her it would be equal in purity to the water she was drinking in Beverly Hills; that thereafter the equipment was installed and monthly statements for the amount of the contract price were sent to Fred R. Bright, beginning August 29, 1946, and ending at the time of his death, and that no objections were ever made in reference thereto. The

trial court sustained an objection to the offer into evidence of the agreement of purchase between plaintiff and Fred R. Bright, on the theory that no sufficient evidence was shown that it was an obligation of the partnership for which Mrs. Bright was liable, and that no showing was made that Mae Hernandez, who signed it as secretary, was authorized to bind the partnership.

In addition, plaintiff offered and the court received in evidence two letters dated June 4, 1946, and another dated December 16, 1946, written by Mr. Bright on the letterhead of the partnership company, signed personally by him and directed to plaintiff, wherein it is stated in the first one: "Please enter order for material enumerated below". Then follows a description of the materials included in the water conditioning system. It was signed: "Approved: By Fred R. Bright, Purchaser". The second reads: "In regards, of your statement of November 30,. Although *we* know this order August 28, *we* did promise to pay, when equipment is installed and in running condition. If you will check with your man * * * he will tell you the machinery is not in perfect running order, * * *" (Signed) "Fred R. Bright" (Italics ours).

Appellant now argues that the judgment of nonsuit must be reversed first, because the court erroneously refused to allow the purchase agreement in evidence. The objection to its admission was sustained primarily upon the claim that it was necessary for the agent to have authority in writing to execute a contract which itself has to be in writing, citing Sections 2309 and 1624a Civil Code. There are certain recognized exceptions to this equal dignity of agent rule. In Knaugh v. Baender, 84 Cal.App. 142, 148, 257 P. 606, it was held that a deed not signed by the grantor himself is sufficiently executed where it is signed by a person in the grantor's presence, at his request, and with his authorization. See, also, Kadota Fig Ass'n v. Case-Swayne Company, 73 Cal.App.2d 815, 819–821, 167 P.2d 523, and 17 C.J.S., Contracts, § 62–c, page 413, where it is said that a party may be bound by an agreement where his signature has been affixed pursuant to due and prior authorization or has been adopted or ratified, or where he is estopped to deny a signature. To the same effect is Moore v. Hoar, 27 Cal.App.2d 269, 279, 81 P.2d 226.

[1] If there was any question as to the authority of the secretary to sign Fred R. Bright's name to the contract, the letter of December 16, 1946, and the delivery and installation of the equipment thereon might well be deemed sufficient evidence of ratification of the signature and the contract from the date of its inception. At least it was sufficient evidence to present the question to the jury.

[2] It is next argued that there was sufficient evidence that the contract was executed in behalf of the partnership; that the equipment was furnished and used in connection with the business of said partnership; and that it was intended to be a partnership transaction and not a personal transaction of Fred R. Bright. It is the rule that "prima facie" a contract, when signed by an individual, is presumed to be the paper of the individual partner whose name is signed to it, and the burden of proof is upon the holder to show affirmatively that the signature was intended for the signature of the firm. Bank of America Nat. Trust & Savings Ass'n v. Kumle, 70 Cal. App.2d 362, 160 P.2d 875.

[3] Under section 15009 of the Corporations Code every partner is an agent of the partnership for the purpose of its business, but an act of a partner which is not apparently for carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners. In this connection it is contended that there is no evidence that the furnishing of the water softening system to the home or swimming pool was any part of the partnership business or that Mrs. Bright had any knowledge that it was intended to be such.

[4, 5] In determining the issue presented we are bound by the time-honored rule that we must consider only the evidence most favorable to plaintiff's cause of action and indulge in every favorable inference fairly deducible, and every favorable presumption fairly arising therefrom, and give to plaintiff the benefit of every piece of

evidence which tends to sustain the averments of his complaint. To justify the submission of any question of fact to the jury there must, of course, be proof of a substantial character that the fact is as alleged. In re Estate of Luckenbach, 205 Cal. 292, 270 P. 961; Thomas v. Seaside Memorial Hospital of Long Beach, 80 Cal. App.2d 841, 183 P.2d 288.

[6] Considering a general partnership, it has been held that the mere form of the agreement between the partners is immaterial if the transaction be in fact a joint adventure for mutual profit; that the law will not countenance contrivances for giving parties the whole advantage of a partnership without subjecting them to its liabilities. Oscar Krenz Copper & Brass Works, Inc., v. England, 109 Cal.App. 747, 751, 293 P. 689; San Joaquin Light & Power Corp. v. Costaloupes, 96 Cal.App. 322, 274 P. 84.

In Furlow Pressed Brick Co. v. Balboa Land & Water Co., 186 Cal. 754, 765, 200 P. 625, 630, plaintiff sought to recover against the partnership where an open account was maintained only against one of the individuals. There was no question there raised as to the authority of the one partner to bind the partnership. It was said there that it was clearly proper to show that the indebtedness was a partnership one, and the fact that it was charged on the plaintiff's books to one of the partners was sufficient to constitute a book account within the meaning of the code. It then said:

> "It appears from the correspondence between the parties that all the negotiations with reference to the account were carried on by E. J. Louis in his own name and that in all this correspondence he purported to be representing his associates. We thus have a case where one member of a partnership carries on the business in his own name with the consent of his associates and contracts a partnership indebtedness in his own name. It is true that the partners are in a sense agents for one another, but they also have power to act for and on behalf of the partnership, and when they act in partnership business the partnership acts. The partnership is regarded for some purposes as an entity." (Citing authority.)

To the same effect is California Canneries Co. v. Scatena, 117 Cal. 447, 449, 49 P. 462. Here, the books of the partnership show that the construction of the house and installation of the other equipment was paid for by company checks and charged on the books of the company to "House Construction" account.

In Rishwain v. Smith, 77 Cal.App.2d 524, 534, 175 P.2d 555, 561, it is said that "Property acquired with partnership funds is partnership property, in spite of the fact that it may be bought in the individual names of the partners." See, also, Section 15008, subdivision 2 of the Corporations Code.

In Westcott v. Gilman, 170 Cal. 562, 568, 150 P. 777, it was held that a partnership, where the rights of third parties are involved, is to be determined by the contract, taken with the conduct and the dealings with the world of those who are parties to it. If that contract, and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint liabilities and responsibilities attached thereto, then, so far as third persons are concerned who have had dealings with them, the defendants are partners. In view of the evidence produced on this subject, the written agreement should have been received in evidence for the consideration of the jury.

[7] The question whether a general partnership was shown or whether respondent was liable as such a partner should have been submitted to the jury under proper instructions.

Besides the testimony of respondent, taken under section 2055 of the Code of Civil Procedure, there was no evidence showing that she was a *limited* partner and by virtue thereof was relieved of personal liability.

[8, 9] Section 15501 et seq. Corporations Code, known as the "Uniform Limited Partnership Act" provides generally that

the limited partners, as such, shall not be bound by the obligations of the partnership and are not liable to creditors such as is a general partner, unless, in addition to the exercise of the rights and powers as a limited partner, he takes part in the control of the business. It then provides for the filing and recording of the certificate setting forth certain prescribed facts. Sec. 15502 Corporations Code. Such a limited partnership is not formed until there has been a substantial compliance with these provisions. It is apparent then that if such special partnerships are not formed in substantial compliance with the provisions of the law in respect thereto or such special partner takes part in the control of the business, he may become liable as a general partner. Siebold v. Berdine, 61 Cal. App. 158, 214 P. 655; Holzman v. de Escamilla, 86 Cal.App.2d 858, 195 P.2d 833; Stowe v. Merrilees, 6 Cal.App.2d 217, 44 P.2d 368. There is no sufficient showing here that Mrs. Bright was, in fact or in law, a *limited* partner and that she had complied with the statutory requirements in respect thereto so as to prevent a creditor of the partnership seeking judgment against her for the debts of the partnership. She having been called as a witness for plaintiff under section 2055 of the Code of Civil Procedure, plaintiff was not bound by her testimony that she was a limited partner. The purpose of calling this witness was to illustrate such facts as the witness might testify to which were favorable to the party calling her, without being bound by any adverse testimony which the witness might give. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. The testimony of a witness called under that section is therefore not conclusive in this respect. Whether she can establish that fact as a matter of defense is not before us. The trial court therefore was not authorized to grant a nonsuit based on her testimony in respect to the claimed limited partnership. Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825.

Whether Mrs. Bright may or may not become liable under the other two causes of action pleaded depends largely on the facts finally established in reference to the third cause of action.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.



119 Cal.App.2d 14

PEOPLE v. CARNAVACCI.

Cr. 4970.

District Court of Appeal, Second District, Division 2, California.

July 3, 1953.

Defendant was convicted for assault by means of force likely to produce great bodily injury. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Assault and Battery ⇐92

Evidence was sufficient to sustain the conviction for assault by means of force likely to produce great bodily injury. Pen. Code, § 245.

2. Criminal Law ⇐260(11)

Upon appeal from conviction for assault by means of force likely to produce great bodily injury, the District Court of Appeal could not reweigh evidence and draw inferences contrary to those drawn by the trial court. Pen.Code, § 245.

3. Criminal Law ⇐260(11)

In prosecution for assault by means of force likely to produce great bodily injury, question as to what force is likely to produce great bodily injury is basically one of fact for trial court. Pen.Code, § 245.

4. Criminal Law ⇐1144(13)

Upon appeal from conviction, the District Court of Appeal must view evidence most favorably to successful party below.

5. Witnesses ⇐372(2)

In prosecution for assault by means of force likely to produce great bodily injury, record pertaining to cross-examination of victim was sufficient to establish that defendant had ample opportunity to go into question of victim's attitude toward defendant as result of defendant's testimony in divorce case involving victim. Pen.Code, § 245.

6. Criminal Law ⇐379

To be admissible, evidence concerning bad reputation for peace and quiet in community must be directed to general reputation in community in which party lives or is generally known, and such evidence is properly excluded where reputation is confined to the vicinity of such person's place of business or to members of a restricted group of persons.

7. Criminal Law ⇐696(3)

In prosecution for assault by means of force likely to produce great bodily injury, where one witness admitted that his testimony that victim's reputation for peace and quiet was not good was based upon way victim acted in witness' presence and other witnesses' testimony concerning such reputation was limited to three or four persons who came into victim's garage, sufficient foundation was not laid for such testimony and, therefore, striking of such testimony did not constitute an abuse of trial court's discretion. Pen.Code, § 245.

8. Criminal Law ⇐379, 1153(6)

Question whether sufficient foundation has been laid to warrant admission of testimony concerning reputation for peace and quiet is matter committed to sound judgment of trial court, and trial court's ruling will not be disturbed upon appeal in absence of showing of abuse of discretion.

Saul J. Bernard and Levy, Bernard & Jaffe, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Ellis Peter Miller, Dep. Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of assault by means of force likely to produce great bodily injury. Pen.Code, sec. 245. He appeals from the ensuing judgment.

Defendant and the victim, William R. Kallian, were partners in the auto parking business in Los Angeles. This offense occurred at about 8:00 p. m. on August 6, 1952, in a parking lot near Mr. Kallian's residence. He had just parked his car and was about two or three car lengths away when he first saw the defendant secreted between two automobiles in a crouching position. The defendant stated, "I've got you now, and I'm going to kill you." Whereupon the victim started to walk rapidly away. Defendant, however, "jumped" him from behind, struck him on the back of the head; jerked him around, pummeled him with a series of blows to the face and head, causing him to fall backward against a light pole and to the pavement. He rolled partially under an automobile during which time defendant kicked him "several times" in the back and in the stomach. Kallian crawled further under the car in an attempt to escape the defendant's kicking. His legs, however, protruding, defendant "jumped on them with his feet" and "forced them up against the bumper of the automobile." Defendant tore off some of the victim's clothes in an unsuccessful effort to pull him out from under the car. Because of the inaccessibility of his victim, defendant released the brake on the automobile and let it roll so that Mr. Kallian was again exposed. He attempted to escape but only went 20 to 30 feet, when defendant hit him "up against a building." When defendant pursued the attack, the victim lost his balance and fell. He "was half draped over an iron railing" when defendant kicked him in the face. Mr. Kallian finally locked his arms around defendant, and in their struggle they fell to the blacktop. Having lost his hold on defendant the victim tried to escape. Defendant, however, grabbed him, struck several blows to the stomach and then knocked him out by a "very hard" blow to the temple.

The victim was taken to the Receiving Hospital where two double stitches were taken on a cut about his right eye. He also received contusions above his left eye and on his forehead. His hands were bruised and his knees and ankle were swollen. He had bumps on the back of his head, and black and blue marks on both his chest and back. His skin was broken in 39 different places. A hernia condition was greatly aggravated, and he had difficulty in urinating for 36 hours. He was hospitalized for nine days.

[1–3] Defendant's first contention is that the evidence does not support a conviction of assault by means likely to produce great bodily injury; that at most this was nothing more than a simple assault. The foregoing résumé of the evidence furnishes a complete answer to this argument. Forcing the legs of a victim who is on the ground under an automobile up against the bumper in an obvious attempt either to break or seriously injure them; kicking him in the face; and giving him such a severe beating that he required emergency treatment and nine days hospitalization certainly is ample to justify a conviction of an assault by means of force likely to produce great bodily injury. Defendant, however, points to his own testimony as truly reflecting what took place between him and Mr. Kallian. He would have this court reweigh the evidence, and draw inferences contrary to those drawn by the trial court. Under firmly established principles, we are not at liberty to do this. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Gould, 111 Cal.App.2d 1, 243 P.2d 809. Furthermore, what force is likely to produce great bodily injury is basically a question of fact for the trial court. People v. Nudo, 38 Cal.App.2d 381, 385, 101 P.2d 162.

[4] Defendant relies on People v. Fuentes, 74 Cal.App.2d 737, 169 P.2d 391, in support of his argument that the offense here was only a simple assault. Viewing the evidence, as we must, most favorably to the successful party in the court below, it is clear that the assault in this case was much more severe than was the assault in the Fuentes case.

[5] There is no basis for defendant's argument that he was not given an opportunity to show the victim's ill feeling toward the defendant at the time of this attack because of defendant's adverse testimony in a divorce case between the victim and his wife. The record shows the following cross examination of the victim by counsel for the defendant on this subject matter:

"Q. * * * By reason of giving of his testimony in that matter you became prejudiced against him and disliked him, isn't that true? A. Well, I didn't exactly dislike him, I just stayed away from him, that is all. He testified against me and he wasn't for me.

"Q. Well, would you say that your feeling was as friendly toward him after he testified? A. No, it wasn't.

"Q. * * * Did you tell Mr. Carnavacci in the Park Rite Garage that you intended to get him, did you ever say that to him? A. No, I did not."

It is thus clear that defendant had ample opportunity to go into the question of the victim's attitude toward him as a result of his testimony in the divorce case.

[6–8] Defendant's final contention is that the court erred in striking the testimony of witnesses Moran and Wilson that the victim had a bad reputation for peace and quiet in the community where he resided. This testimony was stricken on the ground that sufficient foundation was not established. To be admissible such evidence must be directed to the general reputation in the community in which the party lives or is generally known. 40 C.J.S., Homicide, § 222, page 1141; People v. Soules, 41 Cal.App.2d 298, 306, 106 P.2d 639; People v. Griner, 124 Cal. 19, 21–22, 56 P. 625. "Such evidence is properly excluded where the reputation is confined to the vicinity of his place of business or among the members of a restricted group of persons." Cosler v. Norwood, 97 Cal. App.2d 665, 667, 218 P.2d 800, 801; People v. Markham, 64 Cal. 157, 163, 30 P. 620. Here witness Moran admitted his testimony that Kallian's reputation for peace and quiet was not good was based upon the way he acted in the witness' presence. Witness

Wilson had been employed in a garage by Kallian; his knowledge of Kallian's reputation for peace and quiet was limited to three or four people who came into the garage. Under these authorities a sufficient foundation was not laid to entitle Moran and Wilson to express an opinion as to Kallian's general reputation for peace and quiet. Furthermore, whether a sufficient foundation had been laid to warrant the admission of such testimony is a matter committed to the sound judgment of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. People v. Love, 29 Cal.App. 521, 525, 157 P. 9; Cosler v. Norwood, supra; People v. Soules, supra, 41 Cal.App. 2d at page 307, 106 P.2d at page 643. There is no showing here of any abuse of discretion.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



119 Cal.App.2d Supp. 892

PEOPLE v. FINCH.

Cr. A. 3008.

Appellate Department, Superior Court, Los Angeles County, California.

June 23, 1953.

Prosecution for violating statute prohibiting the modification of the exhaust system of an automobile in manner that increases noise of motor over that of original muffler. The Municipal Court of the El Monte Judicial District entered an order dismissing the action and the plaintiff appealed. The Superior Court, Bishop, J., held that jeopardy had attached but that defendant's successful motion for dismissal constituted waiver of jeopardy and entitled People under statute to appeal from order granting such motion.

Order reversed and cause remanded.

1. Criminal Law ⇐1024(2)

Where a defendant, charged with having modified exhaust system of automobile in manner that increased noise of motor over that of original muffler in violation of statute, successfully moved for dismissal on ground that statute on which prosecution was based was unconstitutional, jeopardy had attached within constitutional provision against subjecting a person to jeopardy twice for same offense, but defendant's successful motion for dismissal, constituted waiver of jeopardy and entitled people under statute to appeal from order granting such motion. Vehicle Code, § 673; U.S.C. A.Const. Amend. 5.

2. Automobiles ⇐316

Statute prohibiting modification of exhaust system of automobile in manner that increases noise of motor over that of original muffler is not unconstitutional. Vehicle Code, § 673.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for appellant.

George Halverson and Byron Halverson, Los Angeles, for respondent.

BISHOP, Judge.

The People have appealed from an order dismissing this action. The charge made against the defendant was that he had modified the exhaust system of a Mercury coupe in a manner that increased the noise of the motor over that of the original muffler, in violation of section 673, Vehicle Code. After a jury had been selected and one witness was sworn, the defendant moved for a dismissal on the ground that section 673 is unconstitutional. The defendant contends (1) that the People have no right of appeal, because jeopardy had attached, and, inconsistently, (2) that the order of dismissal was correctly made. We agree with neither contention.

The procedural facts that we have related all appear from the record before us, consisting of the complaint, the minutes and the notice of appeal. As the record

fully presents the problem which the People wish to have determined on this appeal, no occasion arose for the preparation of a statement on appeal, which would be required under other circumstances. Rule 4, Rules on Appeal from Municipal Courts and Inferior Courts in Criminal cases, published in 29 Cal.2d 2; 50 West's Calif. Digest 968. True, the clerk's minutes do not state that the jury was sworn, but, as they do not reveal that it was not sworn, we infer that it was, an inference based upon the fact that it is not probable that a witness was sworn when the jury had not been. As the inference is one essential to the premise upon which the defendant's contention is based, he cannot find fault with our action in drawing it, and the People are not hurt by it.

[1] The statute, sec. 1466, Penal Code, now authorizes the People to appeal "(a) From an order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy". We agree with the defendant in his insistence that the defendant had been placed in jeopardy—if the jury had been sworn. See discussions of "jeopardy" in People v. Matiasevich, 1936, 12 Cal.App.2d Supp. 759, 55 P.2d 942, 943, and in Jackson v. Superior Court, 1937, 10 Cal.2d 350, 352, 355–357, 74 P.2d 243, 244, 246–247, 113 A.L.R. 1422. Citing a number of cases in support of their observation that "The substance of this definition has been approved by the courts of California," our Supreme Court, in the Jackson case, 10 Cal.2d 355–356, 74 P.2d 246, quoted this definition of former jeopardy from 8 Ruling Case Law, page 138: "'A person is in legal jeopardy when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is said to be thus charged when it is impaneled and sworn. The opinion prevails to some extent that jeopardy does not attach until a verdict is rendered. This doctrine, however, limits the term jeopardy to mean the same as autrefois acquit or convict. But the word means exposure to danger, and where a person is put on his trial on a charge of a crime before a jury sworn to decide the issue between the state and himself, he is then exposed to danger in that he is in peril of life or liberty. * * *'"

There remains the question. Has the defendant waived jeopardy? It is to be regretted that there has not been a more meticulous use of terms throughout the literature dealing with this matter of jeopardy, but we must take it as we find it. Even the constitutional provisions are not given a literal interpretation. The Fifth Amendment states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *." Of this safeguard, the Federal Supreme Court remarked, in Wade v. Hunter, 1948, 336 U.S. 684, 688, 69 S.Ct. 834, 837, 93 L. Ed. 974, 978: "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." The same philosophy probably accounts for the refusal of our appellate courts to give literal effect to the declaration of section 13, Article I, of our Constitution, that "No person shall be twice put in jeopardy for the same offense". Various avenues are followed in reaching the conclusion that the defendants may be twice put in jeopardy despite the Constitution. In the early cases of People v. Hunckeler, 1874, 48 Cal. 331, 334, and People v. Higgins, 1881, 59 Cal. 357, 358, the ingenious theory is advanced that when a trial before a jury commences, the jeopardy is "apparent," and is "real" or "actual" only if nothing interrupts the course of the trial, such as the death of the judge or of a juryman, or the disagreement of the jury. It is concluded, in the Hunckeler case, 48 Cal. at page 334: "A person cannot be twice placed in jeopardy for the same offense; but, in the cases to which we have referred, the happening of the subsequent

event which renders the discharge of the jury necessary, shows that the defendant has never been in actual jeopardy."

In other cases the philosophy followed seems to be to deny the existence of that which stands in the way of the desired end. Although jeopardy had undoubtedly attached, the court, in People v. Curtis, 1888, 76 Cal. 57, 58, 59, 17 P. 941, 942, stated: "As the jury was discharged with the consent of the defendant, without rendering a verdict, it must be held that there was no jeopardy and no acquittal." This statement was quoted in People v. Baillie, 1933, 133 Cal.App. 508, 513, 24 P.2d 528, 530, with the introductory remark: "* * * we do not see how defendant could claim that he had been once in jeopardy * * *." The language used in People v. Webb, 1869, 38 Cal. 467, 479–480, would seem to put that case in the group being considered in this paragraph: "We are, therefore, of opinion that under our Constitution, which protects a party from a second jeopardy of life, limb, liberty or property, for the same public offense, whatever its grade, a person once placed upon his trial before a competent Court and jury, charged with his case upon a valid indictment, is in jeopardy, in the sense of the Constitution, unless such jury be discharged without rendering a verdict, from a legal necessity, or for cause beyond the control of the Court, such as death, sickness or insanity of some one of the jury, the prisoner or the Court, or by consent of the prisoner * * *." Again, in People v. Agnew, 1947, 77 Cal.App.2d 748, 760, 176 P.2d 724, 731, 732, we have the flat statement: "Where a jury has been discharged with the consent of the defendant without rendering a verdict there was no jeopardy * * *."

Some cases make a more realistic approach to the result they wish to attain, and while recognizing the fact that the defendant has been in jeopardy, simply hold that, under certain conditions, the defendant may not be heard to say that he has been once in jeopardy. We note: People v. Travers, 1888, 77 Cal. 176, 19 P. 268; People v. Kelly, 1933, 132 Cal.App. 118, 121–122, 22 P. 2d 526.

Now we come to those cases where the defendant is said to have waived his right to rely upon the defense of once in jeopardy. In the first of these, People v. Tong, 1909, 155 Cal. 579, 102 P. 263, 24 L.R.A., N.S., 481, the Supreme Court was unanimous in reversing the order denying a new trial, although three justices were the most that concurred in any one opinion. Six were agreed, however, that the defendant had been in jeopardy (he had been convicted of robbery on an information charging grand larceny), but that he waived his constitutional immunity from double jeopardy by his successful effort to obtain a new trial. An interesting discussion follows the statement, 155 Cal. 583, 102 P. 263, 265: "There are few questions upon which courts have differed more radically than they have disagreed upon those arising from considerations of jeopardy. We find all shades of opinion." In re Colford, 1924, 68 Cal.App. 308, 311, 229 P. 63, 64, the court quotes from 8 R.C.L. 141 and from section 1016, Bishop's New Criminal Procedure, to the effect that a defendant who allows an imperfect verdict to be rendered, without objection, waives the right to plead once in jeopardy if the verdict is set aside and a retrial ordered. In Brewster v. Swope, 9 Cir., 1950, 180 F.2d 984, 986, we read: "An example of a permissible second trial is one granted upon the accused's motion or appeal, in which case it is said that the accused has waived his right to claim double-jeopardy."

Turning, again to the provisions of section 1466, Penal Code, if we could bring ourselves to say that it was only an apparent, not a real jeopardy, in which the defendant had been placed, or if we believed that in the light of what happened "there was no jeopardy," then we could conclude that the People were authorized to appeal because the order of dismissal was made before the defendant was placed in jeopardy. We are unwilling to rest upon this solution of our problem. We are face to face, then, with the inquiry: was jeopardy waived within the meaning of section 1466?

Some effect, must, of course, be given to the words "jeopardy was waived," and as

we read the cases, we have no trouble in determining what that meaning is. It cannot be the waiver that occurs when the defendant fails to plead once in jeopardy, a waiver illustrated by the cases reviewed in In re Burns, 1947, 78 Cal.App.2d 294, 301, 177 P.2d 649, 653, for the waivers there dealt with are those that appear when the defendant is, or is about to be, placed in jeopardy the second time. Plainly, the People's right to appeal from a judgment of dismissal is not made conditional upon the defendant's action if the judgment of dismissal is reversed and a new trial threatened. That which the legislature was endeavoring to guard against was the authorization of appeals in cases where they would be futile because of the existence of a good defense of once in jeopardy. However, if the defendant had done something that would deprive him of the right to interpose such a defense, he may be said to have waived it, and an appeal would not be futile. We find the best expression of the principle which controls here in this quotation from 8 R.C.L., sec. 141, found in Craig v. United States, 9 Cir., 1936, 81 F.2d 816, 819–820: "It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense. His action in having the indictment quashed constitutes a waiver of his constitutional privilege."

A case in essence like ours, is People v. Nash, 1911, 15 Cal.App. 320, 114 P. 784, 786. The defendant, on trial before a jury, moved that the jury be dismissed, and an order to that effect was made. Then a demurrer filed by him was sustained and a judgment of dismissal entered. The defendant objected to the People's appeal on the ground that having been once in jeopardy he could not be retried. "The consent by defendant to discharge of jury without verdict", the court stated, "is a bar to his plea of 'once in jeopardy.'" Whether we call it a bar or a waiver, the result is the same, to this extent: the prior jeopardy does not stand in the way of a second trial, if the dismissal be set aside. When the dismissal is the result of the defendant's prodding, as here, the situation created, that is, a trial that does not culminate in either an acquittal or a conviction, is of his doing, and, within the purview of the section, he has waived his right to defend on the ground that he was once in jeopardy.

At the time we decided People v. Matiasevich, supra, 12 Cal.App.2dSupp. 759, 55 P.2d 942, section 1466 did not refer to the waiver of jeopardy, and we did not consider the possibility that the defendant's active participation in the events leading to a dismissal of the action would stand between him and a successful plea of once in jeopardy. Had we that case before us today, we would hold that the People were authorized to appeal.

[2] Because a defendant may take inconsistent positions, the defendant may be heard to say both (1) that he was once in jeopardy, which would not be so if the statute were void on which the prosecution is based, People v. Terrill, 1901, 133 Cal. 120, 129, 65 P. 303, and (2), that the statute is void. We have considered each of the arguments made in support of defendant's contention that the provision of section 673, Vehicle Code, involved here, is unconstitutional, and find none of them persuasive.

The order dismissing the action is reversed; the cause is remanded for trial.

SHAW, P. J., concurs.

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